

Participation in the NCOP

The Intergovernmental Relations Working Group of SALGA has been considering a number of Bills with a view to make recommendations to the organisation on the mandates it has to give to its representatives in the NCOP. These include the Open Democracy Bill, Administrative Justice Bill, Preferential Procurement Policy Framework Bill, and the Transitional National Land Transport Bill. The following is a summary of the main points that were submitted.

Open Democracy Bill

The main object of the Bill is to give effect to the constitutional right of access to any information held by the state. It aims to do this by, firstly, making available to the public information about the functions of governmental bodies; secondly, by providing persons with access to their personal information held by private bodies; thirdly, by providing for the correction of personal information held by governmental or private bodies and to regulate the use and disclosure of that information and, lastly, by providing for the protection of persons disclosing evidence of contraventions of the law, serious maladministration or corruption in governmental bodies (the whistle blowers).

Comments

SALGA made extensive comments on the Bill and suggested the addition of a chapter on special provisions for local government. These provisions relate to the designation of a person in the employ of the municipality as an information officer, the publication of a guide for the public on how to use the Act in respect of municipalities, the publication of a manual on functions of, and index of records held by municipalities, and the prosecution of appeals on decisions of the information officer to the relevant Magistrate's Court or, in certain instances, to the relevant High Court.

The publication of the guide in all official languages is seen as a supplement to a guide already provided for earlier in the Bill. The guide should be compiled by the SA Human Rights Commission and should contain details such as the names and contact details of all municipal information officers, categories of records open to the public, all remedies open to the pub-

lic in terms of the Act and how to prosecute them, and a reference to the manual published by provincial local government associations and how to obtain it.

The manual, which should be compiled by every provincial local government association for its province, must contain a general description of the functions and duties of each municipality in the province, contact details of the information officers, a description of the records kept by each municipality indicating the categories of records held on each subject, and a description of every personal information bank held by a municipality.

Administrative Justice Bill

This Bill aims to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and incorporates to written reasons for administrative action as contemplated in the Constitution.

Comments

SALGA made extensive comments on earlier drafts of the Bill and the majority of its concerns were addressed in the latest version. The idea of magistrate's courts having jurisdiction to hear matters in terms of the Bill, is an advance but care should be taken to synchronise the boundaries of municipalities with that of magisterial districts otherwise jurisdictional problems may arise.

Preferential Procurement Policy Framework Bill

The procurement of goods and services by a municipality must, in terms of section 217(1) of the Constitution, be done in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. In line with the developmental nature of local government as espoused by the White Paper on Local Government, constitutional provision is made for the implementation of a procurement system that allows for categories of preference in the allocation of contracts, and the protection or advancement of persons, or categories of persons, who were disadvantaged by unfair discrimination (s 217(2)). The further elaboration of the procurement

policy referred to above will be set out in framework legislation that must be adopted by Parliament before 4 February 2000. Such framework legislation should determine issues such as principles and policies for the identification of categories of preference, and for the identification of persons, or categories of persons, to be protected or advanced. The legislation should also provide possible mechanisms to mediate the tension between what is fair and equitable, on the one hand and competitive and cost-effective, on the other. The absence of such legislation during this period should not prevent municipalities from implementing affirmative action measures in the area of procurement as contemplated by the Constitution.

The Preferential Procurement Policy Framework Bill (PPPF) has as its stated objectives the identification of institutions contemplated in section 217(1) and the provision of a framework for the implementation of a procurement policy contemplated in the Constitution. The Bill further defines an "identified institution" by referring to paragraph (b) of the definition of organ of state in section 239 of the Constitution. The substance of the Bill is in section 2 where the framework for the implementation of a preferential procurement policy is set out. The framework consists of a 90/10 compulsory point preference system and the method of application is set out. It is provided, further, that an invitation to tender preferentially must clearly define the categories of preference, and the persons, or categories of persons disadvantaged by unfair discrimination intended to be protected or advanced. The Bill shall not apply to any procurement process implemented under a preferential procurement policy that was initiated before the coming into operation of the Act. It provides, finally, that the Minister of Finance may make regulations regarding any matter that may be necessary or expedient to prescribe in furtherance of the objects of the Act.

Comments

From the outset, it must be stated that it would be ideal if this procurement policy framework could form part of the Municipal Systems Bill. There are currently procurement provisions in the Systems Bill as well as provision for the promulgation of regulations in respect of listed items in the Systems Bill. The PPPF (potentially) contains procurement provisions

that will aid redistribution of local wealth by prescribing a system of preference. It also makes provision for the promulgation of regulations resulting in a scenario where the law of municipal procurement is found in at least two Acts and two sets of regulations on a national level. A further difficulty is that the Bill does not provide an adequate framework for municipalities to devise a preferential procurement policy and for the following reasons:

- It provides no principles or guidelines on the identification of categories of preference;
- It provides no guidelines or principles on the identification of persons or categories of persons to be protected or advanced;
- It provides no guidelines or principles on how municipalities should approach the issue of “unfair discrimination”; and
- It leaves the imposition of a preferential procurement system to the discretion of a municipality.

The topic of procurement must be approached holistically and must be integrated with the broad approach of the Systems Bill that seeks to be developmentally orientated.

Transitional National Land Transport Bill

The Bill is designed to bring about a fundamental restructuring of the laws regulating land transport in the country, with the emphasis on public (passenger) transport. It was decided that the full policy of the National Department of Transport, as formulated in consultation with the provinces, cannot be implemented immediately due to the need to dovetail it with the new and proposed local government legislation. For this reason the Bill is transitional in nature, and is scheduled to be replaced by final legislation within the next three years. The Bill therefore also sets the scene for the long term restructuring of the land transport system as envisaged by the Moving South Africa project. By providing for formalisation and regulation of the minibus taxi industry, the Bill will act as an invaluable tool for the government to achieve order and harmony in the industry.

A working document of the full version of the Bill, catering for the short, medium and long term, was published for comment on 20 December 1996 and a draft bill was approved by the Cabinet during May

1997. The current Bill focuses on the short term, as it is planned to draft a final bill at a later stage. This Bill sets the stage for medium and long-term policy implementation.

Comments

The Bill touches upon three functions set out in Schedule 4 to the Constitution, namely public transport, municipal public transport and municipal planning. The first function is a functional area of concurrent national and provincial competence in terms of Schedule 4A whilst the latter two functions are functional areas of concurrent national and provincial competence relating to local government in terms of Schedule 4B. National and provincial governments have, with regard to the latter two functions, the power to regulate the exercise by municipalities of their executive authority.

Municipal public transport

An essentially jurisdictional difficulty is the line that should be drawn between “municipal public transport” and “public transport”. According to the normal method of interpretation, “public transport” is the broader term and “municipal public transport” is the narrower or specific term. The normal canon of construction is that the general gives way to the specific. Thus, if an item falls within the specific, it does not fall within the general function. The critical question is thus ‘What is “municipal public transport”?’ There are two possibilities. First, municipal public transport is public transport owned and/or operated on behalf of the municipality. Second, municipal public transport is any public transport operating exclusively within a municipal area. If “municipal public transport” is perceived as only “public transport” owned or operated by or on behalf of the municipality, the bulk of the Bill is constitutionally defensible. The Bill does not envisage that a municipality must “buy in” to the proposed transport authority system. The municipality could refuse to do so and leave the regulation of “public transport” to the provincial and national authorities. Note must, however, be taken of the duty placed upon national and provincial governments to assign to municipalities the administration of a matter listed in Part A of Schedules 4 or 5 which necessarily relates to local government if that matter would most effectively be administered locally and the municipality has the capaci-

ty to administer it. As “public transport” is a Schedule 4A function and is intimately tied in with the operation of a city, the municipality could force an assignment of the function subject to appropriate conditions being agreed between the municipality and the national and provincial governments. Naturally, if a system of central government subsidised public transport is envisaged involving a substantial amount of bureaucracy, no sensible municipality would agree to such assignment without adequate funds being provided. The national and provincial governments can, of course, insist on conditions that are fairly similar to those set out in the Bill for a transport authority.

Municipal planning

A feature of the Bill is the attempt by the central government to regulate the internal plans of the municipality. “Municipal planning” is a Schedule 4B function where the central government is restricted to “regulating the exercise by municipalities of their executive authority” referred to in section 156(1). Whilst “zoning” is an aspect of “municipal planning” which can be done either legislatively or in an executive manner, the aspects of planning, e.g. intended developments and the like are purely internal and have nothing to do with the executive authority of a municipality. Neither the national government nor the provincial government is empowered to regulate these internal plans under section 155(7). The provincial government, however, is entitled to call for such plans under section 155(6) of the Constitution. If it is intended to assign “public transport planning” subject to the conditions of providing certain plans dictated by the provincial government or the national government, then such assignment must be made under section 156(4) of the Constitution.

It should further be pointed out that most of the Bill falls within an area that legitimately is provincial in terms of section 146 of the Constitution and thus may be replaced by provincial legislation.

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