

REPUBLIC OF SOUTH AFRICA

BUSINESS INTERESTS OF GOVERNMENT

EMPLOYEES BILL

*(As introduced in the National Assembly (proposed section 76) (Bill and prior notice of its
introduction published in Government Gazette No. 36552 of 10 June 2013)*

(The English text is the official text of the bill)

(Ms L D Mazibuko, MP)

[PMB 4 – 2013]

BILL

To restrict the business interests of employees of Government and members of boards or controlling bodies of national and provincial public entities when conducting business with the Government; to provide for the disclosure of such interests; and to provide for matters incidental thereto.

PREAMBLE

WHEREAS the provisions of section 217(1) of the Constitution of the Republic of South Africa, 1996 require an organ of state, when it contracts

for goods or services, to do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective;

AND WHEREAS it is necessary to impose a procurement system and regulate it as required by those provisions to restrict the business interests that employees of Government, are allowed to have in entities that conduct business with Government;

AND WHEREAS it is necessary to require employees to disclose such interests,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:

Definitions

1. In this Act, unless the context indicates otherwise—

“accounting authority” means the accounting authority referred to in section 49 of the Public Finance Management Act, 1999 (Act No. 1 of 1999);

“business interest” means –

- (a) a right or entitlement to share in profits, revenue or assets of an entity;
 - (b) a real or personal right in property;
 - (c) a right to remuneration from an entity;
 - (d) any other private gain or benefit from an entity; or
- any interest or potential interest contemplated in paragraphs (a), (b), (c) or (d), acquired by a person including –
- (i) a person to whom is granted or from whom a general power of attorney is received; or
 - (ii) a representative or agent;

“employee” means a person employed by Government, whether permanently or temporarily, including -

- (a) an employee contemplated in section 8 of the Public Service Act;
- (b) any person appointed in terms of section 12A of the Public Service Act;
- (c) any person transferred or seconded to Government in terms of section 15 of the Public Service Act;
- (d) an educator as defined in section 1 of the Employment of Educators Act, 1998 (Act No. 76 of 1998);

- (e) an employee as defined in section 1 of the Defence Act, 2002 (Act No. 42 of 2002), and includes all persons identified in section 5 of that Act;
- (f) a member as defined in section 1 of the Intelligence Services Act, 2002 (Act No. 65 of 2002);
- (g) a member as defined in section 1 of the South African Police Service Act, 1995 (Act No. 68 of 1995); and
- (h) a member of a board or other controlling body of a national or provincial public entity;

“entity” means any association of persons, whether or not incorporated or registered in terms of any law, including a -

- (a) company;
- (b) corporation;
- (c) trust;
- (d) partnership;
- (e) close corporation;
- (f) joint venture;
- (g) consortium; or
- (h) sole proprietorship.

“entity conducting business with the Government” means an entity that contracts, applies or tenders for the sale, lease or supply of goods or services to the Government;

“family member” means --

- (a) an employee’s Spouse or partner in -
 - (i) marriage, in accordance with the Marriage Act, 1961 (Act No.25 of 1961);
 - (ii) a customary union in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);
 - (iii) a civil union in terms of the Civil Union Act, 2006 (Act No. 17 of 2006);
 - (iv) a union in terms of religious rites; or
 - (iv) a relationship in which the parties live together in a manner that resembles a marital partnership or customary union; or
- (b) an employee’s --
 - (i) child;
 - (ii) parent;

(iii) brother; or

(iv) sister,

whether such a relationship results from birth, marriage or adoption;

“Government” includes the National Government and the Provincial Government as defined in this Act;

“Head of a department” or “Head of the department” means the incumbent of a post mentioned in Column 2 of Schedule 1, 2 or 3 of the Public Service Act and includes any employee that acts in such post;

“National Government” means the National Government of the Republic of South Africa, and includes a national public entity;

“national public entity” means a national public entity as defined in section 1 of the Public Finance Management Act, 1999 (Act No. 1 of 1999);

“prescribe” means prescribe by regulation in terms of section 8;

“Provincial Government” means the nine Provincial Governments of the Republic of South Africa, as established in terms of section 103 of the Constitution of the Republic of South Africa, 1996 respectively and includes a provincial public entity;

“provincial public entity” means a provincial public entity as defined in section 1 of the Public Finance Management Act, 1999 (Act No. 1 of 1999);

“Public Service Act” means the Public Service Act, 1994 (Proclamation 103 of 1994);

“responsible Cabinet Member” means –

(a) the President;

(b) a Minister in the National Government, or

(c) a Premier, or a Member of the Executive Committee in a Provincial Government,

responsible for the national, or provincial department or national, or provincial public entity, as the case may be, where the transaction is to be concluded;

“this Act” includes any regulations made in terms of section 8;

Application of other legislation

2. This Act does not affect the application of any other legislation that regulates procurement by the Government or provides for the disclosure of the interests of employees.

Disclosure of business interests of employees and family members of employees in entities conducting business with Government

3. (1) Before an entity enters into any contract with Government for the sale, lease or supply of goods or services, the entity must provide Government with an affidavit in the prescribed manner and form, that discloses any business interest that an employee or a family member has in that entity.

(2) An employee must disclose to Government in the prescribed manner and form any business interest that employee or any family member has in an entity conducting business with Government.

(3) An employee must make the disclosure referred to in subsection (2) when that employee becomes aware of the business interest concerned, or when it is brought to his or her attention, and thereafter at prescribed intervals.

(4) An employee must disclose any business interest referred to in subsection (2) that exists at the commencement of this Act in the prescribed manner and form within three months after this Act comes into effect.

Restriction of business interests of employees in entities conducting business with Government

4.(1) Subject to subsection (3), section 30 of the Public Service Act and section 33 of the Employment of Educators Act, 1998 (Act No. 76 of 1998), an employee may not have a business interest in any entity conducting business with the Government if that employee himself or herself or together with one or more –

- (a) family members of the employee;
- (b) partners or other business associates of the employee; or
- (c) other employees,

directly or indirectly owns or controls more than five per cent of the shares, stock, membership or other interest of that entity.

(2) Subsection (1) does not apply in respect of a business interest acquired from a valid contract which was concluded with the Government before the commencement of this Act and where the contractual period thereof has not yet expired.

(3) The responsible Cabinet Member may, on application in the prescribed manner by an employee, after consultation with the Head of the department concerned, and on good cause shown, grant permission for that employee, more than one employee, or any category of employees, to have a business interest or business interests that exceeds the limit referred to in subsection (1) in an entity that conducts or intends conducting business with the Government.

(4) In considering an application contemplated in subsection (3), the responsible Cabinet Member must take into account --

- (a) the nature of the relevant goods or services to be supplied to Government;
- (b) the nature and extent of the business interest of the employee or employees concerned in that entity or relevant entities;
- (c) the nature and extent of any adverse financial, operational and other circumstances for the state, the employee or employees concerned or members of the public, if the application is not approved; and
- (d) whether the approval of the application will be consistent with –
 - (i) fair, equitable, transparent, competitive and cost effective procurement of goods or services; and
 - (ii) applicable procurement legislation and policy.

(5) An employee may not-

- (a) enter into any contract with Government in contravention of subsection (1); or
- (b) request that any contract which was concluded before the commencement of this Act and which will result in the contravention of subsection (1), be extended.

Database

5. The Head of the department responsible for finance must compile and maintain a database of all business interests disclosed in terms of section 2 by employees and by entities conducting business with the Government.

Failure to comply with Act

6. (1) For purposes of this section “**member**” means a member of the board or other controlling body of a national or provincial public entity.

(2) In the event of a failure to comply with section 2(1), Government may—

- (a) where a contract has not yet been awarded, reject the application or tender of that entity; or
- (b) where a contract has been awarded--
 - (i) cancel the contract;
 - (ii) claim damages; and
 - (ii) effect such other remedy as may be allowed by the contract or law of general application,if applicable.

(2) In the event of an alleged failure by an employee, excluding a member or a Head of a department, to comply with a provision of this Act, the Head of the department or the accounting authority, as the case may be, must –

- (a) investigate the matter, or cause the matter to be investigated; and
- (b) institute disciplinary action against the employee, if a *prima facie* case is made out in the investigation,

(3) In the event of an alleged failure by a Head of a department to comply with a provision of this Act, the responsible Cabinet Member must -

- (a) investigate the matter or cause the matter to be investigated; and
- (b) institute disciplinary action against the Head of Department, if a *prima facie* case is made out in the investigation.

(4) In the event of an alleged failure by a member to comply with the provision of this Act, the responsible Cabinet Member must –

- (a) investigate the matter or cause the matter to be investigated; and
- (b) take appropriate steps against that member if a *prima facie* case is made out in the investigation.

Delegation

7.(1) A responsible Cabinet Member may delegate in writing any function assigned to him or her by this Act, excluding the functions

referred to in sections 5(3), 5(4) or 8, to the Head of the Department concerned, or the accounting authority, as the case may be.

(2) The Head of a department may delegate in writing any function assigned to him or her by or in terms of this Act, to a senior manager in the department.

Regulations

8. The Minister of Finance and the Provincial Member of the Executive Committee responsible for finance, respectively, may make regulations regarding –
 - (a) any matter that may or must be prescribed in terms of this Act;
 - (b) the exemption of any entity or category of entities conducting business with the Government or any employee or category of employees from the application of any provision of section 2; and
 - (c) generally, any matter which is necessary or expedient to prescribe in order to achieve the objects of this Act.

Short title and commencement

9. This Act is called the Regulation of Business Interests of Government Employees Act, 2013, and comes into operation on a date fixed by the President by proclamation in the *Government Gazette*.

**MEMORANDUM ON THE OBJECTS OF THE BUSINESS
INTERESTS OF STATE EMPLOYEES BILL, 2013**

1. INTRODUCTION

It is essential that the fight against corruption in the public service is effective. The concern is that a large proportion of corruption detected in government results out of public servants and politicians starting or becoming major shareholders in companies that do business with government.

- In 2010/2011 the Auditor-General reported that R54.6 million was awarded to government department officials, and nearly R1 billion worth of government tenders was awarded to provincial officials and their families. In 2011/2012 the Auditor-General /12 reported that the Free State government alone had awarded 50% of its contracts to politicians and their family members, with approximately 191 government officials and 18 close relatives benefiting from state tenders valued at R133 million in the last financial year.
- PricewaterhouseCoopers confirmed that the Eastern Cape Health Department has lost at least R45 million to corruption and irregular contracts with state employees.
- In the Eastern Cape during the 2010/2011 financial year, out of municipal government tenders worth R891 million, councillors and their families benefitted from nearly R100 million.
- A Special Investigating Unit probe has revealed that close to 9 000 Department of Health employees are active company directors and about 1 000 do business with the Department. The report shows that R42.8 million had been paid to 235 employees.
- The Department of Basic Education revealed this year that at least 3 314 of its employees had engaged in business with the state in the past two financial years, earning a combined R152 million. Of these employees, 2 485 were teachers.

- Corruption Watch confirms 8 034 Eastern Cape Health Department employees are directors of active companies, whilst 929 are listed suppliers to government. A report compiled by Corruption Watch also points out that R11 million was paid over four years for services rendered by 35 companies whose directors were spouses of department employees.
- In 2010, it was estimated that R624 million worth of state money went to companies with links to civil servants, their families or members of their spouses' families.

While ordinary South Africans need government to deliver quality services, many civil servants have undermined this objective by inappropriately benefiting from government tenders. This bill to regulate the business interests of state employees will go a long way toward addressing the problem.

National Planning Minister Trevor Manuel recently stated that no public servant should be able to do business with government. There should be consequences for those civil servants that benefit from state contracts.

2. OBJECTS OF THE BILL

This bill seeks to:

- Prohibit government employees and their families from directly or indirectly holding more than 5% of shares, stock, membership or other interests in an entity that does business with government, unless approval is given by the relevant Minister in accordance with certain criteria set out in the bill;
- Ensure that, before the government enters into any contract with an entity for the sale, lease or supply of goods and services, the entity must provide an affidavit disclosing whether or not it is owned or part-owned by employees of the government; and
- Require that all government employees disclose their business interests at prescribed intervals, in the same way that members of cabinet already do.

3. FINANCIAL IMPLICATIONS FOR STATE

Minimal financial implications are foreseen. Costs foreseen are associated with the alignment of procurement procedures with the content of the Bill only.

4. PARLIAMENTARY PROCEDURE

This Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution as its provisions deal in a substantial manner with a functional area of concurrent national and provincial legislative competence listed under Schedule 4 to the Constitution, namely “Trade”.

This Bill does not have to be referred to the National House of Traditional Leaders in terms of section 18(1) (a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

TABLINGS

National Assembly and National Council of Provinces

1. The Speaker and the Chairperson

- (a) Report of the Commission for Gender Equality on Position Paper on Sex Work 16 January 2013.

2. The Minister of Transport

- (a) Updated Strategic Plan of Road Traffic Management Corporation for 2013-2017 and Annual Performance Plan for 2013/14.

3. The Minister of Water and Environmental Affairs

- (a) Yearly Report to Parliament on international environmental instruments for 2012-13, tabled in terms of section 26(1) of the National Environmental Management Act, 1998 (Act No 107 of 1998).
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