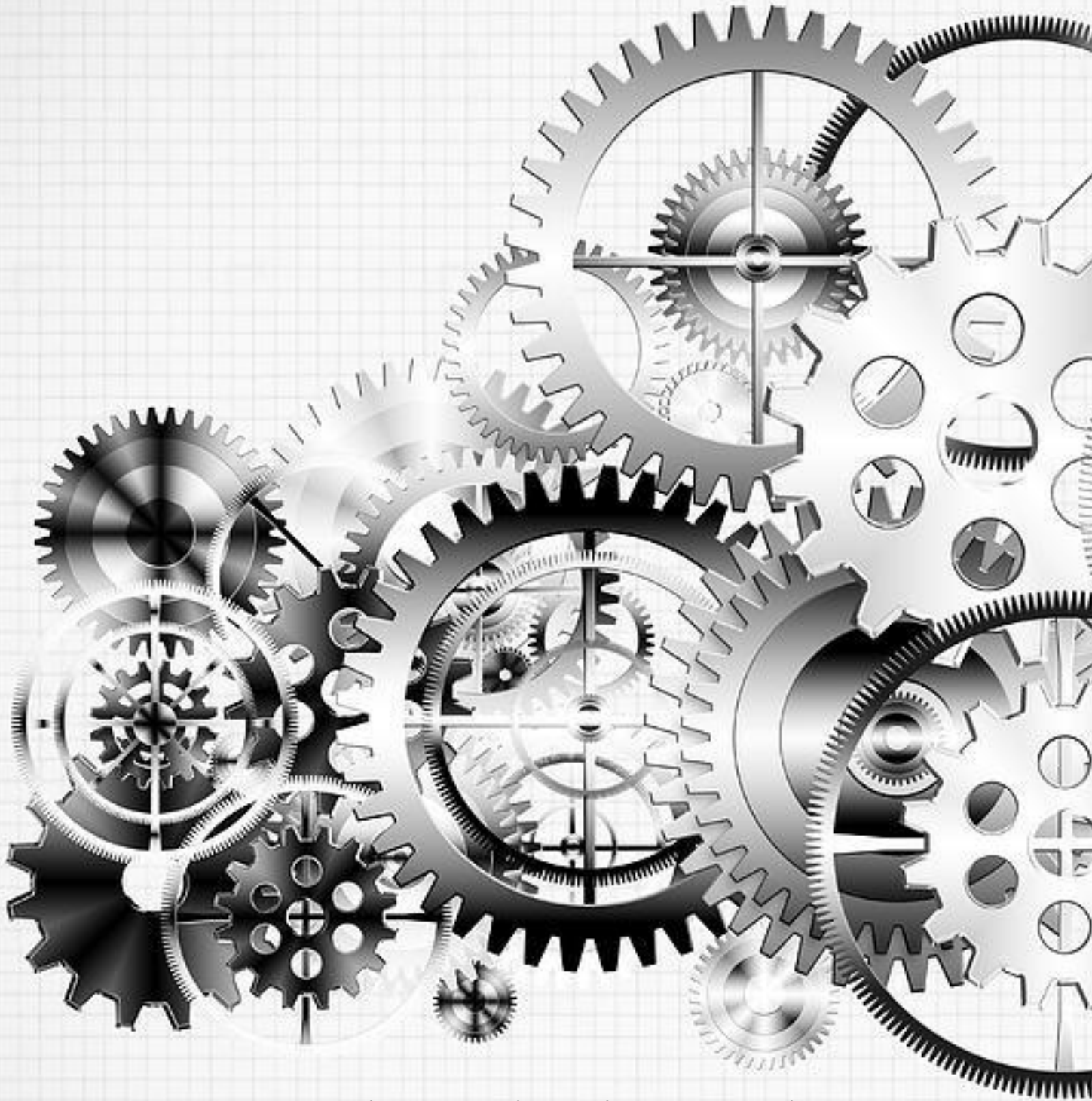


An Institutional Legal Structure for Regulating Public Procurement in South Africa



Research report on the feasibility of specific legislation for National Treasury's newly established Office of the Chief Procurement Officer

Geo Quinot

**Research report on the feasibility of specific legislation for
National Treasury's newly established
Office of the Chief Procurement Officer**

FINAL REPORT

MARCH 2014

Prepared by

Prof Geo Quinot

Professor, Department of Public Law, Stellenbosch University
Director, African Public Procurement Regulation Research Unit

for DFC S.A.U.

funded by the Delegation of the European Union to the Republic of South Africa
under grant

LOT N° 11: Macro economy, Statistics, Public finance management
REQUEST N° DCI-AFS/2013/330-767

TABLE OF CONTENTS

LIST OF ABBREVIATIONS AND ACRONYMS	viii
EXECUTIVE SUMMARY	x
KEY RECOMMENDATIONS.....	xviii
1 INTRODUCTION	1
2 OVERVIEW OF THE PROJECT	3
2.1 Project objective	3
2.2 Scope and structure of the Project	3
2.2.1 Regulatory landscape.....	3
2.2.2 Oversight body findings	3
2.2.3 Service delivery challenges	4
2.2.4 Comparative review.....	4
2.2.5 Proposed OCPO regulatory framework	4
2.3 Methodology.....	4
2.3.1 Comparative methodology	5
2.3.1.1 Risks in comparative analysis	5
2.3.1.2 Systems compared	7
2.3.1.2.1 National systems.....	8
2.3.1.2.2 Model laws and international instruments	8
3 LEGISLATIVE FRAMEWORK	9
3.1 Introduction	9
3.2 Regulatory overview	9
3.2.1 Primary procurement legislation	10
3.2.2 Entity- and issue-specific procurement legislation.....	11
3.2.3 General legislation with procurement relevance	11

3.3	Constitution	13
3.3.1	Section 217.....	14
3.3.1.1	Source of public procurement regulation	16
3.3.1.2	Legally binding and justiciable.....	16
3.3.1.3	Scope of application	18
3.3.1.3.1	Entity coverage.....	19
3.3.1.3.2	Transaction coverage	19
3.3.2	Section 33.....	19
3.3.3	Section 195.....	22
3.4	Specific regulatory instruments	23
3.4.1	Public Finance Management Act	23
3.4.1.1	Institutional arrangements	24
3.4.1.2	Treasury Regulations	26
3.4.1.3	Treasury instructions	28
3.4.2	Municipal Finance Management Act	28
3.4.2.1	Institutional arrangements	28
3.4.2.2	Procurement rules	29
3.4.2.3	Municipal Supply Chain Management Regulations.....	29
3.4.2.4	Treasury instructions	30
3.4.3	Preferential Procurement Policy Framework Act	30
3.4.3.1	Preferential procurement policies.....	31
3.4.3.2	Preferential Procurement Regulations, 2011.....	31
3.4.4	State Tender Board Act.....	33
3.4.5	Broad-based Black Economic Empowerment Act	34
3.4.6	Prevention and Combating of Corrupt Activities Act	34
3.4.7	Construction Industry Development Board Act.....	35

3.4.8	National Land Transport Act	37
3.4.9	National Supplies Procurement Act	37
3.4.10	State Information Technology Agency Act	38
3.4.11	Entity- and issue-specific legislation	38
3.4.12	General legislation	40
3.4.12.1	Promotion of Access to Information Act	41
3.4.12.2	Promotion of Administrative Justice Act	41
3.4.12.3	Local Government: Municipal Systems Act	43
3.5	Overview analysis	44
3.5.1	Concerns regarding fragmented regulation	44
3.5.2	OCPO legal mandate	46
4	OVERSIGHT BODIES' FINDINGS ON PROCUREMENT-LAW COMPLIANCE	48
4.1	Introduction	48
4.2	Auditor General	48
4.2.1	National and provincial audits	48
4.2.2	Procuring consultancy services	50
4.2.3	Local government audits	51
4.2.4	Focused audits	53
4.2.4.1	Transversal term contracts	54
4.2.4.2	Contract extensions/variations	54
4.2.4.3	Record-keeping	56
4.3	Public Protector	56
4.4	Management Performance Assessment Tool	58
4.5	Conclusion	59
5	PUBLIC PROCUREMENT AND SERVICE DELIVERY CHALLENGES	61
5.1	Introduction	61

5.2	Linking public procurement regulation and service delivery	61
5.3	Case studies	63
5.3.1	Social grants	64
5.3.2	Education	67
5.3.3	Health.....	73
5.3.4	Infrastructure development	76
5.4	Analysis	78
5.4.1	Time delays	78
5.4.2	Quality or functionality	81
5.4.3	Arrangements between organs of state	82
5.4.4	Judicial remedies.....	82
5.5	Conclusion.....	83
6	COMPARATIVE PERSPECTIVES	85
6.1	Introduction	85
6.2	Comparative analysis	85
6.2.1	Overview	86
6.2.2	Structure of central bodies	86
6.2.2.1	African systems.....	86
6.2.2.1.1	Botswana.....	87
6.2.2.1.2	Ethiopia	88
6.2.2.1.3	Ghana	89
6.2.2.1.4	Kenya.....	90
6.2.2.1.5	Nigeria	90
6.2.2.1.6	Rwanda.....	91
6.2.2.1.7	Tanzania	92
6.2.2.1.8	Uganda	92

6.2.2.2	Eastern Europe	93
6.2.2.2.1	Bulgaria	93
6.2.2.2.2	Hungary	93
6.2.2.2.3	Poland	94
6.2.2.3	Analysis	95
6.2.3	Function of central bodies	98
6.2.3.1	Splitting operational and regulatory functions	98
6.2.3.2	Core regulatory functions	98
6.2.3.3	International influence on African systems	99
6.2.4	Enforcement of procurement rules	103
6.2.4.1	Distinct enforcement agencies	103
6.2.4.2	Systems without distinct regulatory bodies	104
6.2.4.3	Systems with distinct regulatory bodies	105
6.2.4.4	Procurement ombudsman	106
6.3	Conclusion	107
7	OCPO REGULATORY FRAMEWORK	109
7.1	Introduction	109
7.2	The regulatory problem	110
7.3	The recommended solution	110
7.3.1	The Regulator as an autonomous entity	111
7.3.2	The institutional structure alignment	114
7.3.2.1	Agency and board	114
7.3.2.2	Enforcement structure	116
7.3.3	The Regulator's legal mandate	118
7.3.4	The Regulator's functions	120
7.3.5	Operational functions	122

7.3.6	OCPO institutional implications	123
7.4	Wider public procurement regulatory reforms	123
7.5	Proposed roadmap	124
7.5.1	Short term action plan	124
7.5.2	Medium term action plan	125
7.5.3	Long term action plan	126
SOURCES	128
	South African legislation	128
	Foreign legislation	129
	Case law	129
	Reports, books, articles.....	133
Annexure A.....		136
Annexure B.....		138



LIST OF ABBREVIATIONS AND ACRONYMS

ABA	American Bar Association
AG	Auditor General
BBBEEA	Broad-based Black Economic Empowerment Act 53 of 2002
BCLR	Butterworth Constitutional Law Reports
BEE	black economic empowerment
CC/ZACC	Constitutional Court of South Africa
CIDB	Construction Industry Development Board
CIDBA	Construction Industry Development Board Act 38 of 2000
CIPRO	Companies and Intellectual Property Registration Office in South Africa
CkH	Ciskei High Court
COMESA	Common Market for Eastern and Southern Africa
Constitution	Constitution of the Republic of South Africa, 1996
Corruption Act	Prevention and Combating of Corrupt Activities Act 12 of 2004
CPAR	World Bank Country Procurement Assessment Report
CPO	Chief Procurement Officer
DAM	Directorate Affordable Medicines
DG	Director General
DPE	Department of Public Enterprises
DPME	Department of Performance Monitoring and Evaluation
DPSA	Department of Public Service and Administration
DPW	Department of Public Works
DTI	Department of Trade and Industry
DWA	Department of Water Affairs
E	Eastern Cape Division of the High Court
ECG	Eastern Cape High Court, Grahamstown
EDD	Economic Development Department
FSB	Financial Services Board
GG	Government Gazette
GN	General Notice
GNP	Gauteng North High Court, Pretoria
IT	information technology
JDR	Juta's Daily Reports
KZP	KwaZulu-Natal High Court, Pietermaritzburg
LTSM	Learner, Teacher Support Material
MEC	Member of the Executive Council
MFMA	Local Government: Municipal Finance Management Act 56 of 2003
MPAT	Management Performance Assessment Tool
MSCM	Municipal Supply Chain Management
MSCM Regulations	Municipal Supply Chain Management Regulations
NDoH	National Department of Health
NT	National Treasury
OCPO	Office of the Chief Procurement Officer
OPO	Office of the Procurement Ombudsman
PAIA	Promotion of Access to Information Act 2 of 2000

PAJA	Promotion of Administrative Justice Act 3 of 2000
para(s)	paragraph(s)
PFMA	Public Finance Management Act 1 of 1999
PO	Procurement Ombudsman
PP	Public Protector
PPO	Public Procurement Office
PPPFA	Preferential Procurement Policy Framework Act 5 of 2000
SASSA	South African Social Security Agency
SCA	Supreme Court of Appeal
SCM	Supply Chain Management
SITA	State Information Technology Agency
SOCs	state-owned companies
STB	State Tender Board
STBA	State Tender Board Act 86 of 1968
Systems Act	Local Government: Municipal Systems Act 32 of 2000
T	Transvaal Provincial Division of the High Court, Pretoria
UNCITRAL	United Nations Commission on International Trade Law
W	Witwatersrand Local Division of the High Court, Johannesburg
ZACC	Constitutional Court
ZAECCLC	Eastern Cape High Court, East London Local Court
ZAGPPHC	Gauteng High Court, Pretoria
ZASCA/SCA	Supreme Court of Appeal
ZAWCHC	Western Cape High Court, Cape Town



EXECUTIVE SUMMARY

There can be no doubt that public procurement is a challenging area of state administration in South Africa at present. It may be further argued that this dimension of public administration is now facing crisis. Over the last few years there have been increasing calls for heightened regulatory attention to public procurement. During the first few months of 2014 alone:

- the President announced in his State of the Nation Address potentially far-reaching changes to government's approach to procurement in the form of increased central adjudication of tenders in an attempt to curb corruption in procurement;
- the Minister of Finance noted "steps to professionalise the public service and overhaul procurement and supply chain management" in his 2014 budget speech;
- the Public Protector found that "organs of state involved in the Nkandla Project failed dismally to follow Supply Chain Management prescripts" and recommended that the President "reprimand the Ministers involved for the appalling manner in which the Nkandla Project was handled and state funds were abused" in her Report No 25 of 2013/14; and
- the Auditor General highlighted supply chain management as a key risk area requiring attention at national departments in his submissions to Parliament's standing committee on public accounts.

A tentative first step has been taken to tackle concerns around public procurement in South Africa from a central, coordinated perspective in the form of the appointment of the Chief Procurement Officer and the establishment of the Office of the Chief Procurement Officer ("OCPO").

The creation of the OCPO as the institutional node for National Treasury's role in relation to public procurement in South Africa calls for consideration of the regulatory framework in terms of which this new structure is to function. Since there is no explicit legislative basis for the OCPO, the need arises to interrogate the current public procurement regulatory regime in order to develop an understanding of the legal environment that frames this structure within existing public procurement law in South Africa. On the basis of such understanding

EXECUTIVE SUMMARY

further consideration can consequently be given to possible reforms of the regulatory environment to facilitate the functions of the OCPO.

This report is the final and consolidated output of a research project under the title "Research the feasibility of specific legislation for National Treasury's newly established Office of the Chief Procurement Officer" ("the Project"). It consolidates the findings of the Project and puts forward the case for a dedicated regulatory regime for the OCPO.

The report indicates that the regulatory landscape pertaining to public procurement in South Africa is a highly fragmented

Key finding 1: The regulatory landscape pertaining to public procurement in South Africa is highly fragmented.

one. Despite the clear public

procurement principles set out in section 217(1) of the Constitution of the Republic of South Africa, 1996, a myriad of statutes and regulations exist that deal with specific aspects of public procurement, without a single, coherent piece of legislation guiding public procurement in its entirety.

In some respects the division of rules between different instruments are unproblematic and even inevitable. However, in general the fragmentation of public procurement law results in a less-than-ideal regulatory regime. Some of the problems emerging from the fragmented regulatory landscape are:

- Significant overlap and duplication between different regulatory instruments leading to uncertainty as to which instrument to follow.
- Unnecessarily complicated questions about the legal status of instruments at the lower end of the cascading regulatory structure generating legal uncertainty.
- Inconsistencies in approach to similar regulatory issues at different levels or spheres of government.
- Conflict between different sets of rules with no clear indication as to which set should prevail.

EXECUTIVE SUMMARY

- Significant variation in the scope of coverage of various instruments leading to considerable difficulties in establishing the complete regulatory regime applicable to a given case and posing challenges for uniform guidance.
- Control by different stakeholders of different dimensions of the regulatory regime in a seemingly uncoordinated manner.
- Capacity development in public procurement is hampered where there are significant differences between the way public procurement is approached in different contexts or institutions.

These problems all impact adversely on the legal mandate of the OCPO to act as central, overarching supervisor for all public procurement.

Key finding 2: The fragmented regulatory approach undermines integrated and comprehensive national oversight

It is apparent that the fragmented nature of the regulatory approach to public procurement impedes any initiatives to consolidate public procurement within a single oversight function. Thus those regulatory instruments which assign primary responsibility for framing procurement processes or aspects of procurement processes to entities other than National Treasury impede the full realisation of an integrated and comprehensive national strategy of procurement regulation as currently contemplated under the OCPO.

When one shifts the focus from the regulatory regime itself to implementation, the findings of the various oversight bodies set out in this report clearly indicate that levels of compliance with public procurement regulations are fairly low. However, for the most part the reports do not indicate with any precision the reasons for such non-compliance. In particular, there is very little evidence suggesting that the reasons for widespread non-compliance can be attributed to the actual public

Key finding 3: Levels of compliance with public procurement regulations are low.

procurement rules as opposed to failures to properly implement the rules. Regardless of this lack of clear data on the reasons for low levels of compliance with public procurement rules,

EXECUTIVE SUMMARY

a number of regulatory concerns can be identified from the oversight bodies' reports. The most important of these are:

- A lack of proper record-keeping.
- The awarding of contracts to state employees or their close family members.
- Existing rules are either not clear enough or require strengthening.
- Many public entities lack capacity to meaningfully integrate public procurement regulation into their procurement functions.

Low levels of compliance with public procurement rules can also be seen to impact adversely on service delivery. Such non-compliance may lead to false starts and consequent delays in getting service delivery programmes off the ground; may lead to litigation with further delays and disruption to concluded contracts; may hamper cost-effectiveness in that the best price may not be obtained or goods and services of questionable quality be procured, with self-evident negative implications for the services being delivered through such procurement.

Apart from the adverse impact on service delivery of non-compliance with procurement rules, it is arguable that in a

Key finding 4: Public procurement regulation failures impact adverse on service delivery.

number of instances public procurement rules themselves (as distinct from the implementation of those rules) hamper service delivery. In this regard delays occasioned by a burdensome procurement regulatory system and constant (risk of) litigation; uncertainty about how to evaluate the quality of goods and services procured; inconsistent regulatory approaches to inter-organ of state contracting and unsophisticated, blunt judicial remedies in procurement disputes may be viewed as undermining efficient service delivery.

Attempts to benchmark the institutional structure of the OCPO against regulatory models in respect of procurement regulation in different legal systems reveal two main approaches to institutional structure.

The first is the more traditional approach that is also followed in South Africa, which involves a division or unit within the relevant national government department responsible

EXECUTIVE SUMMARY

for procurement, typically the national treasury or finance department. This unit typically fulfils a range of functions in respect of procurement encompassing both regulatory and operational functions.

The second approach is the one that is increasingly adopted in current reforms of procurement systems. This involves an entity distinct and independent from national government departments fulfilling an exclusively regulatory function in respect of procurement. In this approach operational functions regarding procurement, that is actual procurement, may still occur centrally within a responsible national government department (typically national treasury) or may be partially or wholly decentralised. The distinct feature of this approach is the independent regulation of procurement operations by an autonomous entity. This second approach reflects the trend in recent reform initiatives as well as in international procurement instruments to split operational and regulatory procurement functions.

Comprehensive recent reforms of procurement systems on the African continent as well as in Eastern Europe have favoured the creation of central, autonomous oversight bodies. The common structure of these bodies involves a public procurement authority with an oversight board. The board is mostly appointed through a political process (e.g. via a Parliamentary process or by the president or cabinet) in terms of a prescribed structure, while the authority consists of officials of which the head is

Key finding 5: Recent reforms of public procurement systems internationally typically favour a central, autonomous oversight structure.

typically appointed by the board and is accountable to the board. These entities mostly exist autonomously from executive government, although they mostly rely on specific government departments, mostly finance departments, for institutional support.

In South Africa, these examples may be of particular value in light of recent developments towards the establishment of a central regulatory function in procurement to compliment the decentralisation of procurement functions introduced by the Public Finance Management Act 1 of 1999.

EXECUTIVE SUMMARY

The findings outlined above point to a significant need for public procurement regulatory reform of a particular nature in South Africa.

The first step in initiating reform of public procurement regulation is the establishment of a fit for purpose institutional

Key finding 6: There is a dire need for public procurement regulation reform in South Africa.

focal point. That is to say, there is a need to create an institutional structure that can facilitate reforms and drive effective implementation of the regulatory regime. The appointment of the CPO and creation of the OCPO are steps in this direction.

However, within the current regulatory framework there is no distinct and overarching regulatory footing for a central oversight structure such as the OCPO. The result is the absence of clear and comprehensive legal powers on the part of the OCPO to provide regulatory coordination and oversight from a central perspective. In addition there is no clear legal mandate for a structure such as the OCPO to fulfil a central regulatory function.

The abovementioned state of public procurement regulation greatly undermines the potential for coordinated oversight of public procurement through the OCPO as an effective institutional mechanism to engage with the demonstrably low levels of public procurement regulatory compliance in South Africa.

In order to address the regulatory problems set out above, it is recommended that the OCPO be realigned as a central procurement Regulator. It is pointedly not recommended that the broader public procurement regulatory framework be revised in any drastic manner at this stage. Such a step would be premature at this time.

The Regulator should be positioned autonomously from any particular government department. It should thus be a free-standing entity. Linkages with National Treasury should, however, be maintained. Institutional autonomy (and even independence) of the Regulator and linkages with NT are not conflicting notions. It is possible and desirable to have both. This raises particular objectives in alignment of the institutional structure of the Regulator and assignment of operational procurement functions at a central government level.

EXECUTIVE SUMMARY

The Regulator structure should be aligned in terms of two main bodies, namely an administrative agency and an oversight board or council, with additional recognition of a third distinct body in the form of an enforcement arm to the agency.

The Regulator administrative agency should be headed by an executive official and be staffed by public servants. This agency should be responsible for the day-to-day regulatory functions of the Regulator. A non-executive board or council, headed by a non-executive chairperson, should oversee the work of the agency, provide strategic guidance and take high-level regulatory decisions. The executive head of the agency should be accountable to the board. The board in turn should be accountable to Parliament on behalf of the entire Regulator organisation.

The composition of the board should be defined in order to ensure broad representation of key interests, both in the public sector and the private (supplier) sector. This should include direct representation of the key line departments concerned with public procurement and in particular NT.

A third structure focusing on enforcement should be created under the umbrella of the Regulator to deal with enforcement of procurement rules, including deciding on supplier challenges. The enforcement arm of the Regulator should include an ombudsman position.

The objectives and powers of the Regulator must be expressly set out in dedicated empowering legislation. It is not feasible to contemplate the legal mandate of the Regulator as proposed here, with reliance on existing public procurement legislation.

Creating the legal mandate of the Regulator by means of an overarching statute is a first and essential step in establishing a consolidated public procurement regulatory regime. It is only by means of such a focused enactment that a central authority can effectively regulate all aspects of public procurement spanning the entire range of distinct regulatory instruments currently governing public procurement in South Africa.

The legal mandate created in this manner will not depart from the basic decentralised framework of public procurement existing in terms of current legislation. Accounting authorities will remain primarily responsible for the implementation of procurement rules

EXECUTIVE SUMMARY

and the procurement function of their particular entities, but will now be legally and uniformly subjected to the regulatory oversight and guidance of the proposed newly aligned Regulator.

The key to the functional arrangements regarding the proposed Regulator is the recognition of a strict split between regulatory and operational procurement functions. The proposed new Regulator will be responsible exclusively for the regulation of public procurement and will not perform any procurement operations. Central procurement operations, i.e. procurement at a central level, should continue to be conducted by a dedicated unit within NT.

A roadmap consisting of short, medium and long term action plans is proposed to implement the recommendations above:

- Short term: develop stakeholder consensus around the revised regulatory approach.
- Medium term: draft the legislation necessary to implement this approach; initiate the legislative process to enact a dedicated Regulator statute; transfer current OCPO regulatory organisation to the proposed Regulator institutional framework.
- Long term: initiate comprehensive reform of public procurement regulation in South Africa leading to the enactment of a comprehensive, integrated public procurement code.



KEY RECOMMENDATIONS

Split regulatory and operational procurement functions at central government level.

Realign the current regulatory functions of the OCPO into a new dedicated procurement Regulator by means of dedicated legislation.

Ensure functional autonomy of the new Regulator.

Create an enforcement arm under the new Regulator.

Retain central procurement operations within NT.

Assign the mandate of large-scale procurement regulatory reform to the new Regulator.



1 INTRODUCTION

There can be no doubt that public procurement is a challenging area of state administration in South Africa at present. It may be further argued that this dimension of public administration is now facing crisis. Over the last few years there have been increasing calls for heightened regulatory attention to public procurement. During the first few months of 2014 alone:

- the President announced in his State of the Nation Address potentially far-reaching changes to government's approach to procurement in the form of increased central adjudication of tenders in an attempt to curb corruption in procurement;
- the Minister of Finance noted "steps to professionalise the public service and overhaul procurement and supply chain management" in his 2014 budget speech;
- the Public Protector found that "organs of state involved in the Nkandla Project failed dismally to follow Supply Chain Management prescripts" and recommended that the President "reprimand the Ministers involved for the appalling manner in which the Nkandla Project was handled and state funds were abused" in her Report No 25 of 2013/14; and
- the Auditor General highlighted supply chain management as a key risk area requiring attention at national departments in his submissions to Parliament's standing committee on public accounts.

A tentative first step has been taken to tackle concerns around public procurement in South Africa from a central, coordinated perspective in the form of the appointment of the Chief Procurement Officer ("CPO") and the establishment of the Office of the Chief Procurement Officer ("OCPO").

The creation of the OCPO as the institutional node for National Treasury's role in relation to public procurement in South Africa calls for consideration of the regulatory framework in terms of which this new structure is to function. Since there is no explicit legislative basis for the OCPO, the need arises to interrogate the current public procurement regulatory regime

INTRODUCTION

in order to develop an understanding of the legal environment that frames this structure within existing public procurement law in South Africa. On the basis of such understanding further consideration can consequently be given to possible reforms of the regulatory environment to facilitate the functions of the OCPO.

This report is the final and consolidated output of a research project under the title "Research the feasibility of specific legislation for National Treasury's newly established Office of the Chief Procurement Officer" ("the Project"). It consolidates the findings of the four preceding phases of the Project and puts forward the case for a dedicated regulatory regime for the OCPO.

The structure of this report follows the phased approach to the Project and presents the final findings on the following distinct research areas:

- the regulatory framework governing public procurement in South Africa;
- findings of oversight bodies on the current state of implementation of public procurement regulation;
- linkages between public procurement regulation and service delivery challenges; and
- comparative perspectives on institutional design of public procurement functions.

In the final part the case for the regulatory framework for the OCPO is put forward.



2 OVERVIEW OF THE PROJECT

2.1 Project objective

The overall objective of the study is to scrutinise the legal landscape as it pertains to the functions of the OCPO and make recommendations on possible regulatory reforms.

2.2 Scope and structure of the Project

The research conducted in this Project was structured around five parts, each focusing on a distinct aspect of public procurement regulation. The research was conducted in a phased approach over the first four parts. An interim report on the findings within each phase was formulated and presented to the OCPO. Each report was discussed during a briefing session and the input received informed the final findings on each part as set out in this final report.

The final part involved the consolidation of the findings on each of the previous parts as reported in this final report. The entire Project was conducted over a period of 60 days.

The study encompassed the following five (5) parts:

2.2.1 Regulatory landscape

This part of the study reviewed the entire statutory regime applicable to public procurement regulation in South Africa. This included all primary legislation with direct relevance for public procurement, but also legislation that indirectly impacts on public procurement as well as all relevant secondary legislative instruments issued in terms of these statutes.

2.2.2 Oversight body findings

This part focused on the most recent reports of the Auditor General on the performance of organs of state in relation to public procurement at national, provincial and local government level. In particular, the study explicated the implications of those findings for the regulation of public procurement.

OVERVIEW OF THE PROJECT

Additional to the reports of the Auditor General, recent reports by other oversight bodies (primarily the Public Protector) were considered to establish whether the findings of these reports corroborate the findings of the Auditor General. The results of the first two rounds of the Management Performance Assessment Tool ("MPAT") administered by the Department of Performance Monitoring and Evaluation were also reviewed.

2.2.3 Service delivery challenges

Part 3 assessed perceived challenges in service delivery that can be linked to public procurement and in particular the regulatory regime applicable to public procurement. A key question in this part was whether the existing public procurement regulatory regime can be said to support or hamper service delivery.

2.2.4 Comparative review

In this part a limited number of foreign systems were investigated from the perspective of providing useful models for structuring the functions of the OCPO. Given the limited nature of this study, only a few foreign systems were considered (see 2.3 on methodology below). Comparative work already done within the OCPO was used as a point of departure. Particular consideration was also given to international regulatory instruments such as the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Public Procurement, 2011 and the World Bank's Country Procurement Assessment Reports ("CPAR").

2.2.5 Proposed OCPO regulatory framework

The final part of the study consolidated the findings of the preceding parts and developed recommendations on possible reforms of the existing regulatory regime in order to facilitate the functions of the OCPO.

2.3 Methodology

The study relied exclusively on a document analysis methodology. This methodology included doctrinal analysis of existing South African law, content analysis of relevant policy documents and reports, literature study pertaining to public procurement regulation and

OVERVIEW OF THE PROJECT

oversight structures in particular and comparative review of relevant aspects of targeted foreign legal systems.

This study did not involve any empirical research given the limited timeframe within which it was conducted. In particular, part 3 of the study (dealing with service delivery challenges linked to public procurement) relied exclusively on and was thus limited to existing materials and studies.

In considering the methodology adopted in this research particular attention should be given to the comparative dimension of the study.

2.3.1 Comparative methodology

2.3.1.1 Risks in comparative analysis

Comparative legal analysis can *inter alia* be of considerable value in gaining new perspectives on domestic legal problems, to identify alternative models of regulation and how to implement alternative regulatory strategies and to develop benchmarks and best practices against which domestic systems can be analysed. However, the inherent limitations of legal comparisons must be carefully kept in mind in drawing conclusions from such studies.

Law is to a very significant extent limited to national boundaries. That is to say, apart from a few distinct areas of trans-national legal rules, law exists as a normative framework for a particular community within a particular geographical area, for the most part national states. Law accordingly does not exist independently from the particular social context within which it is situated. That context plays a crucial role in both the form and substance of specific legal rules. It follows that one cannot simply zoom in on a particular legal rule and consider that rule without taken the broader context into account, which includes both the broader legal system of which the particular rule forms part and the social context within which the legal system operates.

Against this general background comparative legal analysis must thus be approached with caution. Often legal rules simply cannot be transposed from one system to another because of conceptual differences between the systems. The concepts on which the rules rely in the

OVERVIEW OF THE PROJECT

original system may not exist in the target system, or may have a different meaning so that the rules will also have a different meaning and effect in the target system from that of the original system. There is a real danger in comparative analysis that due to the narrow focus of the particular study the conceptual differences in the broader systems may not be recognised, which may undermine the validity and usefulness of comparative conclusions.

These risks also exist in comparing public procurement laws between different legal systems. This can be illustrated with reference to the basic concept in such analyses, namely public procurement. There is no universal definition of what constitutes public procurement. Different legal systems adopt different views on what qualifies as public procurement. For example, as Arrowsmith, Linarelli and Wallace explain:

"With the increasing diversity of forms of governmental organisation and structure, the question of which entities must adhere to public procurement law is not capable of easy resolution. Some fine lines must be drawn, and they are often drawn in different places in different domestic regimes."¹

Apart from differences in what entities to include in the concept of public procurement there are also differences in what transactions to include.

The basic constitutional architecture of a state will thus be one important differential to consider when comparing legal systems in respect of public procurement laws. States with a strong federal system may thus approach procurement regulation differently from unitary states. Other differences in respect of basic legal concepts may also play an important role in comparative analysis. The notion of contract is a good example, especially when comparing the French legal system (and those systems influenced by French law) with English-law systems. In French law a distinct legal category of contract, called *contrat administratif*, is recognised for particular forms of state contracting distinct from the *contrat de droit commun*, the "ordinary" commercial or private-law contract.² This distinct category

¹ S. Arrowsmith, J. Linarelli and D. Wallace *Regulating Public Procurement* (2000) 324.

² P.J.H. Maree *Investigating an Alternative Administrative-Law System in South Africa* (2013) LLD dissertation, Stellenbosch University, 222-227.

OVERVIEW OF THE PROJECT

of state contract is wholly absent in English-law systems where contract is viewed as a single, monolithic notion.³

In seeking to draw inferences from comparative analyses within the broader framework of this Project, Schwartz's warning should be clearly kept in mind:

"Indeed, both the threshold premise about the value of comparative lessons, and the stronger second premise about the transferability of specific best practices, might be challenged on the ground that each nation-state and society is so unique in its history, institutions and culture that each society must discover for itself the best government procurement practices suited to its circumstances and economic situation."⁴

Bearing these risks in mind, the comparative analysis presented in this study focuses on groups of national systems and on model laws.

2.3.1.2 Systems compared

A number of factors were considered in deciding which systems to include in the comparative part of the Project. These include the risks inherent in comparative legal studies raised above, the availability and accessibility of materials, taking into account the limited scope of this Project, the general comparability of the systems with the legal system and conditions in South Africa as well as the maturity of the particular system. While a perfect balance between these factors is clearly not possible in respect of comparing any one system with the South African position, an attempt was made to consider a range of systems that would in combination provide a balanced comparative perspective.

The context specific nature of comparing actual domestic regulatory systems is offset by including in the comparative analysis model regulatory systems, which are not tied to specific national contexts.

³ See G. Quinot *State Commercial Activity: A Legal Framework* (2009) 202, 209.

⁴ J.I. Schwartz "Learning from the United States' Procurement Law Experience: on 'Law Transfer' and its Limitations" (2002) 11 *Public Procurement Law Review* 115.

OVERVIEW OF THE PROJECT

2.3.1.2.1 National systems

A very broad range of different national systems from different geographical areas with different legal traditions, different developmental paths in respect of their procurement systems and consequent differences in maturity of their current regulatory systems were considered. For the specific purposes of this Project and in particular pertaining to the establishment of a central procurement regulatory body, national systems from two areas were found to hold promise from a comparative perspective. These are sub-Saharan Africa and Eastern Europe.⁵

In both these regions national systems have seen significant public procurement reforms in the last decade or two. In both the international community, through instruments such as the UNCITRAL Model Law and the World Bank's CPAR, has played a significant role in steering the reforms in terms of international benchmarks. And in both regions central oversight bodies have commonly emerged as a result of reforms.

National systems from these two regions thus formed the focus of the comparative part of the Project.

2.3.1.2.2 Model laws and international instruments

While there are a number of international regulatory instruments on public procurement, the three that were found to be most relevant for purposes of this study are the UNCITRAL Model Law on Public Procurement; the ABA Model Procurement Code and the COMESA Public Procurement Reform Initiative, including the COMESA Public Procurement Regulations, 2009. In addition, the World Bank's CPAR process was also found to be highly relevant in the context of the systems compared and the issues considered in the comparison.⁶

⁵ The term "Eastern Europe" is used as a broad reference to countries on the eastern side of the European continent rather than any particular geographical area and no significance is attached to the label in this report.

⁶ See S. Williams-Elegbe "The World Bank's Influence on Procurement Reform In Africa" (2013) 21 *African Journal of International and Comparative Law* 95.

3 LEGISLATIVE FRAMEWORK

3.1 Introduction

Phase 1 of the Project reviewed the entire constitutional and statutory regime applicable to public procurement in South Africa. This includes the Constitution of the Republic of South Africa, 1996 ("Constitution"), all primary legislation with direct relevance for public procurement, but also legislation that indirectly impacts on public procurement as well as all relevant secondary legislative instruments issued in terms of these statutes.

The purpose of the review presented in this part is to create the basis for a consideration of the legal foundation for the functioning of the OCPO within National Treasury ("NT"). The review also provides a comprehensive perspective on the regulatory regime governing public procurement in South Africa, which informs consideration of reform of the current regulatory system.

3.2 Regulatory overview

The regulatory landscape pertaining to public procurement in South Africa is fragmented across a range of different planes (see figure 1 below). These include divergent regulation across different levels of government, spheres of government, between different supplier sectors, differences in relation to distinct policy objectives, and divergence in terms of types of regulatory instruments employed.

South African courts have often commented on this state of public procurement law in South Africa and suggested that it may be one cause of frequent litigation in this area. Thus in *South African Post Office v De Lacy and Another*⁷ the Supreme Court of Appeal noted: "Cases concerning tenders in the public sphere are coming before the courts with disturbing frequency." In the subsequent judgment in *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another*⁸ the court stated:

⁷ 2009 (5) SA 255 (SCA) para 1.

⁸ 2010 (4) SA 359 (SCA) para 1.

"This appeal concerns the award of a government tender. These awards often give rise to public concern – and they are a fruitful source of litigation. Courts (including this court) are swamped with unsuccessful tenderers that seek to have the award of contracts set aside and for the contracts to be awarded to them. The grounds on which these applications are based are many. Sometimes the award has been tainted with fraud or corruption, but more often it is the result of negligence or incompetence or the failure to comply with one of the myriad rules and regulations that apply to tenders."

Most recently, the Supreme Court of Appeal described public procurement law as a "convoluted set of rules and requirements that have proved to be fertile ground for litigation with the law reports becoming littered with cases dealing with public tenders".⁹

3.2.1 Primary procurement legislation

An overview of the national regulatory landscape reveals ten (10) distinct pieces of legislation, apart from the Constitution dealing in a direct and significant manner with the regulation of aspects of public procurement in general. These are the:

- Public Finance Management Act 1 of 1999 ("PFMA")
- Local Government: Municipal Finance Management Act 56 of 2003 ("MFMA")
- Preferential Procurement Policy Framework Act 5 of 2000 ("PPPFA")
- State Tender Board Act 86 of 1968 ("STBA")
- Broad-based Black Economic Empowerment Act 53 of 2003 ("BBBEEA")
- Prevention and Combating of Corrupt Activities Act 12 of 2004 ("Corruption Act")
- Construction Industry Development Board Act 38 of 2000 ("CIDBA")
- National Land Transport Act 5 of 2009
- National Supplies Procurement Act 89 of 1970
- State Information Technology Agency Act 88 of 1998.

⁹ *Dr JS Moroka Municipality v The Chairperson of the Tender Evaluation Committee of the Dr JS Moroka Municipality* [2013] ZASCA 186 (29 November 2013).

3.2.2 Entity- and issue-specific procurement legislation

In addition there are a number of statutes governing, in greatly varying degrees of specificity, the procurement functions of particular organs of state and/or in relation to specific issues. These include:

- Financial Management of Parliament Act 10 of 2009
- Road Traffic Management Corporation Act 20 of 1999
- Armaments Corporation of South Africa, Limited Act 51 of 2003
- Administrative Adjudication of Road Traffic Offences Act 46 of 1998
- Nursing Act 33 of 2005
- Public Audit Act 25 of 2004
- Health Professions Act 56 of 1974
- Housing Act 107 of 1997
- Disaster Management Act 57 of 2002
- Correctional Services Act 111 of 1998.

3.2.3 General legislation with procurement relevance

A number of statutes in a third category deal with more general topics, but are nevertheless of particular relevance to public procurement, either in their general import or by virtue of procurement-specific provisions. These include:

- Promotion of Access to Information Act 2 of 2000 ("PAIA")
- Promotion of Administrative Justice Act 3 of 2000 ("PAJA")
- Local Government: Municipal Systems Act 32 of 2000 ("Systems Act")

In developing an overview of the regulatory framework pertaining to public procurement in South Africa and establishing the existing legal mandate of the OCPO within this framework, cognisance must be taken of the salient features of all these statutes and the secondary regulatory instruments made under them. Before such an analysis can be undertaken, particular attention needs to be given to the constitutional regime within which the legislation is situated.

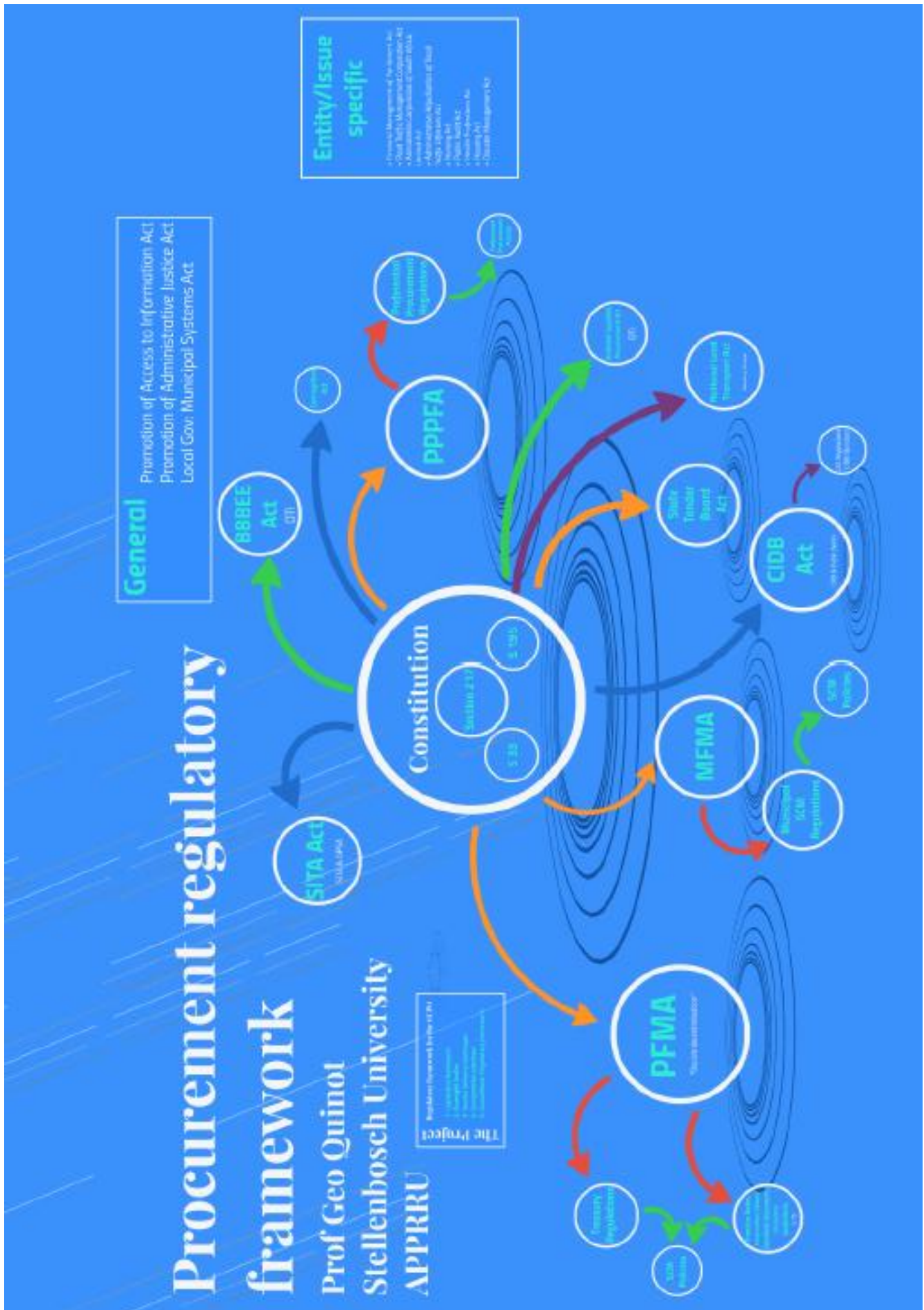


Figure 1: The current public procurement regulatory framework in South Africa

3.3 Constitution

There are a number of reasons why special and fairly detailed attention needs to be given to the Constitution in setting out the regulatory regime applicable to public procurement. The first reason is the supremacy of the Constitution,¹⁰ which has the result that all other law is subject to the Constitution's prescripts and must be formulated and/or interpreted in a way that accord with the Constitution. For this reason it is imperative to have clarity on what the Constitution demands in terms of public procurement. The second reason is that the Constitution expressly creates the foundation for public procurement regulation in South Africa and can accordingly be seen, in a specific manner, as the foundation of domestic public procurement law. A third reason is that while the Constitution provides the supreme basis for public procurement regulation it does so in broad, principled terms with little detail to guide implementation. The relevant constitutional provisions thus require a fair amount of "unpacking", especially in terms of the jurisprudence, to frame the subsequent analysis of the legislative regulatory regime.

It should be noted that the Constitution, as the foundation of the South African democracy, also sets out the mandate of all public administration. To the extent that the public service relies on public procurement to effect this constitutional mandate, the Constitution is thus of much broader relevance to public procurement generally than simply the provisions dealing specifically with public procurement regulation, discussed below. In particular, the realisation of various rights in the Bill of Rights is reliant on effective public procurement processes. For example, the socio-economic rights contained in sections 26, 27 and 29 of the Constitution all place obligations on the state to "take reasonable ... measures, within its available resources, to achieve the progressive realisation" of the particular rights. It follows that when one considers the legal framework applicable to public procurement, these provisions are of relevance in the sense that they emphasise the need for effective public procurement. However, these provisions do not contain any prescripts governing public procurement *per se*. That is to say, while these provisions set the agenda to which public procurement, amongst other administrative processes, must be utilised, they do not contain rules governing the actual process of procurement.

¹⁰ Constitution section 2.

LEGISLATIVE FRAMEWORK

The Constitution contains a number of provisions that can be viewed as creating the framework for public procurement regulation. Given the pervasive nature of public procurement involving in essence all state functions and all public institutions, it follows that the vast majority of sections in the Constitution are relevant to public procurement in one way or another. For example, since public procurement necessarily involves the spending of public funds the whole of chapter 13 of the Constitution is relevant. Likewise, since public procurement is inevitably tied up with public administration, the whole of chapter 10 of the Constitution is of relevance to public procurement. However, if one focuses on those constitutional sections that can be said to govern public procurement in a specific way to the extent that they may be viewed as facilitating the regulatory regime applicable to public procurement, three constitutional sections are of direct relevance:

- Section 217, dealing with the basic constitutional requirements of public procurement;
- section 33, setting out the basic requirements for constitutionally valid administrative action and consequently the grounds upon which administrative action may be reviewed by the courts; and
- section 195, setting out the constitutional values for public administration in South Africa.

3.3.1 Section 217

Section 217 of the Constitution is of the most obvious and immediate relevance for public procurement regulation and as such merits quoting:

217 Procurement

- (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-
 - (a) categories of preference in the allocation of contracts; and

- (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

Section 217(1) clearly lays down the core constitutional requirements for public procurement in South Africa, neatly captured in the five principles of fairness, equity, transparency, competitiveness and cost-effectiveness. These form the basis for public procurement regulation in South Africa.

Section 217(2) provides a constitutional basis for the use of public procurement for horizontal policy purposes. A horizontal policy objective is one that is not directly linked to the functional purpose of the goods, works or services acquired in the procurement, but aims to achieve some other policy objective, sometimes called a collateral or secondary objective, via public procurement.¹¹ This is significant since it removes any doubt as to the lawfulness of the use of public procurement for horizontal policy purposes. Section 217(3), however, continues to restrict the constitutional mandate in section 217(2) to a framework set out in national legislation. The import of section 217(3) is thus that public procurement can only lawfully be used for horizontal policy purposes within a statutory framework. The PPPFA is the statutory framework created in terms of section 217(3) as is evident in the long title of the Act and confirmed in various judgments, including that of the Constitutional Court.¹²

Section 217(2) and (3) should also be read with section 9 of the Constitution, the equality clause. While section 9 guarantees everyone equal protection and enjoyment under law and outlaws unfair discrimination, section 9(2) specifically allows for "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination". The almost identical wording found in sections 9(2) and 217(2)(b) means that measures adopted in terms of section 217(2) will not in principle fall foul of the equality clause, but can indeed be viewed as also taken in terms of section 9(2).

¹¹ See G. Quinot "Promotion of social policy through public procurement in Africa" in G. Quinot & S. Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 370.

¹² *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC) para 24; *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 (29 November 2013) para 33.

3.3.1.1 Source of public procurement regulation

Section 217(1) should be understood as the source of public procurement *regulation* rather than public procurement *power*. That is, section 217(1) creates the regulatory system in terms of which public procurement is to be conducted in South Africa rather than grants organs of state the power to procure. Although the Constitutional Court stated in *Steenkamp NO v Provincial Tender Board, Eastern Cape*¹³ that "[s]ection 217 of the Constitution is the source of the powers and function of a government tender board" thereby creating the impression that the power to procure is derived from section 217(1) itself,¹⁴ the Court went on to state that section 217 "lays down that an organ of State in any of the three spheres of government, *if authorised by law* may contract for goods and services on behalf of government".¹⁵ In its subsequent judgment in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*¹⁶ the Court confirmed the Supreme Court of Appeal's statement in *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others*¹⁷ that the "Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer (section 217)" and continued to add that the "starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the state procurement process is thus section 217 of the Constitution"¹⁸ thereby confirming a reading of section 217(1) as the source of public procurement regulation.

3.3.1.2 Legally binding and justiciable

The principles set out in section 217(1) create binding legal obligations as the Constitutional Court confirmed in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*.¹⁹

¹³ 2007 (3) SA 121 (CC) para 33.

¹⁴ Also see para 20.

¹⁵ Para 33 (emphasis added).

¹⁶ [2013] ZACC 42 (29 November 2013) para 31.

¹⁷ 2008 (2) SA 481 (SCA) para 4.

¹⁸ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 (29 November 2013) para 32.

¹⁹ [2013] ZACC 42 (29 November 2013) para 40.

LEGISLATIVE FRAMEWORK

These provisions are also directly justiciable. This means that South African courts are willing to adjudicate particular instances of procurement directly against the provisions contained in section 217(1).²⁰ For example, in *Sanyathi Civil Engineering & Construction (Pty) Ltd v eThekweni Municipality, Group Five Construction (Pty) Ltd v eThekweni Municipality*²¹ the court stated: "Section 217 (1) of the Constitution is couched in peremptory terms. A contract in breach of these peremptory provisions is invalid and will not be enforced." In *Inyameko Trading 189 CC t/a Masiyakhe Industries v Minister of Education*²² the court declared: "In all the circumstances, I am accordingly of the view that the exclusion of the Applicant's tender constituted the (over technical) adoption of a process which was neither fair nor equitable nor competitive nor cost effective, and, accordingly, fell foul of the provisions of s217(1) of the Constitution and should be corrected."

Despite the line of cases in which the courts have enforced the provisions of section 217(1) directly in respect of a particular procurement transaction, the better approach was recently confirmed by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*,²³ namely that section 217 rather informs other statutory provisions against which particular instances of procurement may be assessed.

From the perspective of challenging procurement decisions in review proceedings the legislative basis for the challenge will be PAJA rather than section 217 itself. The Court thus explained:

"The legislative framework for procurement policy under section 217 of the Constitution does not seek to give exclusive content to that section, nor does it grant jurisdictional competence to decide matters under it to a specialist institution. The framework thus provides the context within which judicial review of state

²⁰ See e.g. *Sanyathi Civil Engineering & Construction (Pty) Ltd v eThekweni Municipality, Group Five Construction (Pty) Ltd v eThekweni Municipality* 2012 (1) BCLR 45 (KZP); *Inyameko Trading 189 CC t/a masiyakhe Industries v Minister of Education* [2007] ZAWCHC 74; *TBP Building & Civils v the East London Industrial Development Zone (Pty) Ltd* 2009 JDR 0203 (ECG); *Telkom SA Limited v Merid Training (Pty) Ltd; Bihati Solutions (Pty) Ltd v Telkom SA Limited* [2011] ZAGPPHC 1 (7 January 2011); *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* [2013] ZAWCHC 3 (6 February 2013).

²¹ 2012 (1) BCLR 45 (KZP) para 33.

²² [2007] ZAWCHC 74 para 31.

²³ [2013] ZACC 42 (29 November 2013) paras 41-45.

procurement decisions under PAJA review grounds must be assessed. The requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system will thus inform, enrich and give particular content to the applicable grounds of review under PAJA in a given case. The facts of each case will determine what any shortfall in the requirements of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost-inefficiency – may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA."²⁴

More generally, the validity of a procurement decision must be determined in terms of the legislative framework creating the system that section 271(1) calls for in each particular case. Thus, in *Chief Executive Officer, SA Social Security Agency NO & others v Cash Paymaster Services (Pty) Ltd*²⁵ the Supreme Court of Appeal declared that section 217(1)

"implies that a 'system' with these attributes has to be put in place by means of legislation or other regulation. Once such a system is in place and the system complies with the constitutional demands of s 217(1), the question whether any procurement is 'valid' must be answered with reference to the mentioned legislation or regulation."

It follows that while section 217 is the most important constitutional provision, and hence legal provision, dealing with public procurement regulation, it will no longer serve as the primary legal basis against which the validity of procurement actions are tested following adoption of a regulatory framework under and giving effect to the constitutional provisions.

3.3.1.3 Scope of application

The scope of application of section 217 is determined by two factors:

- 1 the entity involved and
- 2 the transaction concluded.

²⁴ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 (29 November 2013) para 43 (footnotes omitted).

²⁵ 2012 (1) SA 216 (SCA) para 15 (footnotes omitted). Confirmed in *TEB Properties CC v MEC, Department of Health and Social Development, North West* [2012] 1 All SA 479 (SCA).

3.3.1.3.1 Entity coverage

Section 217(1) on its own terms does not apply to all organs of state as defined in section 239 of the Constitution. Entity coverage beyond "national, provincial or local sphere[s] of government" is limited to those institutions "identified in national legislation". This means in particular that state-owned companies ("SOCs") are not, without more, included in the entity coverage of section 217, but that the section clearly contemplates such coverage on the basis of national legislation.

The courts have held that the PPPFA and PFMA are legislation as contemplated in section 217(1).²⁶ It follows that application of these two pieces of legislation (and by parity of reasoning the MFMA) to an entity will bring that entity under the scope of application of section 217. In light of the expansive application of the Preferential Procurement Regulations, 2011, issued under the PPPFA (see 3.4.3 below), section 217 currently applies essentially to all public entities, including SOCs.

3.3.1.3.2 Transaction coverage

Section 217(1), on its own terms, only applies to "contracts for goods or services", that is "procurement" (as the heading of section 217 also indicates) in a narrow sense of acquisition. The section therefore does not apply to disposal of assets.²⁷ The section also does not apply to transactions involving immovable property, i.e. land.²⁸

3.3.2 Section 33

The second constitutional provision that is of particular importance for public procurement regulation is section 33, which sets out the fundamental right to administrative justice. Section 33(1) requires all administrative action to be lawful, reasonable and procedurally fair. Section 33(2) grants a person affected by administrative action the right to written reasons for such action.

²⁶ *TEB Properties CC v MEC, Department of Health and Social Development, North West* [2012] 1 All SA 479 (SCA) para 15; *TBP Building & Civils (Pty) Ltd v the East London Industrial Development Zone (Pty) Ltd* 2009 JDR 0203 (ECG); *Steradian Consulting (Pty) Limited v Armaments Corporation of South Africa Limited* [2011] ZAGPPHC 99 (10 May 2011).

²⁷ *Cf Londoloza Forestry Consortium (Pty) Ltd v South African Forestry Company Ltd* 2008 JDR 0816 (T).

²⁸ *CSHELL 271 (Pty) Ltd v Oudtshoorn Municipality, Oudtshoorn Municipality v CSHELL 271 (Pty) Ltd* [2012] ZAWCHC 25 (30 March 2012) para 36.

LEGISLATIVE FRAMEWORK

This section is important for public procurement since it is now well-established in South African law that the adjudication of public tenders and the process leading up to the conclusion of a public contract in general amount to administrative action.²⁹ Furthermore, ancillary decisions taken in the process of public procurement, such as a decision to disqualify a particular bidder from the adjudication of bids or to restrict a bidder from future public contracts will also amount to administrative action.³⁰ As a result the rules of administrative law apply to public procurement decisions, which rules are based on section 33 of the Constitution.

However, since the enactment of PAJA to give effect to section 33 it is ordinarily impermissible to rely directly on section 33 in assessing the validity of administrative action.³¹ Reliance must rather be placed on the relevant section in PAJA. This approach also applies to public procurement decisions so that such decisions will now ordinarily be tested in terms of PAJA rather than section 33 itself.³²

Section 33 remains relevant in the procurement context to the extent that it sets out the minimum requirements for administrative justice that procurement rules must comply with. In other words, procurement rules, contained in legislation or policy, may still be tested against section 33 for their compliance with the constitutional guarantee of administrative

²⁹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 (29 November 2013) paras 31, 45; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 21; *TEB Properties CC v MEC, Department of Health and Social Development, North West* [2012] 1 All SA 479 (SCA) para 26; *Municipal Manager: Qaukeni and Others v F V General Trading CC* 2010 (1) SA 356 (SCA) para 26; *MEC for Education, Northern Cape v Bateleur Books (Pty) Ltd* 2009 (4) SA 639 (SCA) para 7-8; *Eskom Holdings Limited and Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 6; *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) para 4; *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA) para 8; *Greys Marine Houtbay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 28; *Logbro Properties CC v Bedderson N.O. and Others* 2003 (2) SA 460 (SCA); *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) para 7; *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) para 33; *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* [1997] 2 All SA 548 (SCA) at 552 j - 553 a.

³⁰ *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd, Chairman of the State Tender Board v Sneller Digital (Pty) Ltd and Others* 2012 (2) SA 16 (SCA) para 31; *Chairman of the State Tender Board and Another v Supersonic Tours (Pty) Ltd* 2008 (6) SA 220 (SCA) para 14.

³¹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 (29 November 2013) para 41; *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para 73; *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) paras 95-97; *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) para 99; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) paras 25-26.

³² *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 (29 November 2013) paras 43-44.

justice. The Constitutional Court confirmed this continued function of direct reliance on section 33 in *Zondi v MEC for Traditional and Local Government Affairs*³³ when it stated that "PAJA cannot be used to evaluate a constitutional challenge [of legislation]. A constitutional challenge must be evaluated under section 33 of the Constitution." The Court also noted the function of section 33 read with PAJA in interpreting legislation in a manner consistent with section 33. In this respect the Court said:

"That said, however, it does not mean that PAJA has no role when a statute is challenged on the grounds that it violates section 33 ... All decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA. The effect of this is that statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA.

Thus, where there is a constitutional challenge to the provisions of a statute on the ground that they are inconsistent with the provisions of section 33 of the Constitution, the proper approach is first to consider whether the provisions in question can be read in a manner that is consistent with the Constitution. If they are capable, they will ordinarily pass constitutional muster. This approach to the construction of a statute is consistent with the approach to constitutional interpretation which has been developed by this Court that, where possible, legislation must be construed consistently with the Constitution. And this approach to constitutional interpretation is consistent with section 39(2) of the Constitution."³⁴

Section 33 thus retains an important function in the formulation and interpretation of public procurement rules.

³³ 2005 (3) SA 589 (CC) para 99.

³⁴ *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) paras 101-102 (footnotes omitted).

3.3.3 Section 195

The final constitutional section of particular relevance for public procurement is section 195. This section sets out the "basic values and principles governing public administration" in South Africa. Given the centrality of public procurement in public administration it follows that this section is also of foundational importance for public procurement. Moreover, among the values and principles listed in section 195(1) there are a number that are particularly apt in a procurement context. These include:

- "(a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- ...
- (d) Services must be provided impartially, fairly, equitably and without bias.
- ...
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information."

The courts have thus on a number of occasions assessed particular public conduct for compliance with section 195.³⁵ Of particular importance in respect of section 195 is its very wide scope of application. Unlike sections 217 and 33, section 195 applies to all action taken under the broad umbrella of public administration. Actions by organs of state that may thus arguably not be subject to section 217 (because the decision at issue may not be strictly a procurement decision, e.g. a decision to sell something or to deal with land) or section 33 (because it does not amount to administrative action) will nevertheless be subject to section 195. Section 195 also has an expansive entity coverage and applies to

³⁵ See *Coetzee v National Commissioner of Police and Others* 2011 (2) SA 227 (GNP); *Treatment Action Campaign v Minister of Health* 2005 (6) SA 363 (T); *Johannesburg Municipal Pension Fund and Others v City of Johannesburg and Others* 2005 (6) SA 273 (W).

- "(a) administration in every sphere of government;
- (b) organs of state; and
- (c) public enterprises."³⁶

Section 195 furthermore has played an important role in bringing particular actions of organs of state within the ambit of broader public procurement regulation, if only under PAJA. The courts have thus on occasion subjected decisions taken by organs of state *in terms of* an existing contract to administrative law scrutiny *inter alia* on the basis of section 195.³⁷

3.4 Specific regulatory instruments

Within the constitutional framework set out above, the specific statutory instruments that regulate public procurement can be analysed. The focus in the discussion that follows is to determine the role of each particular statute (and the secondary instruments made under it) within public procurement regulation broadly and to determine the legal mandate of NT under each.

3.4.1 Public Finance Management Act

Following the Constitution, the PFMA is the most general statute governing public procurement. The object of the PFMA is "to secure transparency, accountability, and sound management" of all aspects of public finance,³⁸ hence including public procurement. The PFMA applies to all organs of state at national and provincial levels of government, including SOCs,³⁹ with the exception of Parliament.

³⁶ Section 195(2).

³⁷ *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others (No 1)* 2008 (3) SA 91 (E) para 54.

³⁸ PFMA section 2.

³⁹ PFMA section 3.

3.4.1.1 Institutional arrangements

The general institutional scheme of the PFMA amounts to a decentralised financial management structure in terms of which the core financial management function rests with the accounting officer/authority of each organ of state.

The PFMA itself contains very little by way of public procurement regulation. It places an obligation on accounting officers/authorities to create and maintain "an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective".⁴⁰ This obligation amounts to a "double decentralisation" of public procurement power. Firstly, it delegates to the entity the power to create the system in terms of which procurement will occur, which includes the specific rules applicable to procurement within that system. Secondly, it delegates the actual procurement, i.e. acquisition, of goods and services to the entity in terms of the system thus created.

NT and provincial treasuries fulfil an oversight function in respect of financial management within organs of state, including the procurement function. The only exception is in respect of provincial legislatures for which NT and provincial treasuries' oversight functions under the PFMA are allocated to the speaker of the particular legislature.⁴¹

The PFMA is NT's most significant source of legal powers in respect of procurement regulation. The Act grants NT a host of general functions and powers of oversight, which also apply to public procurement and which can be viewed as fulfilling the mandate given in section 216(1) of the Constitution. NT's functions include the function to "promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions".⁴² In order to fulfil these functions, NT

"(a) must prescribe uniform treasury norms and standards;

(b) must enforce this Act and any prescribed norms and standards, ...;

⁴⁰ PFMA sections 38(1)(a)(iii); 51(1)(a)(iii).

⁴¹ PFMA section 3(2)(b).

⁴² PFMA section 6(1)(g).

LEGISLATIVE FRAMEWORK

- (c) must monitor and assess the implementation of this Act, including any prescribed norms and standards, in provincial departments, in public entities and in constitutional institutions;
- (d) may assist departments and constitutional institutions in building their capacity for efficient, effective and transparent financial management;
- (e) may investigate any system of financial management and internal control in any department, public entity or constitutional institution;
- (f) must intervene by taking appropriate steps, which may include steps in terms of section 100 of the Constitution or the withholding of funds in terms of section 216 (2) of the Constitution, to address a serious or persistent material breach of this Act by a department, public entity or constitutional institution; and
- (g) may do anything further that is necessary to fulfil its responsibilities effectively."⁴³

At provincial level each provincial treasury fulfils largely similar functions in respect of the particular province.⁴⁴ However, the powers of provincial treasuries are concurrent with that of NT rather than to the exclusion of NT's powers. That NT's powers also extend to provinces is *inter alia* clear from the references to "department" in section 6(2), which is defined in the Act as "a national or provincial department or a national or provincial government component"⁴⁵ and the reference in section 6(2)(f) to intervention under section 100 of the Constitution, which governs national intervention in provincial administration.

NT's legal mandate in respect of the regulatory regime under the PFMA can be classified in three broad categories: 1. Create norms and standards; 2. Enforce the regulatory regime; 3. Assist organs of state in implementing the regime. It is worth noting the broad ancillary or facultative powers granted in section 6(2)(g) above, which only limits NT's mandate to the

⁴³ PFMA section 6(2).

⁴⁴ PFMA section 18.

⁴⁵ PFMA section 1.

LEGISLATIVE FRAMEWORK

aim of fulfilling its obligations under the Act without any restrictions on the nature or form of action taken under that mandate.

NT's general mandate under section 6 is amplified by section 76, which grants NT the more specific power to make regulations or issue instructions to entities covered by the PFMA. Section 76(4)(c) in particular authorises NT to make regulations or issue instructions concerning "the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective". Regulations or instructions issued under this power will consequently have the force of law and be binding on those entities to which the regulation or instruction is made applicable. Departures from such regulations or instructions may only occur by approval from NT.⁴⁶

The institutional scheme that emerges from the PFMA in respect of public procurement is thus that organs of state (through their accounting officers/authorities) have the power to formulate their own rules governing procurement by that entity and to procure in terms of those rules, but that these functions must be fulfilled in terms of the framework created by NT and under the supervision of NT.

3.4.1.2 Treasury Regulations

Acting in terms of section 76 of the PFMA, NT has made the Treasury Regulations,⁴⁷ which include regulations on public procurement.⁴⁸ These regulations set out the framework in terms of which organs of state must determine their procurement systems. However, regulation 16A has a limited scope of entity application and does not apply to SOCs and other government business enterprises listed in schedules 2 (major public entities), 3B (national government business enterprises) and 3D (provincial government business enterprises) of the PFMA.⁴⁹ The regulation does, however, apply to transactions beyond procurement narrowly and also includes transactions involving disposal and letting of state assets.⁵⁰

⁴⁶ PFMA section 79.

⁴⁷ GN R225 in GG 27388 of 15 March 2005.

⁴⁸ Regulation 16A.

⁴⁹ Regulation 16A.2.

⁵⁰ Regulation 16A3.1 and 16A7.

LEGISLATIVE FRAMEWORK

The Treasury Regulations only set out in broad framework what must be included in entities' supply chain management systems, without prescribing the details of each entity's system. Of particular relevance is the further incorporation of a number of additional regulatory instruments in the procurement regulatory scheme created by the Treasury Regulations.

Regulation 16A3.2 thus determines that entities' supply chain management systems *must* be consistent with both the PPPFA and the BBBEEA and regulation 16A6.3 states that all bid documents must include the criteria prescribed by the PPPFA and BBBEEA. The courts have thus suggested that these provisions have the effect of extending the scope of application of the PPPFA beyond the narrow terms of that Act and its regulations (at the time).⁵¹

Regulation 16A furthermore binds entities to additional instructions from NT in implementing their supply chain management systems. These include the threshold values in terms of which particular methods of procurement must be adopted,⁵² the minimum training required of officials staffing supply chain management units,⁵³ the procedure for appointment of consultants,⁵⁴ and ethical standards to be adhered to.⁵⁵

Regulation 16A9.3 obliges NT and each provincial treasury to create a complaint mechanism to deal with non-compliance of the norms and standards prescribed under the PFMA.

Finally, the Treasury Regulations grant NT and provincial treasuries a reporting mandate in terms of which entities must report on their procurement functions to NT and provincial treasuries and the latter must report to NT.⁵⁶ In terms of this regulation entities are obliged to comply with the reporting requirements and NT is given a wide mandate to formulate the information to be included in such reports. NT has, for example, implemented this function through its *Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management* of 31 May 2011.

⁵¹ See *TBP Building & Civils (Pty) Ltd v the East London Industrial Development Zone (Pty) Ltd* 2009 JDR 0203 (ECG).

⁵² Regulation 16A6.1.

⁵³ Regulation 16A5.

⁵⁴ Regulation 16A6.3(g).

⁵⁵ Regulation 16A8.2.

⁵⁶ Regulation 16A11.

3.4.1.3 Treasury instructions

As noted above, both the PFMA and Treasury Regulations authorise NT to issue instructions to entities on procurement. The courts have held that where these instructions are issued in terms of legislation or regulations they are legally binding.⁵⁷ Courts have thus assessed the validity of particular procurement decisions against compliance with specific treasury instructions.⁵⁸ NT has issued a range of procurement guidelines, circulars, practice notes and instructions under its PFMA powers dealing with the issues expressly foreshadowed in Treasury Regulation 16A (noted above) as well as a number of further topics such as reporting obligations, unsolicited bids, tax clearance certificates and verification of preferred bidders against the database of restricted suppliers. These represent the most detailed rules of general public procurement regulation, that is regulation that applies to public procurement across organs of state as opposed to the specific rules contained in the supply chain management policies of individual organs of state.

3.4.2 Municipal Finance Management Act

The MFMA is the equivalent at local government level of the PFMA and applies to all organs of state at local government level.⁵⁹

3.4.2.1 Institutional arrangements

The MFMA allocates responsibility for public finance management, including public procurement, at local government level to individual municipalities, mostly shared between the mayor and municipal manager as accounting officer of the municipality. The accounting officer is in this regard responsible for the creation and implementation of a supply chain management policy.⁶⁰

⁵⁷ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 (29 November 2013) para 38; *Magasana Construction CC v City of Tshwane Metropolitan Municipality and Others* [2013] ZAGPPHC 196 (12 July 2013) para 43; *TBP Building & Civils (Pty) Ltd v the East London Industrial Development Zone (Pty) Ltd* 2009 JDR 0203 (ECG) para 18.

⁵⁸ *Gauteng MEC for Health v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA). Also see *TBP Building & Civils (Pty) Ltd v the East London Industrial Development Zone (Pty) Ltd* 2009 JDR 0203 (ECG).

⁵⁹ MFMA section 3.

⁶⁰ MFMA section 62(1)(f)(iv) read with sections 111, 115.

LEGISLATIVE FRAMEWORK

NT and provincial treasuries exercise an oversight function over municipalities under the MFMA. NT's powers in this respect amount to monitoring compliance with the prescripts of the Act and taking steps to intervene where it finds non-compliance.⁶¹ As with the PFMA, NT has the general power to "take any other appropriate steps necessary to perform its functions effectively".⁶² The Minister of Finance may also make regulations or guidelines in order to facilitate the implementation of the MFMA.⁶³ Departures from these regulations may only occur with approval from NT, although non-compliance may also be condoned.⁶⁴ NT and provincial treasuries furthermore have the power to require municipalities to report to them on matters related to the MFMA.⁶⁵

3.4.2.2 Procurement rules

Unlike the PFMA, the MFMA contains significant procurement rules in the Act itself.⁶⁶ These rules apply generally to all procurement undertaken by municipalities, with the exception of contracts between the municipality and another organ of state.⁶⁷ However, despite the specific rules on public procurement found in the MFMA, the core approach to procurement regulation at local government level is similar to that at national and provincial levels in that individual municipalities are required to formulate their own supply chain management policies, which policy is to serve as the immediate set of rules governing procurement within that municipality,⁶⁸ albeit within the much narrower framework prescribed by the MFMA.⁶⁹

3.4.2.3 Municipal Supply Chain Management Regulations

Acting in terms of section 168 of the MFMA, the Minister of Finance has issued a set of specific procurement regulations for local government, the Municipal Supply Chain Management Regulations ("MSCM Regulations").⁷⁰ While remaining true to the basic point of departure that individual municipalities will formulate their own supply chain

⁶¹ MFMA section 5(2).

⁶² MFMA section 5(2)(f).

⁶³ MFMA section 168.

⁶⁴ MFMA section 170.

⁶⁵ MFMA section 74.

⁶⁶ MFMA chapter 11.

⁶⁷ MFMA section 110.

⁶⁸ MFMA section 111.

⁶⁹ MFMA section 112.

⁷⁰ GN 868 in GG 27636 of 30 May 2005.

management policies to govern procurement by that municipality, the MSCM Regulations provide a regulatory framework in extensive detail for such policies. In fact, given the level of detail prescriptions set out in the MSCM Regulations, little discretion is left to municipalities in formulating their own supply chain management policies.

3.4.2.4 Treasury instructions

Unlike the PFMA, the MFMA does not expressly provide NT with the power to issue instructions to municipalities in respect of public procurement. Section 168 of the MFMA grants the Minister of Finance the power to make "regulations or guidelines" towards implementation of the Act, which would include matters pertaining to procurement. However, this power must be exercised with the concurrence of the Minister of Cooperative Governance and Traditional Affairs. Regulations made under this provision are furthermore subject to consultation and public participation requirements as well as submission to Parliament.⁷¹ Guidelines made under this power will only bind municipalities if the council of the municipality has adopted those guidelines.⁷²

While the MSCM Regulations thus contemplate NT standards,⁷³ these will only be binding on municipalities if issued in one of the two forms set out above, i.e. regulations or guidelines. As a result one finds much more detail in the MSCM Regulations in respect of procurement rules in comparison with the Treasury Regulations under the PFMA, where much of the detailed rules are issued in terms of instruction notes. An important example is the thresholds for the use of various procurement methods, which are set in the MSCM Regulations.⁷⁴ This is distinct from the approach under the PFMA where the determination of thresholds is left to NT to be done in the form of instructions.

3.4.3 Preferential Procurement Policy Framework Act

The PPPFA is the closest enactment to a general procurement statute in South Africa. Despite its short title and in particular the word "preferential" in the title, the PPPFA in fact deals with public procurement more generally and lays down general methods for tender

⁷¹ MFMA section 169.

⁷² MFMA section 168(3).

⁷³ See e.g. MSCM Regulations 3(2)(a), 8, 11(1)(e), 21(a).

⁷⁴ MSCM Regulations 12.

adjudication. Following the full implementation of the Preferential Procurement Regulations, 2011, made in terms of the PPPFA, the Act also has the widest entity coverage of all procurement statutes in South Africa.

As noted above, the PPPFA was enacted to fulfil the mandate in section 217(3) of the Constitution to give effect to the use of procurement for horizontal policy purposes as contemplated in section 217(2) of the Constitution.

3.4.3.1 Preferential procurement policies

As with the PFMA and MFMA, the PPPFA mandates organs of state to formulate their own preferential procurement policies and to procure on the basis of those policies.⁷⁵ However, the PPPFA significantly narrows down the scope for variation in individual preferential procurement policies by providing for a set framework within which individual policies must be formulated and procurement be done. This framework, essentially prescribing points systems for bid adjudication in terms of which certain categories of bidders are given preference, applies to bid adjudication in general and is thus not restricted to only the preferential dimension of procurement.

The Minister of Finance is given the power to make regulations on any matter relating to the implementation of the Act.⁷⁶

3.4.3.2 Preferential Procurement Regulations, 2011

The Preferential Procurement Regulations, 2011 was made pursuant to section 5(1) of the PPPFA. The Regulations came into operation on 7 December 2011,⁷⁷ although a number of organs of state were given exemption from the regulations until 7 December 2012,⁷⁸ upon which date the regulations become fully operational. The Preferential Procurement Regulations apply to virtually all organs of state⁷⁹ and in this regard also extends the field of application of the PPPFA.

⁷⁵ PPPFA section 2(1).

⁷⁶ PPPFA section 5(1).

⁷⁷ Preferential Procurement Regulations 16.

⁷⁸ GN R1027 in GG 34832 of 7 December 2011.

⁷⁹ Preferential Procurement Regulations 2(1).

LEGISLATIVE FRAMEWORK

The Preferential Procurement Regulations further narrow down organs of state's discretion in formulating their own preferential procurement policies. The regulations provide in considerable detail how bids are to be adjudicated, both at qualification and award stages, and how to identify the preferred bidder. One of the most important changes to the regulatory regime applicable to preferential procurement brought about by the 2011 regulations is the integration of the PPPFA's approach to preferential procurement with the approach to broad-based black economic empowerment under the BBBEEA. The thresholds for the use of the different points systems are also set in the regulations.

The Preferential Procurement Regulations introduced local-content set asides to South African procurement law.⁸⁰ NT is given a broad mandate to issue "instructions, circulars and guidelines" to facilitate the implementation of such set-asides.⁸¹ Given the clear legal basis for these instructions, circulars and guidelines, they will have the force of law.⁸² NT shares this mandate with the Department of Trade and Industry ("DTI"), which is responsible for identifying and designating sectors where local-content set-asides are to be applied.⁸³

An argument may be made that the Preferential Procurement Regulations, 2011 are not in compliance with the PPPFA to the extent that the Regulations attempt to restrict the framework for preferential procurement policies to BEE credentials to the exclusion of other goals contemplated in the PPPFA. Section 2(1)(d) of the PPPFA allows organs of state to formulate supply chain management policies in terms of which preference points may be awarded on one or both of two grounds, namely "persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability" and "implementing the programmes of the Reconstruction and Development Programme". The Preferential Procurement Regulations, 2011, however, seem to restrict organs of state to only award preference points on the first of the two grounds contemplated in the Act,

⁸⁰ Preferential Procurement Regulations 9.

⁸¹ Preferential Procurement Regulations 9(2).

⁸² See *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 (29 November 2013) para 38; *Magasana Construction CC v City of Tshwane Metropolitan Municipality and Others* [2013] ZAGPPHC 196 (12 July 2013) para 43; *TBP Building & Civils (Pty) Ltd v the East London Industrial Development Zone (Pty) Ltd* 2009 JDR 0203 (ECG) para 18.

⁸³ Preferential Procurement Regulations 1(i), 9(3), 10(3).

namely BEE status. It is arguable that the Preferential Procurement Regulations, 2011 are unlawful in this regard.

3.4.4 State Tender Board Act

The STBA is old-order legislation that created the basis for public procurement regulation in South Africa prior to the adoption of the PFMA. However, it remains on the statute book. By way of regulation, the Minister of Finance has retained the STBA as a parallel approach to public procurement alongside the PFMA.⁸⁴ The STBA does not seem to be utilised in practice at present.

In contrast to the decentralised approach to procurement introduced by the PFMA (see 3.4.1.1 above), the STBA authorised a central organ of state, the State Tender Board ("STB"), to procure on behalf of the state and to determine the terms and conditions of procurement contracts.⁸⁵

The Minister of Finance is granted broad powers to make regulations to facilitate the implementation of the STBA.⁸⁶

The 2003 regulations made under the STBA elaborate on the STB's powers. In addition to the power granted in the STBA to procure and determine the terms and conditions of its procurement transactions, the STB is authorised in the regulations to

- issue directives to government departments in respect of procurement;⁸⁷
- take remedial steps to sanction abuse of and enforce compliance with the procurement system;⁸⁸
- accord preference to local content in procurement.⁸⁹

⁸⁴ GN R1733 in GG 25766 of 5 December 2003 ("STB Regulations 2003"), regulation 2.

⁸⁵ STBA section 4.

⁸⁶ STBA section 13.

⁸⁷ STB Regulations 2003, regulation 3(1).

⁸⁸ STB Regulations 2003, regulation 3(5) & (6).

⁸⁹ STB Regulations 2003, regulation 8.

3.4.5 Broad-based Black Economic Empowerment Act

As noted above, the BEE regime under the BBBEEA has now been incorporated into procurement regulation by way of the Preferential Procurement Regulations, 2011 (see 3.4.3.2 above). Preference in the award of public contracts is subsequently exclusively given on the strength of bidders' status level certificates issued in terms of the BBBEEA using the matrixes set out in the Preferential Procurement Regulations, 2011.⁹⁰ There is consequently no longer any procurement-specific approach to BEE distinct from the general approach to BEE under the BBBEEA.

3.4.6 Prevention and Combating of Corrupt Activities Act

The Corruption Act aims to "prevent and combat corruption and corrupt activities" *inter alia* by creating a number of offences relating to corruption and providing for sanctions for such offences.⁹¹

Included in the offences created by the Corruption Act are a number of procurement-specific offences. These pertain to "corrupt activities relating to contracts",⁹² "corrupt activities relating to procuring and withdrawal of tenders"⁹³ and corrupt activities relating to "acquisition of private interest in contract, agreement or investment of public body" by a public officer.⁹⁴

The Corruption Act also creates sanctions specific to procurement offences. The Act authorises the Minister of Finance to establish the Register for Tender Defaulters within NT⁹⁵ and to appoint an official as the Registrar.⁹⁶ When a person is found guilty of a corruption offence under sections 12 or 13 of the Act, the court may, in addition to other sanctions, order the details of that person, and a host of related parties, to be endorsed on the Register with the effect that the person will be debarred from future public contracts for

⁹⁰ Regulations 5(2), 6(2), 10.

⁹¹ Corruption Act long title.

⁹² Corruption Act section 12.

⁹³ Corruption Act section 13.

⁹⁴ Corruption Act section 17.

⁹⁵ Corruption Act section 29.

⁹⁶ Corruption Act section 30.

a period determined by NT.⁹⁷ Once endorsement has been ordered, NT is authorised to impose a number of additional sanctions such as termination of any agreement with the endorsed person or claiming damages.⁹⁸

The Minister of Finance is given powers to make regulations pertaining to the Register for Tender Defaulters.⁹⁹

3.4.7 Construction Industry Development Board Act

Construction procurement is governed by the CIDBA in addition to general procurement laws set out above.

The CIDB is granted a host of general regulatory powers in relation to the construction industry, which include the powers to "implement policies, programmes and projects aimed at ... (vi) simplification of regulatory procedures; (vii) procurement reform; (viii) standardisation and uniformity in procurement documentation, practices and procedures".¹⁰⁰ The CIDB is authorised to "promote the standardisation of the procurement process with regard to the construction industry".¹⁰¹ To this end the CIDB "must publish a code of conduct for all construction-related procurement and all participants involved in the procurement process."¹⁰² Significantly, the CIDB's powers relating to standardisation of procurement are expressly restricted to be undertaken "within the framework of the procurement policy of Government".¹⁰³ From this provision it is thus clear that the CIDB's powers in relation to public procurement do not trump that of NT or exclude general procurement regulation. The CIDB's procurement regulation must comply with general procurement regulation.

The CIDB is mandated to establish a register of contractors "which provides for categories of contractors in a manner which facilitates public sector procurement".¹⁰⁴ The Minister of Public Works is authorised to prescribe the "manner in which public sector construction

⁹⁷ Corruption Act section 28.

⁹⁸ Corruption Act section 28(3).

⁹⁹ Corruption Act section 33.

¹⁰⁰ CIDBA section 5(1)(a).

¹⁰¹ CIDBA section 5(3)(c).

¹⁰² CIDBA section 5(4)(a).

¹⁰³ CIDBA section 5(3)(c).

¹⁰⁴ CIDBA section 5(2)(d) and see sections 16-20.

LEGISLATIVE FRAMEWORK

contracts may be invited, awarded and managed within the framework of the register", but also subject to general procurement policy.¹⁰⁵ Organs of state are obliged to award construction contracts with reference to the register.¹⁰⁶

The Minister of Public Works has issued the Construction Industry Development Regulations under section 33 of the CIDBA.¹⁰⁷ These regulations contain further detailed rules on public procurement in the construction sector with a value above R30 000. This includes the range of tender values per contractor grading designation in the register.¹⁰⁸ The regulations also require organs of state to comply with the Standard for Uniformity in Construction Procurement ("CIDB Standard"), published by the CIDB Board,¹⁰⁹ in their construction procurement.¹¹⁰

The CIDB Standard sets out in extensive detail standard methods to be followed in construction procurement. Organs of state are obliged to adopt one of the methods set out in the Standard.¹¹¹ The Standard also contains standard documents to be used in construction procurement.

The CIDB Standard¹¹² requires all construction procurement to comply with the CIDB Code of Conduct for all parties engaged in construction procurement.¹¹³

An overview of the CIDB regime that emerges from the regulatory instruments above reveals some problems of alignment between this regime and general procurement regulation, in particular the Preferential Procurement Regulations, 2011. For example, the CIDB Standard mandates functionality to be assessed by way of "establishing a category of preference for quality in the evaluation of tenders".¹¹⁴ This approach is clearly not in line with the Preferential Procurement Regulations, 2011, which restricts the use of functionality

¹⁰⁵ CIDBA section 16(3).

¹⁰⁶ CIDBA section 16(4).

¹⁰⁷ GN 692 in GG 26427 of 9 June 2004.

¹⁰⁸ Construction Industry Development Regulations 17.

¹⁰⁹ Board Notice 12 in GG 31823 of 30 January 2009.

¹¹⁰ Construction Industry Development Regulations 24(c).

¹¹¹ CIDB Standard 4.2.

¹¹² CIDB Standard 4.1.

¹¹³ Board Notice 127 in GG 25656 of 31 October 2003.

¹¹⁴ CIDB Standard 4.3.1(f).

to a qualification criterion and not an award criterion.¹¹⁵ It is accordingly not surprising that where an organ of state attempted to follow *both* the CIDB Standard and the PPPFA procedures in a single procurement, the court found that the procurement fell afoul of section 217 of the Constitution.¹¹⁶ The court held that the inconsistencies that resulted from the contracting authority's attempt to follow both regimes offended against the constitutional principles of transparency and fairness and had to be set aside.¹¹⁷

3.4.8 National Land Transport Act

The National Land Transport Act aims to develop a national land transport system and coordinate activities across all spheres of government in this regard. To this end the Act prescribes rules and procedures to be followed in respect of the procurement of land transport services.¹¹⁸ These rules are in addition to general procurement laws and the Act specifically requires compliance with general procurement regulation.¹¹⁹ The Minister of Transport is given the power to prescribe requirements for tenders and contracts under the Act, including standard documents.¹²⁰

The Minister of Transport has made regulations under the Act containing further detailed rules on public transport services contracts,¹²¹ including rules on qualification criteria for such contracts.¹²²

3.4.9 National Supplies Procurement Act

The National Supplies Procurement Act is another old-order statute dealing with procurement that is still on the statute book. This Act in essence authorises the Minister of

¹¹⁵ Preferential Procurement Regulations, 2011, regulation 4.

¹¹⁶ *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* [2013] ZAWCHC 3 (6 February 2013).

¹¹⁷ *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* [2013] ZAWCHC 3 (6 February 2013) paras 70-74.

¹¹⁸ National Land Transport Act chapter 5.

¹¹⁹ National Land Transport Act section 42(3), (4).

¹²⁰ National Land Transport Act sections 42(6), 43(3), 44.

¹²¹ GN R877 in GG 32535 of 31 August 2009: National Land Transport Regulations on Contracting for Public Transport Services.

¹²² National Land Transport Regulations on Contracting for Public Transport Services, regulation 5.

Trade and Industry to procure goods and services for the state outside of the general procurement laws if he "deems it necessary or expedient for the security of the Republic".¹²³

3.4.10 State Information Technology Agency Act

The State Information Technology Agency Act creates the SITA for the purpose of providing information technology ("IT") services to the state administration. The Act obliges all national and provincial state departments to procure all IT goods and services through the SITA.¹²⁴ These arrangements trump other procurement laws. Other organs of state may procure IT goods and services through the SITA, but are not obliged to do so.¹²⁵ The SITA is, however, expressly bound to the PPPFA in exercising its procurement functions.¹²⁶

The Minister for the Public Service and Administration is obliged to make regulations in respect of the procurement functions of the SITA.¹²⁷ The regulations made under the SITA Act set out in further detail how IT services and goods will be procured.¹²⁸ The regulations expressly bind SITA to general procurement regulation in exercising its procurement function.¹²⁹ The SITA is obliged to report to the Minister of Finance on a range of matters relating to IT procurement contracts.¹³⁰ In terms of the regulations the SITA may arrange transversal term contracts for the procurement of IT goods or services.¹³¹

3.4.11 Entity- and issue-specific legislation

While the statutes discussed in paragraphs 3.4.1 to 3.4.10 above regulate procurement across a range of organs of state, there are a significant number of statutes that deal with procurement by particular entities. There are also statutes addressing procurement in relation to a particular issue.

In most cases these statutes prescribe procurement rules in addition to the rules that would apply to the procurement activities of these entities in terms of the more general legislation

¹²³ National Supplies Procurement Act section 2.

¹²⁴ SITA Act section 7(3).

¹²⁵ SITA Act section 7(5).

¹²⁶ SITA Act section 7(8)(c)(iv).

¹²⁷ SITA Act section 23(1)(a).

¹²⁸ GN R904 in GG 28021 of 23 September 2005, part 3.

¹²⁹ SITA Regulations 7.2.1.

¹³⁰ SITA Regulations 7.4.1.

¹³¹ SITA Regulations 10.

above. In some instances, however, the entity-specific legislation operates to the exclusion of general rules such as in the case of the Financial Management of Parliament Act, which governs public procurement by Parliament to the exclusion of the PFMA.

The level of detail found in these entity-specific pieces of legislation varies significantly. Thus the Financial Management of Parliament Act contains an entire chapter setting out procurement rules for Parliament¹³² while statutes such as the Road Traffic Management Corporation Act and Administrative Adjudication of Road Traffic Offences Act contain only single provisions with fairly bland statements such as "[a]ny procurement under this Act must be undertaken in terms of the prescribed procedures"¹³³ or simply repeating obligations found in general legislation such as the Health Professions Act, Nursing Act and the Public Audit Act, which repeat the PFMA's obligation on accounting officers to create "an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective".¹³⁴

A specific procurement regime is created in terms of the Armaments Corporation of South Africa, Limited Act in respect of defence procurement, which is conducted by the Corporation on behalf of the Department of Defence. The Act authorises the Corporation to establish a "system for tender and contract management in respect of defence matériel".¹³⁵ "Defence matériel" is defined as "any material, equipment, facilities or services used principally for military purposes".¹³⁶ The Corporation is also authorised to procure "commercial matériel", that is goods and services other than "defence matériel", for the Department of Defence and/or any other organ of state in terms of a service level agreement between the Corporation and such organ of state.¹³⁷ The defence procurement system contemplated in the Act must comply with the basic requirements of the PFMA.¹³⁸ In terms of the SITA Regulations, procurement of IT goods and services that qualify as "defence matériel" must be conducted in terms of the procurement system created under the

¹³² Financial Management of Parliament Act chapter 6.

¹³³ Road Traffic Management Corporation Act section 43.

¹³⁴ Health Professions Act section 13(3)(c)(ii); Nursing Act section 29(2)(b)(ii); Public Audit Act section 43(2)(b)(ii).

¹³⁵ Armaments Corporation of South Africa, Limited Act section 4(2)(e).

¹³⁶ Armaments Corporation of South Africa, Limited Act section 1(1)(g).

¹³⁷ Armaments Corporation of South Africa, Limited Act sections 4(2)(e), 4(3)(a)(ii), 5(1).

¹³⁸ Armaments Corporation of South Africa, Limited Act section 17.

Armaments Corporation of South Africa, Limited Act rather than the SITA Act and will thus be done by the Corporation rather than the SITA.¹³⁹

There are also issue-specific procurement rules in relation to housing development and disasters. The Housing Act obliges the Minister of Human Settlements to determine a procurement policy, in line with section 217 of the Constitution, specifically for housing development.¹⁴⁰ When a national disaster has been declared, the Disaster Management Act mandates the Minister for Cooperative Governance and Traditional Affairs to "make regulations or issue directions or authorise the issue of directions concerning ... emergency procurement procedures".¹⁴¹ Premiers and municipal councils have similar powers in respect of provincial and local disasters respectively.¹⁴²

While not strictly regulating public procurement *per se* the Correctional Services Act contains a provision of significance for public procurement. Section 133(1) states that "[a]ll State departments must, as far as practicable, purchase articles and supplies manufactured by sentenced offender labour from the Department [of Correctional Services] at fair and reasonable prices as may be determined by the Minister of Finance". These transactions will not be procurement transactions, but rather internal provisioning. This provision is of significance for public procurement regulation, because it obliges departments to consider as a first option provisioning from the Department of Correctional Services before going out to market to procure goods.

3.4.12 General legislation

Apart from legislation that deals specifically with procurement, there are a large number of statutes containing regulation of a more general nature, but which also impacts on public procurement activities. A few of these merit attention as of particular relevance for public procurement law.

¹³⁹ SITA Regulations 17.4.

¹⁴⁰ Housing Act section 3(2)(cA).

¹⁴¹ Disaster Management Act section 27(2)(l).

¹⁴² Disaster Management Act sections 41(2)(l), 55(2)(l).

3.4.12.1 Promotion of Access to Information Act

PAIA contains the rules governing access to information held by both the state and private bodies. In respect of information held by the state PAIA grants unconditional access to any member of the public in line with section 32 of the Constitution, but also creates grounds upon which an organ of state can refuse access.

In the procurement context PAIA thus opens the door to access to all documents relating to a particular procurement, including all the bids received, scoring documents and minutes of relevant procurement committees. The access to information regime under PAIA links closely with the requirement of a transparent procurement system in section 217(1) of the Constitution. However, there are a number of grounds of refusal that are also particularly relevant in the context of procurement. These include tax records,¹⁴³ protection of the privacy of natural persons,¹⁴⁴ commercial information of third parties,¹⁴⁵ confidential information of third parties,¹⁴⁶ the economic interests and financial welfare of the Republic and the commercial activities of public bodies.¹⁴⁷

It should be noted that PAIA does not constitute the only avenue of access to procurement information. In *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works*¹⁴⁸ the Court held that an unsuccessful bidder wishing to bring an internal appeal against the award of the tender, in circumstances where such internal challenge is provided for in the applicable procurement rules, should be granted access to all the records pertaining to the particular procurement process as part of the appeal procedure. Refusing to do would result in the appeal procedure being procedurally unfair. The approach thus provides access to procurement information outside of PAIA.

3.4.12.2 Promotion of Administrative Justice Act

As noted in the discussion of section 33 of the Constitution above (see paragraph 3.3.2), PAJA is the legislation that gives effect to the administrative justice rights found in section

¹⁴³ PAIA section 35.

¹⁴⁴ PAIA section 34.

¹⁴⁵ PAIA section 36.

¹⁴⁶ PAIA section 37.

¹⁴⁷ PAIA section 42.

¹⁴⁸ 2008 (1) SA 438 (SCA).

LEGISLATIVE FRAMEWORK

33. Since procurement decisions are generally regarded as administrative action¹⁴⁹ it follows that PAJA applies to the procurement process.

PAJA thus plays an important role as one of the primary mechanisms to enforce procurement rules. The Constitutional Court explained this role of PAJA in the procurement context thus:

"The legislative framework for procurement policy under section 217 of the Constitution ... provides the context within which judicial review of state procurement decisions under PAJA review grounds must be assessed. The requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system will thus inform, enrich and give particular content to the applicable grounds of review under PAJA in a given case. The facts of each case will determine what any shortfall in the requirements of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost-inefficiency – may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA.

...

Section 217 of the Constitution, the Procurement Act and the Public Finance Management Act provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in PAJA."¹⁵⁰

¹⁴⁹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 (29 November 2013) paras 31, 45; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 21; *TEB Properties CC v MEC, Department of Health and Social Development, North West* [2012] 1 All SA 479 (SCA) para 26; *Municipal Manager: Qaukeni and Others v F V General Trading CC* 2010 (1) SA 356 (SCA) para 26; *MEC for Education, Northern Cape v Bateleur Books (Pty) Ltd* 2009 (4) SA 639 (SCA) para 7-8; *Eskom Holdings Limited and Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 6; *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) para 4; *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA) para 8; *Greys Marine Houtbay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 28; *Logbro Properties CC v Bedderson N.O. and Others* 2003 (2) SA 460 (SCA); *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) para 7; *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) para 33; *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* [1997] 2 All SA 548 (SCA) at 552 j - 553 a.

¹⁵⁰ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 (29 November 2013) paras 43, 45 (footnotes omitted).

PAJA does not, however, only provide grounds of review to facilitate judicial oversight over procurement decisions. PAJA also provides positive rules on what constitutes procedural fairness in taking administrative action¹⁵¹ and what the requirements are for providing reasons for administrative action.¹⁵² These rules will consequently supplement the more specific rules on public procurement procedures found in the various procurement-specific statutes discussed above. While these latter statutes may provide fairly detailed procedures for the adjudication and award of public contracts, there are a number of other procurement decisions for which no similar detailed procedures are set out in the procurement-specific legislation or regulations. These include decisions to restrict suppliers from future public contracts or most of the decisions taken in contract management, e.g. decisions to cancel a contract or vary the terms of the contract. Since these decisions often also amount to administrative action¹⁵³ and no specific procedures are created for taking such decisions, PAJA will be the key statutory source setting out the procedure to be followed.

However, a major issue in this regard is the continued uncertainty about when decisions taken in the context of public contract management will amount to administrative action and thus be subject to PAJA and when not. As Justice Froneman of the Constitutional Court has noted, this area of law "is a contested and controversial subject on which ... the final word has yet to be spoken" and decisions from the Supreme Court of Appeal are not consistent.¹⁵⁴

3.4.12.3 Local Government: Municipal Systems Act

The Systems Act governs operational and institutional aspects of local government in general. However, the Act also contains a number of provisions that are particularly relevant for local government procurement.¹⁵⁵

¹⁵¹ PAJA sections 3 & 4.

¹⁵² PAJA section 5.

¹⁵³ See *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA).

¹⁵⁴ *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others* 2013 (4) SA 262 (CC) para 101.

¹⁵⁵ *Sanyathi Civil Engineering & Construction (Pty) Ltd v eThekweni Municipality, Group Five Construction (Pty) Ltd v eThekweni Municipality* 2012 (1) BCLR 45 (KZP) paras 28-29.

Of particular relevance are the provisions governing the delivery of municipal services by means of private contractors. The Systems Act expressly authorises municipalities to procure the services of private parties to render municipal services.¹⁵⁶ The Act sets out specific procedures to be followed in deciding whether to procure such private services.¹⁵⁷ When the municipality has decided to procure such services from a private contractor, the Systems Act obliges the municipality to following a competitive bidding procedure that complies with the procurement rules set out in chapter 11 of the MFMA in appointing such service provider.¹⁵⁸

3.5 Overview analysis

3.5.1 Concerns regarding fragmented regulation

It is evident from the regulatory overview above that public procurement regulation is highly fragmented in South Africa. The rules pertaining to public procurement are spread out over a large number of different statutory instruments.

In some respects the division of rules between different instruments are unproblematic and even inevitable. This is especially the case where particular contexts call for specific procurement rules such as defence procurement and disaster scenarios. However, in general the fragmentation of public procurement law results in a less-than-ideal regulatory regime. Some of the problems emerging from the fragmented regulatory landscape are:

- Significant overlap and duplication between different regulatory instruments leading to uncertainty as to which instrument to follow. One example is the distinct complaint mechanisms available to aggrieved bidders at local government level under the Systems Act section 62 and regulation 49 of Municipal Supply Chain Management Regulations made under the MFMA. While the former allows for internal appeals against delegated decision-making within local government, thus including local government procurement decisions, within a period of 21 days, the latter obliges supply chain management policies to include a complaints mechanism

¹⁵⁶ Systems Act section 76(b).

¹⁵⁷ Systems Act section 78.

¹⁵⁸ Systems Act section 83(1).

that allows for objections or complaints to be lodged within 14 days. This duplication has, not surprisingly, given rise to litigation.¹⁵⁹ A second example is the current misalignment between the Preferential Procurement Regulations, 2011 and CIDB instruments governing functionality and preference points assessment in construction procurement.¹⁶⁰

- Unnecessarily complicated questions about the legal status of instruments at the lower end of the cascading regulatory structure (i.e. Constitution, legislation, regulation, NT instructions and norms, CIDB standards and codes, supply chain management policies) and consequent legal uncertainty. For example, while it is widely accepted that where regulatory instruments are issued in terms of an express legislative mandate, such as section 76 of the PFMA, such instruments are legally binding, it emerges from the jurisprudence that such legal basis is not always apparent, resulting in the relevant instrument lacking legal enforcement.¹⁶¹
- Inconsistencies in approach to similar issues, e.g. setting the thresholds for national and provincial procurement methods in NT instructions, but at local government level in regulations.
- Conflict between different sets of rules with no clear indication as to which set should prevail. The current misalignment between the Preferential Procurement Regulations, 2011 and the CIDB regime is again a good example.
- Significant variation in the scope of coverage of various instruments leading to considerable difficulties in establishing the complete regulatory regime applicable to a given case and posing challenges for uniform guidance. The prime example of this problem is the limited coverage of the PFMA and the Treasury Regulations made under it in respect of procurement on the one hand and on the other the (now) expansive coverage of the PPPFA and the Preferential Procurement Regulations, 2011.

¹⁵⁹ See *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 (4) SA 346 (T).

¹⁶⁰ See *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* [2013] ZAWCHC 3 (6 February 2013) and para 3.4.7 above.

¹⁶¹ See *Magasana Construction CC v City of Tshwane Metropolitan Municipality and Others* [2013] ZAGPPHC 196 (12 July 2013) para 43.

LEGISLATIVE FRAMEWORK

- Control by different stakeholders of different dimensions of the regulatory regime in a seemingly uncoordinated manner. In this respect questions can be asked as to the alignment of the clear preference given to price in adjudication of tenders under the Preferential Procurement Regulations, 2011 on the one hand and on the other hand the notion of set-asides for local production. Another example of this problem is the generation of standard procurement documents by different stakeholders (ostensibly pursuing different regulatory agendas), such as for example NT in respect of procurement generally under the PFMA and MFMA, the CIDB in respect of construction procurement under the CIDB Act and the Minister of Transport in respect of national land transport under the National Land Transport Act.
- Capacity development in public procurement is hampered where there are significant differences between the way public procurement is approached in different contexts or institutions.

3.5.2 OCPO legal mandate

The concerns raised above all impact on the legal mandate of the OCPO to act as central, overarching supervisor for all public procurement.

It is apparent that the fragmented nature of the regulatory approach to public procurement impedes any initiatives to consolidate public procurement within a single oversight function. Thus those regulatory instruments which assign primary responsibility for framing procurement processes or aspects of procurement processes to entities other than NT impede the full realisation of an integrated and comprehensive national strategy of procurement regulation as currently contemplated under the OCPO. Regulatory instruments that have this effect include:

- DTI's function in respect of set-asides under the Preferential Procurement Regulations, 2011;
- Provincial treasuries' oversight functions over local government procurement in terms of the MFMA;
- CIDB's function (with the Minister of Public Works) in respect of construction procurement under the CIDBA and its extensive secondary regulatory instruments;

LEGISLATIVE FRAMEWORK

- The Minister of Transport's function in respect of land transport services procurement under the National Land Transport Act;
- SITA's function (with the Minister for the Public Service and Administration) in respect of IT procurement under the SITA Act;
- Parliament's procurement under the Financial Management of Parliament Act;
- The Armaments Corporation of South Africa's function in respect of defense procurement under the Armaments Corporation of South Africa, Limited Act;
- The Minister for Cooperative Governance and Traditional Affairs' power in respect of emergency procurement under the Disaster Management Act.

Despite the fragmentation evident under above statutory instruments, the PFMA provides a fairly extensive legal basis for the OCPO's contemplated function and can as such be viewed as the main statutory instrument empowering the contemplated functions of the OCPO. The PFMA together with the MFMA provide a legal basis upon which a comprehensive oversight function can be created in the form of regulations. However, as outlined above, that basis does not cover all instances of procurement and the relationship between the PFMA and other statutory instruments in respect of procurement is not clear in all instances. As a result there are "regulatory gaps" in the legal mandate of the OCPO where the OCPO cannot unequivocally fulfil an oversight and standard-setting function, thus impeding the objectives of the OCPO initiative.



4 OVERSIGHT BODIES' FINDINGS ON PROCUREMENT-LAW COMPLIANCE

4.1 Introduction

The second phase of the Project focused on the most recent reports of the Auditor General ("AG") on the performance of organs of state in relation to public procurement. The main aim was to obtain a sense of the current level of compliance with public procurement regulation. On the basis of the current state of compliance, potential implications for the regulation of public procurement can be assessed.

Additional to the reports of the AG recent reports by other bodies, namely the Public Protector and the Department of Performance Monitoring and Evaluation, were considered to establish whether the findings of these reports corroborate the findings of the AG.

An overview of the findings of these various entities is presented here. The focus is on gauging the level of compliance with public procurement regulation in South Africa at present.

4.2 Auditor General

4.2.1 National and provincial audits

The AG's 2012-2013 consolidated general report on the national and provincial audit outcomes¹⁶² reveals non-compliance with public procurement regulation as a major source of concern in public finance management. Supply chain management is accordingly listed as one of the "six areas [that] should receive attention" across the system.¹⁶³

The AG reported on non-compliance with legislation at 75% of entities audited, including particularly high non-compliance rates at national departments (93%) and provincial departments (83%). Of the three areas where the AG most commonly found non-compliance with legislation, public procurement featured in two, namely "supply chain management as well as the prevention and follow-up of unauthorised, irregular as well as

¹⁶² AG Consolidated General Report on the National and Provincial Audit Outcomes 2012-2013 (2013) ("AG Consolidated General Report National and Provincial").

¹⁶³ AG Consolidated General Report National and Provincial 18.

fruitless and wasteful expenditure",¹⁶⁴ the latter being a result of expenditure outside the prescripts of applicable legislation, which typically include procurement legislation. The AG thus reported that non-compliance with procurement regulation was the "main contributor to irregular expenditure".¹⁶⁵

These latest audit findings show no change in the overall non-compliance with procurement prescripts, although the AG report notes that there were fewer material findings in the latest audits (3% less), indicating some attention being given to compliance with supply chain management regulation.¹⁶⁶ A particular concern noted in the latest audit report is that 11% of entities audited could not provide procurement documents as evidence of compliance with procurement regulation for audit purposes, representing contracts to the value of R3 billion.¹⁶⁷ At 35% of these entities the AG experienced similar problems in previous audits.¹⁶⁸

Another area of concern noted by the AG in the latest audit report is the material levels of procurement contracts awarded to suppliers in which state employees or their close family members had an interest.¹⁶⁹ As the AG correctly notes, this is not unlawful, but it does raise concerns regarding conflicts of interests, which must be carefully managed.¹⁷⁰ The AG found progress on declarations of interest lacking in a material number of these instances. These findings of the AG support increased regulatory attention on the state contracting with employees and/or their family members currently underway.¹⁷¹

The AG notes that the three most common instances of non-compliance with procurement regulations were:

- (i) Three written quotations were not invited and the deviation was not approved, or the approved deviation was not reasonable or justified;

¹⁶⁴ AG Consolidated General Report National and Provincial 23.

¹⁶⁵ AG Consolidated General Report National and Provincial 36.

¹⁶⁶ AG Consolidated General Report National and Provincial 23, 41.

¹⁶⁷ AG Consolidated General Report National and Provincial 23, 41.

¹⁶⁸ AG Consolidated General Report National and Provincial 41.

¹⁶⁹ AG Consolidated General Report National and Provincial 23.

¹⁷⁰ AG Consolidated General Report National and Provincial 23, 41.

¹⁷¹ See Public Administration Management Bill B55 of 2013 section 8 and draft Treasury Regulations GN 1005 in GG 35939 of 30 November 2012, regulation 20.11.

- (ii) procurement from suppliers who did not have a tax clearance certificate; and
- (iii) no financial interest declaration was submitted by suppliers or, where submitted, such financial interest declarations were false.¹⁷²

In addition, the AG found two common issues in contract management:

- (i) No or inadequate contract performance measures and monitoring; and
- (ii) contracts amended or extended without proper approval.¹⁷³

In light of the findings above, the AG found that institutions generally lacked mechanisms to engage meaningfully with public procurement regulation in a manner that will enable the relevant entity to align its procurement functions with the applicable regulatory prescripts.¹⁷⁴ This is an important finding since it suggests that failures to comply with public procurement regulation may be attributable to a lack of structures and/or capacity to bring the applicable regulatory framework to bear on the procurement actions of entities, rather than to the content of the regulatory framework itself. As a result, ongoing compliance monitoring as well as capacity development should be a high priority in responding to these audit findings. That this is a task for NT to take up is also supported in the AG's report where it states that it found NT's support to institutions lacking in respect of improving audit outcomes significantly in the areas of procurement and contract management.¹⁷⁵

A final point in the AG's report relates to the appointment of consultants. On this topic the AG also issued a dedicated performance audit report in 2013.

4.2.2 Procuring consultancy services

In its general audit report the AG noted general deficiencies in the procurement of consultancy services and a need for "decisive corrective actions".¹⁷⁶ These findings were echoed in the earlier performance audit report on the use of consultants in selected national departments, which found that weaknesses found "are caused largely by the lack of

¹⁷² AG Consolidated General Report National and Provincial 41.

¹⁷³ AG Consolidated General Report National and Provincial 41.

¹⁷⁴ AG Consolidated General Report National and Provincial 55.

¹⁷⁵ AG Consolidated General Report National and Provincial 63.

¹⁷⁶ AG Consolidated General Report National and Provincial 42.

rigorous review processes to ensure that existing laws, regulations and policies are followed".¹⁷⁷ These findings were subsequently echoed in a host of performance audit reports on the use of consultants in provincial departments.

In particular the AG found that typically demand/needs assessment was not properly done to inform the sourcing of consultancy services; that a competitive process was not followed; that consultants did not meet the qualifying criteria; that contract prices exceeded quoted prices without justification; that consultant performance was not adequately monitored during the course of the contract and reviewed after conclusion to ensure compliance with contract outcomes.¹⁷⁸ The AG noted that these practices violated a number of public procurement regulations pertaining to the procurement of consultancy services.¹⁷⁹ It consequently recommended that NT should "monitor compliance with relevant legislation, regulations and policies and enforce appropriate action where departments deviate".¹⁸⁰

From these findings it is apparent that the current regulatory regime applicable to the procurement of consultancy services at national and provincial levels, contained almost exclusively in NT guidance instruments, is inadequate in controlling this particular type of procurement. The AG's findings and recommendations emphasise the need for more focused regulation of especially the demand management and contract management dimensions of consultancy services procurement.

4.2.3 Local government audits

The most recent audit report for local government is for 2011-2012.¹⁸¹ The AG's findings in respect of procurement in these audits largely reflect the findings at national and provincial levels set out above, although the level of non-compliance with procurement regulation seems to be even higher at local government level. As with national and provincial government, the AG identified supply chain management as one of the six key areas that

¹⁷⁷ AG Report of the Auditor General of South Africa on a Performance Audit on the Use of Consultants at Selected National Departments (2013) 7 ("AG Report on the Use of Consultants").

¹⁷⁸ AG Report on the Use of Consultants 13, 20-21, 25-29, 32-33.

¹⁷⁹ The AG's list of violations is reproduced in Annexure A.

¹⁸⁰ AG Report on the Use of Consultants 40.

¹⁸¹ AG Consolidated General Report on the Audit Outcomes of Local Government 2011-12 (2013) ("AG Consolidated General Report Local Government").

require particular attention.¹⁸² The AG concluded that entities audited "have not made progress in any of the SCM areas audited".¹⁸³

Of particular concern is the noted regression in respect of compliance with procurement prescripts found in the latest audits. In the 2010-2011 audits the AG found 77% of local government entities not complying with procurement rules, whereas in the 2011-2012 audits that figure rose to 84%.¹⁸⁴ The most commonly found instances of non-compliance with procurement rules at local government during the 2011-2012 audits were that three written quotations were not invited with no deviation approved, or where approved, the deviation was not reasonable or justified (findings at 52% of entities audited); no declaration of interest submitted by providers (42%); competitive bids were not invited and no deviation approved (33%); procurement from suppliers without tax clearance (28%); the preference point system required in terms of the Preferential Procurement Policy Framework Act 5 of 2000 was not applied (26%).¹⁸⁵

As at national and provincial levels, at local government level non-compliance with procurement legislation was also the major source of irregular expenditure in 2011-2012.¹⁸⁶ During that period irregular expenditure rose to R9.82 billion, an increase of 41% from the previous year.¹⁸⁷ The number of local government entities (94/30%) that could not provide the AG with documents to show compliance with procurement rules was even higher than that reported at national and provincial levels.¹⁸⁸ The AG thus noted that the weakness in respect of procurement non-compliance at local government level is probably higher than what the findings suggest given that such a material proportion of local government procurement could not be audited for compliance.¹⁸⁹

Awarding contracts to suppliers owned or managed by state employees and/or counsellors is also a material concern at local government level.¹⁹⁰ Unlike the position at national and

¹⁸² AG Consolidated General Report Local Government 14.

¹⁸³ AG Consolidated General Report Local Government 64.

¹⁸⁴ AG Consolidated General Report Local Government 62.

¹⁸⁵ AG Consolidated General Report Local Government 72.

¹⁸⁶ AG Consolidated General Report Local Government 16.

¹⁸⁷ AG Consolidated General Report Local Government 21.

¹⁸⁸ AG Consolidated General Report Local Government 64.

¹⁸⁹ AG Consolidated General Report Local Government 66.

¹⁹⁰ AG Consolidated General Report Local Government 16.

provincial levels, such awards are prohibited by the Municipal Supply Chain Management Regulations ("MSCM Regulations").¹⁹¹ Nevertheless, the AG found material non-compliance with this prohibition in 5421 instances, including 615 awards by 60 entities audited to employees or counsellors of the contracting authority, 36 of which were also identified for such non-compliance in the 2010-2011 audits.¹⁹² In the vast majority of these cases the particular individual did not declare the interest.¹⁹³ The AG thus found this type of non-compliance to be "one of the most widespread findings relating to procurement processes and the most common control weakness".¹⁹⁴ The 2011-2012 audits also reveal an upward trend in this form of non-compliance.¹⁹⁵

This finding is noteworthy when compared to the position at national and provincial levels, which reveals a very similar picture. The significance lies in the fact that in one instance, local government, procurement rules outlaw such awards whereas in the other instance, national and provincial levels, there is no such prohibition. The similarity in audit findings thus suggests that the existence of a prohibition in procurement regulations does not have the desired effect and that other (additional) measures must be implemented to avoid state contracts with state employees or office bearers. Put differently, a regulatory prohibition, without more, seems ineffective.

4.2.4 Focused audits

In addition to the general audits of national, provincial and local government entities, the AG has also in recent years concluded specific, focused audits of particular transactions at public entities, including procurement transactions. The findings in these audits also contain important lessons on public procurement regulation.

¹⁹¹ GN 868 in GG 27636 of 30 May 2005, regulation 44.

¹⁹² AG *Consolidated General Report Local Government* 67.

¹⁹³ AG *Consolidated General Report Local Government* 67.

¹⁹⁴ AG *Consolidated General Report Local Government* 68.

¹⁹⁵ See AG *Consolidated General Report on the Audit Outcomes of Local Government 2010-11 (2012)* 64.

4.2.4.1 Transversal term contracts

In its audit report into the procurement of an enterprise content management system by CIPRO,¹⁹⁶ the AG made some noteworthy findings in respect of transversal term contracts. In this instance CIPRO procured services from a supplier appointed to render IT services to the public administration under a transversal framing term contract placed by SITA. The AG found that the financial standing of the bidder eventually appointed by CIPRO was never assessed. The reason for this failure was that CIPRO thought that SITA would have assessed the financial standing of all successful bidders under the transversal contract. SITA on the other hand held the view that financial standing should be assessed by individual client departments when they award actual contracts to contractors under the transversal term contract following a closed bidding process.

It is thus evident that an error crept in here because the respective roles of the public entities utilising a transversal term contract approach were not clearly set out. The AG accordingly recommended that "[r]egulations should be improved to clearly state the responsibilities of SITA and that of its client with regard to a transversal framing term contract and the evaluation of the financial sustainability of suppliers".¹⁹⁷

This finding highlights an important *lacuna* in the public procurement regulatory regime. There are very few rules governing transversal term contracts in the current regime. As this finding illustrates, the lack of clear rules can have detrimental implications for individual procurement processes.

4.2.4.2 Contract extensions/variations

While the AG has noted, in passing, concern regarding contract variations and/or extensions in its general audit reports,¹⁹⁸ this issue was squarely dealt with in a number of focused audits. These include the audits of procurement by the Gauteng Provincial Department of

¹⁹⁶ AG Report of the Auditor-General on an investigation into the procurement of the enterprise content management system at the Companies and Intellectual Property Registration Office in South Africa (2010) ("AG CIPRO Report").

¹⁹⁷ AG CIPRO Report 4.

¹⁹⁸ See e.g. AG Consolidated General Report on National and Provincial Audit Outcomes of 2011-12 (2012) 90.

Roads and Transport;¹⁹⁹ of consultancy services by selected national departments;²⁰⁰ of certain procurements by the Department of Water Affairs.²⁰¹

In its audit of the Gauteng roads and transport procurement, the AG noted that the applicable supply chain management policy had no provisions dealing with extensions and/or variations of contracts. The AG consequently found purported extensions and variations of contracts to be irregular. It is of interest to note the AG's reasoning in this regard, namely that a competitive bidding process had to be followed in respect of the extended/varied contracts. This process could only be deviated from in terms of the SCM policy in the established scenarios of "emergency, where there is a sole provider or in exceptional circumstances where it is impractical/impossible to follow the procurement processes".²⁰² Since none of these circumstances were present in the given cases, the extended/varied contracts were irregularly concluded.

In its audits of the use of consultants at both national and provincial levels, the AG noted grave concern about the significant extensions of contracts instead of inviting new bids. At national level the AG found that at the eight departments audited during the period 2008-09 to 2010-11 a total of 42 contracts were extended by over R1093 billion representing an average 64% increase in contract values.²⁰³

Its audit of specific procurements by the DWA in 2010 revealed extensions of contracts by 49 months leading to an increase of the contract value by 587%.²⁰⁴ The SCM policy of the DWA allowed extensions of up to one year and to a value of no greater than 50% of the original contract value "without sound reason". None of these prescripts were adhered to in the present instance.

These findings suggest that the current, scant, rules on contract extensions/variations are not optimally achieving the purpose of limiting such extensions/variations.

¹⁹⁹ AG Report of the Auditor-General of South Africa on an investigation into the procurement of various contracts at the Gauteng Provincial Department of Roads and Transport (2011) 8, 62, 66, 69-71 ("AG Gauteng Roads Procurement Report").

²⁰⁰ AG Report on the Use of Consultants 34-35.

²⁰¹ AG Report of the Auditor-General of South Africa on an investigation into certain alleged procurement irregularities at the Department of Water Affairs (2010) ("AG DWA Report").

²⁰² AG Gauteng Roads Procurement Report 69-70.

²⁰³ AG Report on the Use of Consultants 20, 35.

²⁰⁴ AG DWA Report 3.

4.2.4.3 Record-keeping

An issue already raised in the general audit reports at national and provincial as well as local government levels is the lack of record keeping resulting in the AG being unable to confirm compliance with applicable procurement regulations. As noted above, 11% of national and provincial entities audited during 2012-2013 and 30% of local government entities audited during 2011-2012 could not provide procurement documents as evidence of compliance with procurement regulation for audit purposes.²⁰⁵

In its audit of Gauteng roads and transport procurement, the AG likewise noted a failure to produce documents evidencing compliance with procurement regulations. Of particular interest is the AG's view in its audit report in this instance that the non-existence of a "centralised filing system to maintain all documentation relating to SCM policies and processes" was in contravention of the transparency requirement in section 217(1) of the Constitution of the Republic of South Africa, 1996.²⁰⁶

4.3 Public Protector

In recent years the Public Protector ("PP") has investigated and reported on a number of procurement transactions. These reports must, however, be treated with caution in a study like the present. Given the nature of the PP's functions, these investigations and reports focus closely on individual instances of procurement and are highly fact-bound. They thus do not present a comprehensive view of procurement activity and accordingly do not generally reveal trends in respect of procurement regulation. Nevertheless, there are some interesting findings in these reports that merit attention in the current context.

One of the trends identified in the AG's reports discussed above that is confirmed in the PP's investigations is the problem with proper record-keeping. As outlined above, the AG has repeatedly noted concern about poor record-keeping in respect of procurement functions and expressed the view that such failure amounts to a violation of the transparency requirement in section 217(1) of the Constitution.

²⁰⁵ AG Consolidated General Report National and Provincial 23, 41; AG Consolidated General Report Local Government 64.

²⁰⁶ AG Gauteng Roads Procurement Report 10.

The PP has noted in a number of reports on procurement transactions that the relevant investigation was hampered or that no conclusions could be reached on particular questions because of the absence of records. This is most evident in the PP's report on complaints relating to improper awarding of local government tenders in Limpopo and North West in 2010.²⁰⁷ In this report the PP noted that compliance with public procurement regulations could not be established in respect of a number of tender investigated because of poor record-keeping and that this in itself was a violation of procurement prescripts.²⁰⁸ The PP also noted that this finding confirmed the AG's audit findings regarding failures to maintain proper procurement records.²⁰⁹

In two reports the PP raised the difficulty of the legal status of public procurement prescripts issued by NT. In her reports on allegations of impropriety and corrupt practices relating to the awarding of contracts for goods and services by the Limpopo Department of Roads and Transport²¹⁰ and on procurement of communication services by the Western Cape Department of the Premier,²¹¹ the PP grappled with the question whether particular instructions issued by NT could be considered legally binding. In the latter report the PP noted legal opinion obtained from senior counsel, which expressed the view that NT instructions in the form of practice notes, even though issued in terms of section 76 of the Public Finance Management Act 1 of 1999 ("PFMA"), was not binding on provincial governments.²¹² The PP disagreed with this view, correctly holding that instructions issued expressly in terms of the power granted to NT in section 76 of the PFMA are binding on provincial governments. In the same report the PP noted another legal opinion from senior counsel holding the view that NT's *Supply Chain Management Guide for Accounting Officers* of 2004 was not legally binding and non-compliance with the prescripts found in that document thus did not amount to unlawful conduct.²¹³

²⁰⁷ PP *Report on an Investigation into Complaints Relating to the Improper Awarding of Tenders by Municipalities in the Limpopo and North West Provinces* (2010) ("PP *Limpopo and North West Municipalities Report*").

²⁰⁸ PP *Limpopo and North West Municipalities Report* 80-81.

²⁰⁹ PP *Limpopo and North West Municipalities Report* 69.

²¹⁰ PP *Report No 10 of 2012/13* (2012) 127-128.

²¹¹ PP *Report 1 of 2012/13* (2012).

²¹² PP *Report 1 of 2012/13* 89.

²¹³ PP *Report 1 of 2012/13* 91.

These findings are noteworthy in that they highlight the risk of reliance on secondary legislative instruments, that is to say instruments other than legislation and regulations, in regulating procurement conduct.

4.4 Management Performance Assessment Tool

The results reported in the two rounds of Management Performance Assessment Tool ("MPAT") assessments administered by the Department of Performance Monitoring and Evaluation ("DPME") in 2012 and 2013 respectively contain useful information on public procurement regulation compliance.²¹⁴

The first round of MPAT assessments involved 30 national departments and 73 provincial departments and reported only on the self-assessment conducted by these departments in respect of a range of management standards on four key performance areas. The key performance area of financial management focused only on supply chain management.

The 2012 report found that "the level of compliance with supply chain management requirements is not positive and this applies to all areas of supply chain management".²¹⁵ 48% of departments assessed themselves as less than fully compliant with SCM practices.²¹⁶ For acquisition management in particular, which captures compliance with public procurement rules, only 46% of departments rated themselves as compliant.

All national and provincial departments participated in the 2012/2013 MPAT assessments. Unlike the first round, the 2013 report of this second round of assessments reported on the externally moderated results of departments' self-assessments.

The 2013 report shows that 48% of departments complied with regulatory requirements in respect of demand management; 55% in respect of acquisition management; 56% in respect of logistics management and 58% in respect of disposal management.²¹⁷ The report notes

²¹⁴ DPME *MPAT Report on results of assessment process for 2011/2012* (2012) ("DPME MPAT 2012 Report"); DPME *MPAT Report on results of assessment process for 2012/2013* (2013) ("DPME MPAT 2013 Report").

²¹⁵ DPME *MPAT 2012 Report* 24.

²¹⁶ DPME *MPAT 2012 Report* 18.

²¹⁷ DPME *MPAT 2013 Report* 39-41.

that overall performance on the financial management key performance area remains "unsatisfactory".²¹⁸

These results thus support the AG's findings on large-scale non-compliance with public procurement prescripts.

4.5 Conclusion

The findings of the various oversight bodies set out in this report clearly indicate that levels of compliance with public procurement regulations are fairly low. However, for the most part the reports do not indicate with any precision the reasons for such non-compliance. In particular, there is very little evidence suggesting that the reasons for widespread non-compliance can be attributed to the actual public procurement rules as opposed to failures to properly implement the rules.

A number of particular regulatory concerns do emerge from the findings. The first is the lack of proper records. The serious concerns raised in this regard may point to a substantive regulatory problem rather than merely a failure of implementation. The evidence suggests that stricter rules on record-keeping within public procurement regulation may be necessary.

A second issue relates to the awarding of contracts to state employees or their close family members. While there are currently a number of regulatory initiatives aimed at addressing this issue, the correlation between findings in this regard at national/provincial and local government levels in light of the differences in the relevant rules between these levels is noteworthy.

Thirdly, in a number of areas the evidence suggests that the existing rules are either not clear enough or require strengthening. These include rules pertaining to consultancy services procurement, transversal term contracts and contract extensions and variations.

Finally, the reports scrutinised indicate that many public entities lack capacity to meaningfully integrate public procurement regulation into their procurement functions.

²¹⁸ DPME MPAT 2013 Report 45.

OVERSIGHT BODIES' FINDINGS ON PROCUREMENT-LAW COMPLIANCE

That is to say, there is a lack of capacity to bring the regulatory prescripts to bear on procurement activities. These findings hold important implications for the role of a central body to provide guidance to procurement units, but also potentially for the type of regulatory system that is feasible within such a context.



5 PUBLIC PROCUREMENT AND SERVICE DELIVERY CHALLENGES

5.1 Introduction

This part assesses perceived challenges in service delivery that can be linked to public procurement and in particular the regulatory regime applicable to public procurement. A key question is whether there is any evidence to suggest that the existing public procurement regulatory regime can be said to support or hamper service delivery.

No new empirical work was undertaken in compiling this part. The discussion relies exclusively on existing data on service delivery challenges and public procurement practices. While there is no shortage of materials on service delivery in South Africa, including the challenges experienced in this regard, there is very little evidence that directly and positively links these challenges with public procurement in general and even less in relation to public procurement regulation in particular.

This part starts by introducing the link between service delivery and public procurement regulation in general terms. Consequently a number of case studies are presented in which linkages between particular public procurement rules and specific areas of service delivery have emerged. Based on these case studies a number of distinct areas of public procurement rules are considered against their perceived role in service delivery challenges.

5.2 Linking public procurement regulation and service delivery

As set out in the legislative framework presented in chapter 3 above, there is a necessary connection between public procurement regulation and government's general service delivery obligations under the Constitution. Since the rendering of public services relies heavily on public procurement, the constitutional provisions dealing with service delivery are of relevance in the public procurement context. In one sense these provisions calling on the state to take measures to render services²¹⁹ give an added urgency to effective public procurement. The Constitutional Court expressed this general link when it stated in *Allpay*

²¹⁹ E.g. in sections 26, 27 and 29 of the Constitution.

*Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others.*²²⁰

"It is because procurement so palpably implicates socio-economic rights that the public has an interest in its being conducted in a fair, equitable, transparent, competitive and cost-effective manner."

It thus seems axiomatic that efforts at enhancing the quality of public procurement practices, including those efforts focusing on the public procurement regulatory regime, can be viewed as aligned to an agenda of enhanced service delivery and *vice versa*.

In a general sense this seems to be an irrefutable point. It seems clear that public procurement rules which minimise waste, both in time and money, facilitate better service delivery. It is also arguable that enhancing competition in public procurement will result in cheaper service delivery since better prices will be achieved. If, on the other hand, public procurement rules fail to generate cost-effective procurement, it likewise follows that service delivery will suffer. The fairly widespread non-compliance with public procurement regulation that emerged from the reports of the oversight bodies set out in chapter 4 above thus suggest that service delivery challenges experienced in South Africa may, amongst other reasons, also be attributed to procurement failures.

These generalised linkages between public procurement regulation and service delivery are supported by experience elsewhere. For example, in Ghana the World Bank's 2003 Country Procurement Assessment Report noted:

"Ghana's Poverty Reduction Strategy (GPRP) recognizes the inadequacy of procurement procedures. Estimates of potential savings from improved procurement vary and have not yet been analyzed precisely in quantitative terms, but many among those who are directly involved, including the outcomes of the 'Value for Money Assessment Project', believe that at least 25 % in cost savings could be achieved by better procurement management. If based on the estimated government financed procurement for 2003 alone, this could imply annual savings of

²²⁰ [2013] ZACC 42 (29 November 2013) para 4.

some 1.5 trillion Cedis (or close to US\$150 million). *Such savings from improved procurement practices could help Ghana reduce current fiscal imbalances and increase expenditures required to accelerate poverty reduction.*"²²¹

Apart from these highly generalised linkages between public procurement regulation and service delivery there are a limited number of regulatory provisions expressly linking public procurement and service delivery. The prime example is found in provisions dealing with service delivery contracting at local government level. The Systems Act provides in its chapter 8 for service delivery by means of "external mechanisms", which may include service delivery agreements with private entities.²²² The Systems Act continues to prescribe a number of rules for such service delivery agreements, including the requirement that such agreements be concluded following a competitive bidding process.²²³

5.3 Case studies

In the absence of any comprehensive empirical studies on the linkages between public procurement regulation and service delivery challenges, such linkages are best assessed in terms of a number of case studies emerging from jurisprudence and regulatory processes which involved both areas.

In the following paragraphs a number such case studies are presented, organised around broad service delivery areas. The aim of the analysis, apart from illustrating the linkages between public procurement rules and service delivery challenges, is to identify those public procurement rules that are implicated in service delivery challenges.

²²¹ World Bank *Ghana Country Procurement Assessment Report Volume 1* (2003) 4 (emphasis in original).

²²² Systems Act section 76(b).

²²³ Systems Act section 83.

5.3.1 Social grants

There have been a number of cases dealing with procurement challenges in the context of social grants.²²⁴ In most of these cases the challenge related to the award of tenders for the rendering of grant payment services.

The most notable case in this context is Allpay Consolidated Investment Holdings' challenge to the awarding of a payment services contract in relation to all nine provinces to Cash Paymaster Services by the South African Social Security Agency ("SASSA"), which was heard and decided by the Constitutional Court towards the end of 2013.²²⁵ What is particularly noteworthy of the various judgments in this matter is the courts' sensitivity to the potential service delivery impact of any decision setting the award of the tender aside. The Supreme Court of Appeal thus declared:

"We need no evidence to know the immense disruption that would be caused, with dire consequences to millions of the elderly, children and the poor, if this contract were to be summarily set aside."²²⁶

While the Constitutional Court reached a different conclusion on the merits of the challenge than the Supreme Court of Appeal, the higher court shared the appeal court's concerns regarding the potential impact of setting the award of the tender aside. The Constitutional Court accordingly declined to rule on an appropriate remedy holding such ruling over until further submissions have been made by the parties, without a doubt to include submissions

²²⁴ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 (29 November 2013); *AllPay Consolidated Investment Holdings & others v The Chief Executive Officer of the South African Social Security Agency & others* [2013] ZASCA 29 (27 March 2013); *Chief Executive Officer, SA Social Security Agency NO & others v Cash Paymaster Services (Pty) Ltd* 2012 (1) SA 216 (SCA); *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC); *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others* 1999 (1) SA 324 (CKH).

²²⁵ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 (29 November 2013).

²²⁶ *AllPay Consolidated Investment Holdings & others v The Chief Executive Officer of the South African Social Security Agency & others* [2013] ZASCA 29 (27 March 2013) para 99.

on the impact of any order interfering with the current contract.²²⁷ Also significant in this regard is the fact that when the Constitutional Court rendered its judgment on the merits of the challenge in November 2013, finding the award of the tender constitutionally invalid, the contract had been in place for 20 months and the Court noted that "SASSA and Cash Paymaster assert that it is running smoothly and efficiently".²²⁸

Another case of interest in the social grants context is that of *The Chief Executive Officer of the South African Social Security Agency N.O. v Cash Paymaster Services (Pty) Ltd*.²²⁹ In this matter SASSA published a request for proposals for the provision of grant payment services in one or more of the provinces. Cash Paymaster Services, a supplier that had provided such services in various provinces to SASSA and its provincial predecessors on public tender in the past, again submitted a tender in respect of all nine provinces. However, SASSA eventually cancelled the call for tenders, citing irregularities in the process as reason. In the meanwhile SASSA entered into an agreement with the South African Post Office Ltd ("the Post Office") in terms of which the Post Office would inter alia render grant payment services to SASSA. This agreement was entered into without any tender process being followed, i.e. following direct and private negotiations between SASSA and the Post Office. Cash Paymaster Services subsequently challenged SASSA's decision to enter into this agreement with the Post Office on the basis that it did not comply with section 217 of the Constitution, in particular by failing to follow a competitive process in awarding the contract. SASSA and the Post Office argued that section 217 did not apply to the present case, because they are both organs of state. In support of this argument they pointed to provisions in the Constitution calling on "all spheres of government and all organs of state within each sphere [to] ... co-operate with one another in mutual trust and good faith by ... assisting and supporting one another and ... co-ordinating their actions ... with one another"²³⁰ and that "public administration must be governed by the democratic values and principles enshrined in the Constitution including

²²⁷ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 (29 November 2013) para 96. At the time of writing the Court is in the process of considering these further submissions and the further judgment on a remedy is awaited.

²²⁸ Para 96.

²²⁹ 2012 (1) SA 216 (SCA).

²³⁰ Section 41(1)(h).

... efficient, economic and effective use of resources".²³¹ They further argued that despite the fact that SASSA and the Post Office are separate juristic persons, no organ of state is separate from the state and that all organs of state act as a unit. The argument thus followed that when different organs of state contract with one another, it is only the state dealing with itself. The gist of the argument was that in effect the state was supplying itself in the present instance, i.e. it was fulfilling its needs internally, in line with the quoted constitutional provisions and that section 217 as a result did not apply. The High Court rejected these arguments and held that SASSA was bound by section 217 of the Constitution when it concluded the agreement with the Post Office. Since that agreement was concluded behind closed doors without any competitive process or considering any alternative proposals by other suppliers, it fell afoul of both the peremptory transparency and competitive requirements of section 217. As a result the High Court set aside SASSA's decision to enter into an agreement with the Post Office. On appeal the SCA held that the question of whether inter-organ of state contracting is subject to section 217 of the Constitution is "beside the point".²³² The real question, according to the court, was whether SASSA was entitled to deviate from open tendering procedures in the instant case based on the relevant provisions of the Treasury Regulations²³³ under the PFMA. In the court's words: "The first inquiry ought to be to determine the meaning of the consequent legislation."²³⁴ On this approach the court held that it simply had to determine whether SASSA met the requirements for deviation set in regulation 16A6.4,²³⁵ which the court eventually found SASSA did. The court accordingly rejected Cash Paymaster Services' challenge.

This case is significant for its focus on the interaction between rules governing inter-governmental relations, premised on the principles set out in chapter 3 of the Constitution, and public procurement rules in the context of service delivery. As the case illustrates, there

²³¹ Section 195(1).

²³² Para 16.

²³³ Notice R225 of 2005 in GG 27388 of 15 March 2005.

²³⁴ Para 16.

²³⁵ This regulations reads: 'If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority'.

is much scope for cooperation between organs of state in effecting service delivery. However, as the case further illustrates, it may be that some such instances arguably amount to procurement in which case public procurement rules apply, most notably rules governing competition between suppliers (whether private or public). While the SCA's ruling in this case is disappointing in not providing greater clarity on the application of public procurement rules to transactions between organs of state, the approach adopted by the court, deciding the matter on the basis of a justified deviation from open tendering *in terms of* procurement rules, suggest that public procurement rules apply to instances such as the present.

5.3.2 Education

A second service delivery context in which public procurement challenges have surfaced is that of education.

The most high profile instance of such challenges is certainly the problems with provision of school books in the Limpopo province in 2012, which *inter alia* resulted in the court application by the NGO, Section27, and others against the Minister of Basic Education to force the latter to provide textbooks to schools.²³⁶ This case illustrates the linkages between a failure to realise the right to education and what was described in court papers as "an unscrupulous tender award" resulting in textbooks not being delivered to schools by the middle of the school year.

Two subsequent investigations into this matter made a number of findings and recommendations on public procurement as it relates to education. In her report on the verification of text book deliveries in Limpopo, Metcalfe found that one of the reasons for the non-delivery of textbooks was due to a legal dispute with a contracted service provider.²³⁷ She also made a number of recommendations in respect of public procurement in the present context, including:

²³⁶ *Section 27 and Others v Minister of Education and Another* 2013 (2) SA 40 (GNP).

²³⁷ M. Metcalfe *Report: Verification of Text Books Deliveries in Limpopo* (2012) 14.

"• All officials, including service providers, should undergo extensive training to understand the procurement process and the importance of their roles in preserving the integrity of the distribution value chain.

- The entire procurement of LTSM [Learner, Teacher Support Material] including requisitioning, ordering and delivery in accordance with national mandates, need to be documented and approved by the Department for effective monitoring and evaluation of LSM distribution.

- Terms of engagement and signed contracts should be available to the project managers to track, monitor and evaluate the performance of service providers.

- Any changes to the procurement process should be timeously and effectively communicated to schools to ensure appropriate mediation of unexpected outcomes."²³⁸

The Report of the Presidential Task Team appointed to investigate this instance also contains various findings and recommendations on procurement.²³⁹ These included the following:

- "The Limpopo Department of Education (LDoE) abolished its book unit and did not put in place a risk management plan, to mitigate any challenges that could arise from the decision to outsource the procurement and distribution of LTSM.
- The LDoE did not place the LTSM orders timeously and did not manage the contract with the service provider, EduSolutions efficiently.
- The department negligently handed over the responsibility to manage and maintain the database for the procurement of materials to the service provider.
- The LDoE prioritised the procurement of stationery instead of textbooks.

...

²³⁸ M. Metcalfe *Report: Verification of Text Books Deliveries in Limpopo* (2012) 41-42.

²³⁹ *Report of the Presidential Task Team established to investigate the non-delivery and/or delays in the delivery of Learner, Teacher Support Material (LTSM) in Limpopo schools* (2012).

PUBLIC PROCUREMENT AND SERVICE DELIVERY CHALLENGES

- The financial and legal dispute with the service provider by the two departments resulted in inaction.
- Despite adequate funding being available, other factors impacted on the timely procurement of LTSM, which include amongst others: ...
 - ii. A general tendency to disregard and transgress legislation.
 - iii. A weakness of the Provincial Treasury in responding to financial management issues such as cash-flow requirements, supply chain management and financial oversight.
 - ...
 - v. Management incompetence, lack of skills and lack of capacity both in the Provincial Treasury and LDoE.
 - vi. General lack of monitoring and evaluation of compliance in the Provincial Treasury regarding prudent cash management and monitoring of supply chain practices of departments.
 - vii. A lack of data, threat of legal action from the service provider and unclear mandates of who should do the procurement.
- The DBE left things too late while addressing issues that would not facilitate the speedy placing of orders and misrepresented facts on a non-existent court order barring them from ordering books from alternative suppliers."

The Task Team thus recommended *inter alia* that

"The Department of Basic Education must develop a policy for the standardisation of the procurement and distribution of Learner Teacher Support Material. The proposed policy must include mechanisms to strengthen contract and risk management, as well as an operation plan for the procurement and delivery of LTSM."

The concerns regarding procurement and education emanating from the Limpopo case are echoed in a number of other instances. In her report on similar school material shortages in the Eastern Cape, the Public Protector quotes a provincial circular declaring that "the process for procurement of textbooks have always been beset with challenges which has infringed on the learners' constitutional right to basic education".²⁴⁰ A study conducted by

²⁴⁰ Public Protector Report No 19 of 2013/14 (2013) 26.

Transparency International also found that textbook procurement at public schools poses real risks, linking procurement failures in this regard to a failure in educational services.²⁴¹ There are also a number of further noteworthy judgments dealing with procurement disputes in the context of education.

In *MEC for Education, Northern Cape Province v Bateleur Books (Pty) Ltd*,²⁴² for example, the SCA invalidated a decision by the MEC to change the process of procuring text books from a decentralised one to a centralised approach, because of a failure on the part of the MEC to properly engage with affected suppliers when taking the decision.

In this case the department of education in the Northern Cape followed a decentralised procurement approach for the acquisition of books in terms of which public schools ordered the materials they needed from bookshops using departmentally sanctioned catalogues produced by private publishers. In 2006, however, the department decided to centralise the procurement of materials. For 2007 the department itself would order materials directly from publishers. The main aim of this change was to save costs by buying in bulk and negotiating discounts. As a group the publishers stood to lose from this change, since fewer publishers would do business with the department, at lower prices. The publishers accordingly approached the court to review the department's decision to alter the procurement process. A majority of judges in the SCA held that the publishers had a legitimate expectation that the decentralised procurement approach would continue. As a result, the department was under a duty in terms of section 3 of PAJA to follow a fair procedure in altering its approach, which at least required it to inform the publishers in good time of the intended change of approach. Since the department did not inform the publishers of the change at all, the decision to alter the procurement approach had to be set aside on procedural fairness grounds. The court emphasised that while the department's objectives to achieve efficiency and cost-savings in their procurement were laudable, it could not do so in a procedurally unfair manner. The court expressly pointed out that its finding did not mean that the department cannot change their procurement approach to a

²⁴¹ A. Leach *School book procurement in SA needs stronger controls*. (2011) <http://aperi.org/2011/08/04/school-book-procurement-in-sa-needs-stronger-controls/> (downloaded 30/01/2014).

²⁴² 2009 (4) SA 639 (SCA).

centralised one, but only that the department must follow a fair procedure when it changes its approach.

A final example of public procurement regulatory failure and education is the matter in *Freedom Stationery (Pty) v MEC for Education, Eastern Cape*.²⁴³ In this matter the Department of Education in the Eastern Cape called for tenders in 2010 to provide scholastic stationery to (mostly no-fee) schools in that province for the 2011 school year. Freedom Stationery tendered for the contract, but eventually learned that the tender was cancelled on the basis that no acceptable tenders were received. They further learned that their tenders were rejected because their tax affairs were not in order. The Department in the meanwhile concluded a contract without going through a public tender process on the basis of the urgent need for the materials in light of the fact that the school year had already started by this stage. Freedom Stationery consequently launched urgent review proceedings calling for the decision to cancel the original tender process as well as the subsequent agreements to be set aside. They also applied for urgent interim relief prohibiting the Department from entering into and/or performing under the subsequent directly concluded agreements.

The judgment on the application for interim relief is noteworthy for present purposes in the way that it dealt with the balancing of interests and in particular the arguments presented about the impact of the public procurement dispute on service delivery making this matter directly comparable with the 2012 Limpopo case. The court noted this aspect of the case as follows:

"[8] The Centre [for Child Law] submitted that, should the third and fourth respondents [the contracted suppliers] be interdicted from supplying the schools with these materials, the learners will be without stationery for a further three weeks on the applicants' "optimistic view of the time that the review process would take", thus severely prejudicing their right to education which is enshrined in Section 29 of the Constitution.

²⁴³ [2011] ZAECELLC 1, 16 March 2011.

[9] In this urgent application, the right to education had to be weighed up against the right to fair administrative action, also protected in the Constitution, as well and the provisions of sections 217 (1) of the Constitution which protect those who contract with the Government if the process is not "fair equitable, transparent competitive and costs effective".

Despite the arguments presented indicating the adverse impact of interim relief in this procurement dispute on service delivery in respect of education, the court nevertheless granted the interim relief, thereby barring the Department from proceeding with the acquisition of materials from the contracted suppliers. This is a surprising judgment and one that has been severely criticised for failing to achieve an appropriate balance between the interests pursued in the procurement dispute on the one hand and the public interest in service delivery on the other.²⁴⁴ It is accordingly worthwhile to quote extensively from the judgement on this aspect of the case:

"[33] The protection of access to education is of prime importance with regard to the public interest, and based thereon the Centre [for Child Law] urged me to dismiss the applicant's urgent application for an interdict pending the review, or make an order compelling the first and second respondents to appoint either of the competing bidders to deliver stationary to the schools in terms of the contract. To follow those suggestions would unduly benefit some parties at the expense of others. To compel performance by the first and second respondent to appoint either of the competing bidders or a third party to perform in terms of the tender, offends one of the most logical and basic principles in our law, namely that courts should not write contracts for the parties before it. Another solution had to be found.

[34] Trampling on the rights of the applicants is not the only course open to assist with the scholastic needs of the learners. The absence of stationary, transport, and in some cases food, at so many of the schools, is directly attributable to the actions (or inaction) of the Department. It was with a note of irony that I listened to the

²⁴⁴ See G. Quinot "Public Procurement" (2011) 1 *Juta's Quarterly Review of South African Law* para 2.6; M. Couzens "Procurement adjudication and the rights of children: *Freedom Stationery (Pty) Ltd v MEC for Education, Eastern Cape* 2011 JOL 26927 (E)" 2012 (15)1 *Potchefstroom Electronic Law Journal* 391.

proposition that the applicants' review and the urgent interdict which it seeks, was the sole cause of the learners' constitutional rights being infringed. The problems that have beset the Department, is of its own making.

[35] Some interim plans, one must assume, would have been made with regard to the food programmes that were cancelled since there have been no court applications that I was aware of, emanating from those dire problems. Similarly, some interim plans could be made with regard to the provision of stationary, at least in some schools. Hopefully charities could be approached for interim assistance in providing stationary. The possibility that stationary stocks may have been left in various departmental depots, should also be explored. The first and second respondent are in the best position to provide information in this regard and to assist with the dissemination of any of the stock left.

[36] To protect the rights of all those involved, was not entirely possible. By granting the urgent interdict sought, the applicants' rights would not be ignored, but the learners would have to wait a while longer for stationary. By burdening the court roll with an expedited date for set down of the hearing of the review, the learners would be spared waiting unduly long for their stationary. The first and second respondents would also then be given the opportunity to award the contracts in question, lawfully."

5.3.3 Health

Health service delivery has also seen its share of procurement challenges, but also some reforms in recent years.

The most noteworthy case in the context of health-related procurement is that in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*.²⁴⁵ This matter dealt with the procurement of services to remove medical waste from public facilities in the Limpopo Province. Following the award of the tender to a consortium, one of the unsuccessful bidders, Millennium Waste Management, challenged the award on the

²⁴⁵ 2008 (2) SA 481 (SCA).

basis that its tender was unlawfully disqualified at an early stage of adjudication. The court agreed and held that the tender award was accordingly reviewable. However, if the court simply invalidated the tender award and referred the matter back to the contracting authority, the danger may arise that the crucial service delivery of medical waste removal will be interrupted. Fortunately, the court was plainly sensitive to these difficulties. It noted in this regard:

"The difficulty that is presented by invalid administrative acts ... is that they often have been acted upon by the time they are brought under review. That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable."²⁴⁶

The court continued to focus particularly on the public interest that may be affected by strict enforcement of procurement rules in this instance:

"From the point of view of the public serious questions arise if the contract is now terminated. The service is for the removal and safe disposal of medical waste from all public hospitals in Limpopo province (it seems there are 44). The removal and disposal of medical waste must be carried out without interruption and the province does not have the capacity to step in itself if the contract is terminated. No doubt some or other interim measures are capable of being taken but how and at what cost is uncertain."²⁴⁷

²⁴⁶ Para 23.

²⁴⁷ Para 28.

The court consequently fashioned an innovative remedy to alleviate any potential adverse effect on service delivery following enforcement of procurement rules in this case. It ordered the contracting authority to re-evaluate the bids received, but this time including the wrongly excluded bid of Millennium Waste Management, within set timeframes. While this process ensued the existing contract was to continue. Once the contracting authority had concluded its re-evaluation the existing contract would only be terminated if it was found that Millennium Waste Management should have been awarded the tender. If, however, the re-evaluation revealed that the current service provider would still have won the tender, it would simply continue to render the service with no further interference.

Apart from public procurement disputes, the National Department of Health ("NDoH") has also in recent years grappled with the interaction between public procurement regulation and health services and in particular medicines procurement for use in public health facilities. The NDoH appointed a task team in 2009 to investigate possible reforms in the approach to public procurement of medicines to strengthen health service delivery. The task team recommended greater centralisation and consolidation of medicines procurement within the NDoH and eventually the establishment of a Central Procurement Agency for medicines procurement operating independently from the NDoH under the oversight of the Minister of Health.²⁴⁸ Consequently the Directorate Affordable Medicines ("DAM") within the NDoH took over the function of procurement of core medicines (anti-tuberculosis, anti-infective and family planning medicines) from NT in 2011.²⁴⁹ In the relatively short period that DAM has managed these procurements there seems to be evidence emerging that greater efficiency in medicines procurement is achieved through this approach.²⁵⁰ This includes cost savings and shorter procurement turn-around times as well as the capacity to monitor and manage risks more closely.

²⁴⁸ B. Pharasi & J. Miot "Medicines Selection and Procurement in South Africa" 2012/13 *South African Health Review* 177 181.

²⁴⁹ Pharasi & Miot 2012/13 *South African Health Review* 181.

²⁵⁰ Pharasi & Miot 2012/13 *South African Health Review* 182.

5.3.4 Infrastructure development

The final area where public procurement regulatory concerns seem to frequently impact on service delivery is in respect of infrastructure projects. In recent years there have been quite a number of court cases dealing with procurement disputes in this area.²⁵¹

In these types of cases the quality of the services procured, or functionality as it is generally referred to, seems to be one of the major causes of dispute. There is thus a number of construction procurement instances where the relevant CIDB grading required for suppliers to meet the functionality criteria were at issue.²⁵² The manner in which quality is to be assessed has also been challenged. A good example is the case of *Simunye Developers CC v Lovedale Public FET College and Another*.²⁵³ In this matter the functionality assessment included points for performance on previous projects. While Simunye Developers submitted the bid with the lowest price and was recommended by the quantity surveyors appointed to advise the contracting authority on the procurement, the bid evaluation committee decided to mandate two of its members to visit previous projects completed by the shortlisted bidders to assess first-hand the quality of previous work. During these visits negative comments were made on the work of Simunye and on that basis the committee decided not to award the contract to it. Consequently Simunye challenged the award to its competitor *inter alia* on the basis that the committee acted unfairly towards it by not allowing it the opportunity to respond to adverse comments on its previous work and that the evaluation process adopted by the committee, specifically relating to the site visits, was irregular. The court rejected these arguments and held that the committee was entitled to gather

²⁵¹ See e.g. *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit* [2009] ZAFSHC 21, 27 February 2009; *Moseme Road Construction CC v King Civil Engineering CC* 2010 (4) SA 359 (SCA); *Haw and Inglis Civil Engineering (Pty) Ltd v MEC of Police Roads and Transport: Free State Provincial Government and Others* [2010] ZAFSHC 51 (28 May 2010); *MACP Construction (Pty) Ltd v Greater Tzaneen Municipality and Another* [2012] ZAGPPHC 55 (12 April 2012); *Piet Bok Construction CC v Minister of Public Works and Others* [2012] ZAGPPHC 168 (15 August 2012); *WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality and Another* 2013 (5) SA 461 (KZD).

²⁵² *Haw and Inglis Civil Engineering (Pty) Ltd v MEC of Police Roads and Transport: Free State Provincial Government and Others* [2010] ZAFSHC 51 (28 May 2010); *Moseme Road Construction CC v King Civil Engineering CC* 2010 (4) SA 359 (SCA).

²⁵³ [2010] ZAECGHC 121 (9 December 2010).

evidence on the quality of previous projects and take such evidence into consideration when deciding on the award.

As with education noted above, a primary consideration in public procurement disputes in the context of infrastructure projects is the delay that may be caused by legal challenges to the award of tenders. In *WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality and Another*,²⁵⁴ for example, the court had to consider the implications for a sewer project of the application for interim relief pending the review of a tender award, which would have the effect of significantly delaying progress on the project. The court noted the following relevant factors in this regard:

"(a) the fact that there was no sewer system in the area, the construction of which was the object the tender, and which was of growing concern to the community;

(b) in the Mzingazi Village people were sub-dividing their plots and selling them without title deeds to third parties causing pressure on the system of pit toilets used by the local community. There was the concomitant danger that Mzingazi Lake alongside which the village exists, could become contaminated by human waste. This is particularly concerning because the lake provides the drinking water to Richards Bay and surrounding areas."²⁵⁵

Nevertheless, the court granted the interim relief, but imposed strict timeframes within which the contemplated review had to be dealt with.

The concern regarding delays to infrastructure projects occasioned by public procurement disputes has also been noted from other quarters. In their study of infrastructure procurement at local government level, Wall, Watermeyer and Pirie thus note that

"it would seem that the SCM process, if allowed to be, is often the primary cause of extended delays in the appointment of contractors, leading to delays in the delivery

²⁵⁴ 2013 (5) SA 461 (KZD).

²⁵⁵ Para 21.

of services. The SCM 'tail' would appear on those occasions to be 'wagging the dog', namely service delivery."²⁵⁶

However, the authors also found significant variation in the turn-around times for infrastructure procurement across the municipalities studied ranging from 6 to 7 weeks on the short end to 6 to 7 months on the long end between bid specification committee decisions and tender award.²⁵⁷ This is despite the respective municipalities using the same public procurement rules to conduct the procurement.

5.4 Analysis

Considering the case studies on the interaction between public procurement regulation and service delivery challenges there are a number of rules of public procurement law that seem to emerge as causing difficulty or at least can be identified as aggravating such challenges.

5.4.1 Time delays

A concern that seems to emerge from most (if not all) service delivery contexts where public procurement challenges have been identified is that of delays in service delivery that can be attributed to public procurement. This concern can be viewed as a result of two distinct issues in public procurement.

Firstly, service delivery can be delayed because the procurement process itself takes a long time to complete. This is the concern raised by Wall, Watermeyer and Pirie in their study of local government construction procurement.²⁵⁸ It is evident that this concern can be linked to the public procurement regulatory regime. The more burdensome the regulatory regime applicable to public procurement is, the longer it will take to complete an individual procurement. It is self-evident that a process which requires up to four different distinct decision-making entities (bid specification committee, bid evaluation committee, bid adjudication committee, accounting authority) and which may additionally include

²⁵⁶ K. Wall, R. Watermeyer & G. Pirie "Supply chain management and service delivery - 'wagging the dog': service delivery" (2013) 38:9 *IMIESA* 44-51.

²⁵⁷ Wall, Watermeyer & Pirie (2013) *IMIESA* 46.

²⁵⁸ Wall, Watermeyer & Pirie (2013) *IMIESA* 44-46.

involvement by specialist (private-sector) advisors (as is common in many infrastructure procurements where strong reliance is placed on quantity surveyors and consulting engineers to assess technical aspects of bids) will take a significant amount of time to run its course.

The second procurement issue bringing about delays in service delivery is the extensive possibility of legal challenges to award decisions and the potential of tender awards being reversed months and even years after the fact. In light of the relative ease with which disappointed bidders can judicially challenge award decisions and the reality that "[t]here will be few cases of any moment in which flaws in the process of public procurement cannot be found, particularly where it is scrutinised intensely with the objective of doing so" as noted by the SCA in *AllPay Consolidated Investment Holdings & others v The Chief Executive Officer of the South African Social Security Agency & others*²⁵⁹ it is to be expected that public procurement will be characterised by high levels of litigation and consequent delays.

It is also not only actual procurement litigation that brings about delays, in other words this second procurement issue generates delays not only in those procurement decisions that are in fact challenged. The mere possibility of litigation may have a detrimental impact on the timeframe within which procurements are completed. Delays may result from both administrator and supplier conduct in procurement in response to the possibility of litigation. The Constitutional Court recognised both these dangers in its judgment in *Steenkamp NO v Provincial Tender Board, Eastern Cape*²⁶⁰ in the context of deciding whether to visit an honest, but negligent administrative mistake in awarding a public tender with a damages claim. In relation to the effect of allowing such a claim on administrator conduct the Court noted:

"A potential delictual [damages] claim by every successful tenderer whose award is upset by a court order would cast a long shadow over the decisions of tender boards. Tender boards would have to face review proceedings brought by aggrieved unsuccessful tenders. And should the tender be set aside it would then have to contend with the prospect of another bout of claims for damages by the initially

²⁵⁹ [2013] ZASCA 29 (27 March 2013) para 21.

²⁶⁰ 2007 (3) SA 121 (CC).

successful tenderer. In my view this spiral of litigation is likely to delay, if not to weaken the effectiveness of or grind to a stop the tender process. That would be to the considerable detriment of the public at large."²⁶¹

As for supplier conduct in the face of potential litigation, the Court inadvertently introduced delays into the procurement process in this same judgment.²⁶² The Court held that the initially successful bidder in this matter was partly itself to blame for its financial woes when the tender was (more than a year after award) set aside in a judicial challenge by a disappointed bidder, because a "prudent and diligent successful tenderer ... may not leap without looking",²⁶³ suggesting that such a tenderer should delay performance to ensure that the tender awarded to it is not subsequently set aside in a judicial review. In a somewhat surprising statement the Court declared in the present context that

"Balraz [the successful bidder] wasted no moment to accept the tender award. But once the order to supply goods and services was made by the Department, Balraz should have curbed its commercial enthusiasm as it was well within its right to require that its initial expenses not lead to its financial ruin should the award be nullified. Balraz unnecessarily chose the more hazardous course which is to incur mainly salary expenses of its directors without fashioning an appropriate safeguard. Its loss could have been easily curbed by prudent conduct and precaution."²⁶⁴

In their minority, dissenting judgment in this matter, Justices Langa and O'Regan noted the potentially adverse effect on service delivery of supporting this type of delay in performance by the successful tenderer:

"In our view, it would be highly undesirable to suggest that a successful tender applicant should hesitate before performing in terms of the contract, in case a challenge to the tender award is successfully brought. Such a principle, in our view,

²⁶¹ Para 55.

²⁶² On this aspect of the case see G. Quinot "Worse than Losing a Government Tender: Winning It" (2008) 19 *Stellenbosch Law Review* 101.

²⁶³ Para 51.

²⁶⁴ Para 52.

would undermine the constitutional commitments to efficiency and the need for delivery which are of immense importance to both government and citizens alike.”²⁶⁵

It is clear that delays in procurement with the consequent adverse impact on service delivery can be attributed to public procurement rules.

5.4.2 Quality or functionality

The second aspect of public procurement law that may be seen to hamper effective service delivery relates to the assessment of quality in procurement, or as it is mostly referred to in this context, functionality.

Zubane refers to three ways in which government failure to render services can be interpreted, one of which is the "[i]nability to render quality service".²⁶⁶ As examples the author refers to "the number of poor quality RDP houses, the number of clinics that are not properly equipped and the quality of roads that are constructed". It is evident that all these examples are necessarily linked to the assessment of quality in public procurement processes underlying the particular instance of service delivery. As the case studies above illustrate, particularly in relation to infrastructure procurement, the rules governing assessment of quality can lead to problems.

The concerns regarding the appropriate way to determine quality in tender adjudication is currently exacerbated by the perceived uncertainty about what procurement rules allow in this regard. At issue in particular is the approach to tender adjudication and the role of functionality therein under the PPPFA and its Preferential Procurement Regulations 2011. The question is whether the new regulation 4 in the Preferential Procurement Regulations, which prescribes the way in which functionality is to be determined, that is as a qualification criterion and not an award criterion, is exhaustive of the role of quality in tender adjudication. Recently, the High Court has again opened the door to the routine reliance on quality as an award criterion in the judgment in *Rainbow Civils CC v Minister of Transport*

²⁶⁵ Para 83.

²⁶⁶ P. Zubane *Alternative Service Delivery Models for the South African Public Service for the Year 2020*. MPhil, Stellenbosch University (2011).

and Public Works, Western Cape.²⁶⁷ In this matter the court held that quality *must* be taken into account as an objective factor under section 2(1)(f) of the PPPFA in order to determine whether the tender should be awarded to the highest scoring bidder based on price and preference points or to another bidder.

5.4.3 Arrangements between organs of state

While the approach to inter-organ of state arrangements to render services at local government level is clarified in the MFMA, the position at other levels of government are far from clear.

Section 110(2) of the MFMA states that procurement rules under that Act are not applicable to the provision of goods or services to a municipality by another organ of state. This provision supports the view that inter-organ of state arrangements for the delivery of services at local government level will not be considered procurement.

As the case studies have, however, indicated, it is not clear what the position is at other levels of government following the judgment in *Chief Executive Officer of the South African Social Security Agency N.O. v Cash Paymaster Services (Pty) Ltd.*²⁶⁸ On one reading this judgment seems to hold that transactions between organs of state will indeed be subject to procurement rules, i.e. amount to public procurement.

Given the significant scope for intergovernmental cooperation, based on the principles set out in chapter 3 of the Constitution, in effecting service delivery, the uncertainty regarding the application of public procurement rules to such arrangements poses real risks.

5.4.4 Judicial remedies

A final area of public procurement law that seems to impact negatively on service delivery relates to the remedies granted in procurement litigation.

The case studies above indicate that traditional approaches to remedies in public procurement disputes may be particularly detrimental to service delivery objectives. As the

²⁶⁷ [2013] ZAWCHC 3, 6 February 2013.

²⁶⁸ 2012 (1) SA 216 (SCA).

courts have noted, once a tender has been awarded a number of further actions may follow in short order so that the subsequent setting aside of the tender award and seemingly automatic invalidation of the contract could cause severe disruptions.

It is mostly the default approach of invalidating the tender award that is to blame for this state of affairs. Recent authoritative judicial pronouncements on this issue suggest that setting aside is indeed the default remedy and that a court will only under exceptional circumstances refuse such relief once it has found the relevant decision to be reviewable.²⁶⁹ In this regard judicial remedies in public procurement law are underdeveloped and unsophisticated.

While there are promising developments, such as the innovative remedy granted in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*,²⁷⁰ the default approach seems to hold even in the face of evident disruptions to service delivery.

This is thus another area where public procurement regulatory regime itself seems to undermine efforts at service delivery.

5.5 Conclusion

There is little evidence of the direct linkages between public procurement regulation and service delivery failures in South Africa. The widespread non-compliance with public procurement law reported in chapter 4 of this report will obviously have a detrimental impact on service delivery. Such non-compliance may lead to false starts and consequent delays in getting service delivery programmes off the ground; may lead to litigation with further delays and disruption to concluded contracts; may hamper cost-effectiveness in that the best price may not be obtained or goods and services of questionable quality be procured, with self-evident negative implications for the services being delivered through such procurement. These problems are, however, not necessarily attributable to public procurement rules themselves, but rather to a failure to comply with rules.

²⁶⁹ *Eskom Holdings Ltd and Another v The New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 16.

²⁷⁰ 2008 (2) SA 481 (SCA).

However, one can draw some inferences from especially procurement disputes where the procurement at issue was linked to service delivery about the conceivable contribution of particular rules of public procurement law to service delivery challenges. In relation to these rules it is advisable to revisit the actual rules, as opposed to mere compliance, in order to ensure that the public procurement regulatory regime optimally support a service delivery agenda.



6 COMPARATIVE PERSPECTIVES

6.1 Introduction

In this part a limited number of foreign systems are set out from the perspective of providing useful models for structuring the functions of the OCPO. Given the limited nature of the Project, only a few foreign systems are considered. Comparative work already done within the OCPO is used as a point of departure. Consideration is also given to a number of model laws such as the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Public Procurement, 2011; the ABA Model Procurement Code for State and Local Governments and COMESA's various public procurement reform initiatives.

In considering the discussion and analysis in this part, it is important to keep in mind the risks associated with comparative legal study, noted in chapter 2 above. This chapter presents data from the comparative investigation under the thematic headings of structure of central regulatory bodies, functions of central bodies and enforcement of procurement rules. While the latter topic inevitably overlaps with the former two, the comparative approaches to enforcement are discussed separately due to distinctions between procurement regulation generally on the one hand and this particular dimension of procurement regulation on the other. At the outset it is important to note that this chapter contains very little normative analysis. The purpose of this phase of the Project was primarily to identify and set out relevant comparative perspectives. The insights gained from these perspectives are integrated with findings from other phases of the Project and applied to the South African context in the final chapter below, where normative arguments are considered.

6.2 Comparative analysis

The comparative analysis is structured thematically below rather than in a system-by-system manner in order to facilitate direct comparison. The focus is throughout on regulatory models pertaining to the role of central/national procurement management.

6.2.1 Overview

A comprehensive overview of regulatory models in respect of procurement regulation reveals two main approaches to institutional structure.

The first is the more traditional approach that is also followed in South Africa, which involves a division or unit within the relevant national government department responsible for procurement, typically the national treasury or finance department. This unit typically fulfils a range of functions in respect of procurement encompassing both regulatory and operational functions. That is to say, the unit typically both procures and regulates procurement. A variation on this approach is that the regulatory and operational functions are divided between different units within the same government department.

The second approach is the one that is increasingly adopted in current reforms of procurement systems. This involves an entity distinct and independent from national government departments fulfilling an exclusively regulatory function in respect of procurement. In this approach operational functions regarding procurement, that is actual procurement, may still occur centrally within a responsible national government department (typically national treasury) or may be partially or wholly decentralised. The distinct feature of this approach is the independent regulation of procurement operations by an autonomous entity. Given that this is the model that is unfamiliar in the South African context and that is increasingly adopted in procurement reforms, the comparative analysis below focuses on this second approach.

6.2.2 Structure of central bodies

The comparative overview reveals a number of central procurement entities fulfilling a regulatory function in respect of procurement at all levels of government with variation in their institutional structure. These entities are notably found in systems that have seen significant public procurement reforms in recent years.

6.2.2.1 African systems

On the African continent central oversight bodies are common, which can be attributed *inter alia* to public procurement reforms initiated and/or supported by the World Bank,

typically by means of a CPAR. One of the primary objectives of the CPAR tool is to assess the institutional framework for public procurement in a system and to propose reforms to that framework.²⁷¹ The COMESA Public Procurement Reform Project also reported that ongoing public procurement reforms increasingly included a move away from a central, operational state tender board to central policy and monitoring bodies.²⁷²

Central oversight bodies can for example be found in Botswana, Ethiopia, Ghana, Kenya, Nigeria, Rwanda, Tanzania and Uganda. The common structure of these bodies involves a public procurement authority with an oversight board. The board is mostly appointed through a political process (e.g. via a Parliamentary process or by the president or cabinet) in terms of a prescribed structure, while the authority consists of officials of which the head is typically appointed by the board and is accountable to the board. These entities mostly exist autonomously from executive government, although they mostly rely on specific government departments, mostly finance departments, for institutional support. The structures of abovementioned African systems are set out below as examples of the institutional frameworks adopted and to illustrate the common trends as well as variations in this regard.

6.2.2.1.1 Botswana

In Botswana the Public Procurement and Asset Disposal Board is an entity that exists between the traditional central state tender board and the type of autonomous oversight authority set out above. The Board is created by the Public Procurement and Asset Disposal Act of 2003 and functions as a parastatal under the direction of the Minister of Finance and Development Planning.²⁷³ While the Board still engages in procurement for government itself upon recommendation from procuring entities, the Act mandates the increased devolution of procurement functions to entities and committees.²⁷⁴ Thus, for each central government department there is a ministerial tender committee established by the Board and to which the Board delegates procurement functions.

²⁷¹ Williams-Elegbe (2013) *African Journal of International and Comparative Law* 99-100.

²⁷² S.R. Karangizi "The COMESA Public Procurement Reform Initiative" (2005) 14 *Public Procurement Law Review* NA51.

²⁷³ See R. Kumar & E. Caborn "The regulatory framework for public procurement in Botswana" in G. Quinot & S. Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 28.

²⁷⁴ Kumar & Caborn in *Public Procurement Regulation in Africa* 29-30.

COMPARATIVE PERSPECTIVES

The Act additionally establishes the Advisory Committee on Public Procurement and Asset Disposal consisting of thirteen members appointed by the Minister of Finance and Development Planning.²⁷⁵ The membership of this Committee is structured in terms of the Act as follows:

- "(a) three from the contractors associations and professional bodies;
- (b) three from ministries with large procurement programmes;
- (c) two from the Ministry of Local Government;
- (d) one from the entity charged with the monitoring of public enterprises performance;
- (e) one from the Public Oversight Agencies [Attorney General's Chambers, the Auditor General's Office, the Directorate on Corruption and Economic Crime, the Office of the Ombudsman and any other institution charged with a responsibility to oversee the activities of other Government departments];
- (f) one from the Ministry of Trade and Industry; and
- (g) two Members of the Board."²⁷⁶

6.2.2.1.2 Ethiopia

In Ethiopia procurement is conducted entirely at entity level. Oversight is provided by the Federal Public Procurement and Property Administration Agency, which is a separate and autonomous legal entity even though it relies on the Ministry of Finance for institutional support and is accountable to the Minister.²⁷⁷ The Agency is headed by a Director General and Deputy Director General, both of whom are appointed by the federal government.²⁷⁸

A separate central entity, the Federal Procurement and Disposal Service, is tasked with procuring, transversally at a central level, strategic items of high value and national

²⁷⁵ Kumar & Caborn in *Public Procurement Regulation in Africa* 30.

²⁷⁶ Public Procurement and Asset Disposal Act of 2003, section 111.

²⁷⁷ T.H. Bahta "The regulatory framework for public procurement in Ethiopia" in G. Quinot & S. Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 56.

²⁷⁸ The Ethiopian Federal Government Procurement and Property Administration Proclamation No.649/2009, article 17.

significance, common-user items used across departments and recurrent supplies under framework contracts.²⁷⁹

6.2.2.1.3 Ghana

In Ghana the Public Procurement Act 2003²⁸⁰ created the Public Procurement Authority under the control of the Public Procurement Board. These bodies do not perform actual procurement on behalf of the state, but are purely regulatory entities.²⁸¹

The Board consists of nine members, appointed by the President in consultation with the Council of State.²⁸² The Board is constituted as follows:

- "(a) a chairperson, who shall be a person competent and experienced in public procurement;
- (b) a vice-chairperson, who shall be elected by members from among their number;
- (c) four persons from the public sector made up of a representative of the Attorney General and three other persons, nominated by the Minister [of Finance], one of whom is a woman and each of whom shall have experience in public procurement and be familiar with governmental and multi-lateral agency procurement procedures;
- (d) three persons from the private sector who have experience in procurement at least one of whom is a woman;
- (e) the Chief Executive of the Board."²⁸³

The Board is accountable to the Minister of Finance by means of annual reporting, which the Minister must subsequently table in Parliament.²⁸⁴

²⁷⁹ Bahta in *Public Procurement Regulation in Africa* 57.

²⁸⁰ Act 663.

²⁸¹ D.N. Dagbanja *The Law of Public Procurement in Ghana* (2011) 61.

²⁸² The Ghanaian Council of State is a body created by article 89 of the Constitution of Ghana 1992 that advises the President in the exercise of his functions and consists of senior former office holders, regional representatives and others appointed by the President.

²⁸³ Public Procurement Act 2003 section 4.

²⁸⁴ Public Procurement Act 2003 section 13.

6.2.2.1.4 Kenya

The Kenya Public Procurement and Disposal Act 2005 established the Kenyan Public Procurement Oversight Authority.²⁸⁵ The Authority is headed by a Director-General who is appointed by the Public Procurement Oversight Advisory Board, which is also established by the Act.

The Board is appointed by the Minister of Finance and approved by Parliament. It consists of the DG of the Authority, the Permanent Secretary to the Treasury, the Attorney-General plus nine members appointed from persons nominated by the following bodies:

- "(a) the Institute of Certified Public Accountants of Kenya;
- (b) the Institution of Engineers of Kenya;
- (c) the Kenya National Chamber of Commerce and Industry;
- (d) the Kenya Federation of Master Builders;
- (e) the Kenya Institute of Management;
- (f) the Kenya Association of Manufacturers;
- (g) the Law Society of Kenya;
- (h) the Institute of Certified Public Secretaries of Kenya;
- (i) the Marketing Society of Kenya;
- (j) the Architectural Association of Kenya ;
- (k) the Computer Society of Kenya;
- (l) the Institute of Surveyors of Kenya;
- (m) the Federation of Kenya Employers, and
- (n) the Central Organization of Trade Unions."²⁸⁶

6.2.2.1.5 Nigeria

The public procurement institutional arrangements in Nigeria closely resemble that in Ghana. The Public Procurement Act, 2007 created the Bureau of Public Procurement and

²⁸⁵ K. T. Udeh "The regulatory framework for public procurement in Kenya" in G. Quinot & S. Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 105.

²⁸⁶ Public Procurement and Disposal Regulations 2006, regulation 5.

the National Council on Public Procurement.²⁸⁷ Neither is a procuring entity with the former exercising a day-to-day regulatory function and the latter a broad oversight function. The Bureau is headed by a Director-General appointed by the President on recommendation by the Council.²⁸⁸

The Council consists of twelve members appointed by the President and consisting of the following:

"the Minister of Finance as Chairman
the Attorney-General and Minister of Justice of the Federation
the Secretary to the Government of the Federation
the Head of Service of the Federation;
the Economic Adviser to the President
six part-time members to represent:
Nigeria Institute of Purchasing and Supply Management
Nigeria Bar Association;
Nigeria Association of Chambers of Commerce, Industry, Mines and
Agriculture ;
Nigeria Society of Engineers ;
Civil Society;
the Media; and
the Director-General of the Bureau who shall be the Secretary of the Council."²⁸⁹

6.2.2.1.6 Rwanda

In Rwanda the Public Procurement Agency replaced the National Tender Board in 2007 as part of the decentralisation of procurement. Unlike the Tender Board, the Agency acquired a regulatory function as opposed to the central procurement function fulfilled by the Tender Board, which is now fulfilled by procurement units at entity level.²⁹⁰

²⁸⁷ Public Procurement Act, 2007 sections 1, 3; K.T. Udeh & M.L. Ahmadu "The regulatory framework for public procurement in Nigeria" in G. Quinot & S. Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 148, 149.

²⁸⁸ Public Procurement Act, 2007 section 7.

²⁸⁹ Public Procurement Act, 2007 section 1(2).

²⁹⁰ I. Rugema "The regulatory framework for public procurement in Rwanda" in G. Quinot & S. Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 165-166.

The Agency is governed by a Board of Directors and managed by a Directorate General, both of which are appointed by Presidential Order.²⁹¹

6.2.2.1.7 Tanzania

The Public Procurement Act, 2011 prescribes the creation of a Public Procurement Policy Division within the Ministry for Finance and a Public Procurement Regulatory Authority. The former functions within the Finance Ministry and must be headed by "a person with appropriate academic and professional qualifications and experience of not less than ten years in procurement related functions".²⁹²

The Authority is headed by a Chief Executive Officer appointed by the President and is governed by a Board of Directors.²⁹³ The Board consists of a chairperson appointed by the President and six further members appointed by the Minister of Finance, with the CEO of the Authority as secretary.²⁹⁴ Of the six further members "at least three of whom are experts or specialists in procurement, law, management, engineering, commerce, or in any other relevant field".²⁹⁵

The Authority reports to the Minister of Finance through an annual performance evaluation report, which the Minister must subsequently table before the National Assembly.²⁹⁶

6.2.2.1.8 Uganda

The Ugandan Public Procurement and Disposal of Public Assets Act, 2003 created the Public Procurement and Disposal of Public Assets Authority. The Authority is governed by a Board of Directors.²⁹⁷ The Board consists of a chairperson, four to six persons from a "multi-sectoral professional background" and the Executive Director of the Authority, appointed by the Minister of Finance in consultation with Cabinet.²⁹⁸

²⁹¹ Law N° 63/2007 of 30/12/2007 articles 6, 7, 10.

²⁹² Public Procurement Act, 2011 section 5.

²⁹³ Public Procurement Act 2011, sections 21, 23.

²⁹⁴ Public Procurement Act 2011, first schedule.

²⁹⁵ Public Procurement Act 2011, first schedule.

²⁹⁶ Public Procurement Act 2011, section 29.

²⁹⁷ Public Procurement and Disposal of Public Assets Act, 2003 section 10.

²⁹⁸ Public Procurement and Disposal of Public Assets Act, 2003 section 11.

The Authority reports to the Minister by means of an annual performance evaluation report, which the Minister must table in Parliament.²⁹⁹

6.2.2.2 Eastern Europe

The reforms of public procurement systems in Eastern-European countries have also seen the emergence of a number of central oversight entities. Three examples are set out below, namely from Bulgaria, Hungary and Poland.

6.2.2.2.1 Bulgaria

The Public Procurement Act of 2004 created the Public Procurement Agency to assist the Minister of Economy and Energy in the implementation of state policy in public procurement.³⁰⁰ The Agency is headed by an Executive Director appointed by the Minister and also reports to the Minister in annual reports.³⁰¹ The Minister must subsequently submit the report to the Council of Ministers for approval.

6.2.2.2.2 Hungary

Act CVIII of 2011 on Public Procurement created the Public Procurement Authority as an independent organ of state subject only to Parliament.³⁰² The Authority is governed by a Council consisting of ten members. These members are designated by distinct constituents in equal number. In addition to being designated by these stakeholders such members are statutorily obliged to represent the interests of these stakeholders, as defined in the Act, and to report to those that designated them. Members are thus designated by the following stakeholders to represent the indicated interests on the Council:³⁰³

Designating stakeholders	Interests designated members are to represent
the president of the Hungarian Competition	enforcement of the principles of the Act and

²⁹⁹ Public Procurement and Disposal of Public Assets Act, 2003 section 22.

³⁰⁰ Public Procurement Act 2004, articles 17, 18.

³⁰¹ Public Procurement Act 2004, article 19.

³⁰² Act CVIII of 2011, article 167.

³⁰³ Act CVIII of 2011, article 168.

COMPARATIVE PERSPECTIVES

Authority; the Minister responsible for public procurements and the Minister responsible for economic policy	specific objectives in the public interest
the National Development Agency; the national associations of local governments (jointly) and the Minister responsible for the building matters	general interests of contracting entities of contract award procedures
national employers' interest representation bodies and the national economic chambers	general interests of tenderers in contract award procedures

In addition to the three members designated by each of these groups, the Council will have a president, appointed by the Council, who will also be the president of the Authority.

The Council account to Parliament through an annual report.³⁰⁴

6.2.2.2.3 Poland

In Poland the President of the Public Procurement Office ("PPO") is responsible for procurement matters in terms of the Public Procurement Law.³⁰⁵ The President of the PPO is appointed by the Prime Minister following an open and competitive recruitment process and is accountable directly to the Prime Minister.³⁰⁶

The Law also creates a Public Procurement Council to advise the President of the PPO.³⁰⁷ The Council consists of 10 to 15 members appointed by the Prime Minister and candidates from parliamentary groups, national self-government organisations and national entrepreneurs' organisations must be especially considered.³⁰⁸

³⁰⁴ Act CVIII of 2011, article 172.

³⁰⁵ Act of 29 January 2004.

³⁰⁶ Act of 29 January 2004 Public Procurement Law, articles 152, 153.

³⁰⁷ Act of 29 January 2004 Public Procurement Law, article 157.

³⁰⁸ Act of 29 January 2004 Public Procurement Law, article 158.

6.2.2.3 Analysis

The examples set out above illustrate a number of noteworthy similarities and differences in central procurement entity institutional frameworks.

The overall institutional trend is of a two-tiered structure with an administrative entity under the direct supervision of a board or council. Typically the head of the administrative entity also serves on the board or council providing a direct structural link between the entities.

The board or council, i.e. the oversight entity, is typically appointed by high political office bearers, in most cases either the head of government or cabinet member responsible for finance or procurement. In a number of instances the legislature also has a hand in the appointment process.

In most cases the board or council and/or the head of the administrative entity is accountable to the person/entity that appointed it. Accountability is, however, mostly limited to annual reporting. Such reports must also typically be tabled in the legislature.

The criteria for membership of the board or council vary between representation of defined entities and defined qualities, with the former being the most common. In most cases the constitution of the council or the board is thus aimed at achieving representation of a range of interests in the procurement process. In some cases, notably Hungary, these interests are distinctly set out. There is also considerable variation in the presence of officials on the board or council, apart from the head of the administrative entity, who, as noted above, is typically a member of the board or council.

The institutional arrangements clearly reflect attempts to establish independent regulatory bodies, in other words bodies that are somewhat independent of executive government. This trend can be ascribed to the view routinely adopted in World Bank CPAR recommendations that international best practice benchmarks involve independent regulatory or oversight bodies. For example, in the 2000 CPAR on Nigeria it is stated:

"There is a need for an independent regulatory body overseeing the numerous public entities engaging in procurement utilising public funds. The current situation

COMPARATIVE PERSPECTIVES

is one of scattered and inadequate control and monitoring as these important tasks are left to bodies within the same entities that undertake the spending of public funds. In fact this is a system of self-control, and as it is shown in the benchmark above, this is not according to international standards of control and monitoring."³⁰⁹

In the 2003 Tanzanian CPAR it is stated that

"experience in other countries has shown that in some cases a line ministry of government may invariably lack the independence needed to oversee a country's public procurement system, as it is subject to pressures from politicians and from other ministries".³¹⁰

Despite the clear intention to create an independent body, it is significant to note that in most cases a strong link is maintained with the relevant ministry responsible for procurement, in most cases the ministry for finance. The rationale for this trend can also be gleaned from CPARs. In the Tanzanian CPAR it is thus explained:

"In the case of Tanzania it is suggested that the [Regulatory Authority] be established as an autonomous body reporting directly to Minister of Finance and not as present to the [Permanent Secretary] of the [Ministry of Finance]. By maintaining the [Regulatory Authority] under the auspices of the Minister of Finance, the [Regulatory Authority] will benefit from the strength and political influence of the [Ministry of Finance] vis-à-vis other ministries. In addition, the [Ministry of Finance] is the coordinator of the major reform efforts and will also be a key player in procurement reform. Thus, by maintaining links between the [Regulatory Authority] and the [Ministry of Finance], the necessary momentum for procurement reform is best ensured."³¹¹

Another important reason for maintaining a link between an independent public procurement body and a ministry of finance relates to the relationship between public procurement and public finance management. It is well accepted that the alignment of systems for public finance management and public procurement is a key element of good governance. Budgetary and expenditure processes must thus be carefully considered in

³⁰⁹ World Bank *Nigeria Country Procurement Assessment Report Volume II* (2000) 16.

³¹⁰ World Bank *Tanzania Country Procurement Assessment Report Volume II* (2003) 45.

³¹¹ World Bank *Tanzania Country Procurement Assessment Report Volume II* (2003) 99 (footnotes omitted).

regulating public procurement and *vice versa*. This is for example recognised by UNCITRAL in its *Guide to Enactment of the UNCITRAL Model Law on Public Procurement*³¹² and implicitly in article 9 of the United Nations Convention against Corruption of 2003.

While the UNCITRAL Model Law does not itself contain provisions on the structure of central procurement bodies, the *Guide to Enactment* supports the creation of "a public procurement agency or other body to assist in the implementation of rules, policies and practices for procurement to which the Model Law applies".³¹³

Other model laws also support the notion of a separate and independent central procurement entity. While the 2000 revised ABA Model Procurement Code in the United States thus introduced an alternative structure to the Policy Office proposed in the original 1979 Model, the commentary in the 2000 Model Code unequivocally declares the ABA to be in favour of separate policymaking and operational entities. The commentary continues to state that the "[p]lacement [of the Policy Office] in the executive branch as a separate entity is the preferred arrangement as it would further ensure the professional integrity of this important policymaking body, and appropriately elevate the entire procurement process in the public sector."³¹⁴ This preferred approach is accordingly presented as option 1 in the Code, which creates an independent Policy Office consisting of a board of members separate from the Chief Procurement Officer. The latter serves an operational, as opposed to policymaking function, although the CPO is an *ex officio* member of the Policy Office. This approach reflects the trend outlined above in respect of the structural link between the operational administrative entity and the purely policymaking council or board.

Even though it did not generate a single model law on procurement, the COMESA Public Procurement Reform Project also supported the "establishment of apex regulatory authorities and institutions for ensuring integrity".³¹⁵ This project was generally aimed at assisting COMESA member states to reform their procurement regulatory regimes as part of

³¹² UNCITRAL *Guide to Enactment of the UNCITRAL Model Law on Public Procurement* (2012) 15.

³¹³ UNCITRAL *Guide to Enactment* 16.

³¹⁴ ABA *The 2000 Model Procurement Code for State and Local Governments* (2000) 11.

³¹⁵ African Development Bank Group *COMESA Public Procurement Reform and Capacity Building Projects Project Performance Evaluation Report* (2012) vii.

a drive to improve governance.³¹⁶ The project noted reforms involving institutionally splitting the operational and policy/monitoring functions of procurement.³¹⁷

6.2.3 Function of central bodies

The functions of the type of central procurement entities outlined above reveal notable similarity across different systems.

6.2.3.1 Splitting operational and regulatory functions

While some of the central bodies still fulfil operational procurement functions, for example the Public Procurement and Asset Disposal Board in Botswana, the clear shift in these systems following reforms is to split operational and regulatory (policymaking or oversight) functions.

This functional divide is also supported in a number of model instruments such as the UNCITRAL Model Law, which advocates the creation of a central entity to assist with implementation of rules, the COMESA reform project, which noted a split in regulatory functions and the ABA Model Law, which also expressed the ABA's preference for a central policymaking and oversight body distinct from the operational functions typically fulfilled by CPOs.

The establishment of a central regulatory entity does not, however, imply that central operational procurement functions are jettisoned. In a number of systems central regulatory functions and central operational functions exist side-by-side, albeit in distinct entities. The operational functions typically remain within the responsible government department (typically national treasury), although another distinct entity may be responsible for this function as is the case in Ethiopia with the Federal Procurement and Disposal Service (see 6.2.2.1.2 above).

6.2.3.2 Core regulatory functions

The core functions of the central regulatory body emerging from these various systems are:

³¹⁶ See Karangizi (2005) *Public Procurement Law Review* NA51.

³¹⁷ Karangizi (2005) *Public Procurement Law Review* NA58.

- **Policy and rule making:** developing and coordinating policy on public procurement approaches; issuing rules to augment public procurement regulation and to provide guidance on implementation of existing rules; contributing to the refinement and development of the regulatory regime, e.g. by driving reforms and statutory amendments; developing standard documents.
- **Monitoring:** scrutinising compliance with procurement rules; identifying shortcomings and common concerns; capturing and maintaining comprehensive data on public procurement.
- **Enforcement:** providing mechanisms through which compliance with procurement rules can be enforced (see 6.2.4 below).
- **Capacity building:** developing training materials and opportunities for procurement officials; ensuring adequate levels of capacity; setting standards for procurement qualifications.
- **Support:** providing advice to contracting authorities; developing systems in support of procurement functions.
- **Research:** generating and analysing information on procurement practices; analysing trends; researching markets.

6.2.3.3 International influence on African systems

The similarities between the recently reformed African systems highlighted above in respect of the functions fulfilled by the central procurement body can again be ascribed to the influence of international instruments such as the World Bank CPAR and the UNCITRAL Model Law.

The Nigerian CPAR of 2000 thus declares the functions of the proposed Public Procurement Commission as:

"policy making; monitoring prices of currently tendered items including publishing of major contracts; keeping statistics on procurement; ensuring compliance of the procurement law by public entities; acting as an appeals body to deal with complaints

COMPARATIVE PERSPECTIVES

from contractor/suppliers; and preparing standard bidding and contract documents for use by the public sector."³¹⁸

The CPAR continues to enumerate the core functions of the proposed Commission as:

- Development of overarching government procurement policy;
- Advising government and Parliament on all matters pertaining to procurement;
- Monitoring the entire procurement function and taking corrective actions where necessary;
- Providing a forum for bid challenges;
- Acting as regulator in issuing regulations to facilitate implementation of procurement laws;
- Coordinating procurement functions by standardizing procurement procedures and documents for example;
- Undertaking research on procurement practices and markets;
- Developing and supporting reliance on IT in procurement;
- Providing capacity building.³¹⁹

This approach is mirrored in the UNCITRAL *Guide to Enactment of the UNCITRAL Model Law on Public Procurement* where it captures the functions that may be assigned to the central entity as follows:

"(a) Ensuring effective implementation of procurement law and regulations.

(b) Rationalization and standardization of procurement and of procurement practices.

(c) Monitoring procurement and the functioning of the procurement law and regulations from the standpoint of broader government policies.

(d) Capacity-building.

(e) Assisting and advising procuring entities and procurement officers."³²⁰

³¹⁸ World Bank *Nigeria Country Procurement Assessment Report Volume I* (2000) 6.

³¹⁹ World Bank *Nigeria Country Procurement Assessment Report Volume II* 20.

COMPARATIVE PERSPECTIVES

Many of these functions are echoed in the COMESA Procurement Regulations 2009, which are aimed at harmonizing procurement systems between COMESA member states. These Regulations require states to create institutional measures that will

- "(a) give overall guidance to the development and practice of public procurement;
- (b) serve as a contact point and information centre on public procurement in the Member States;
- (c) monitor and report, nationally and within the Common Market, on procurement activities of procuring entities; and
- (d) develop professional capacities in public procurement."³²¹

In many cases the functions of the central procurement entity are extensive. This is well illustrated by the relevant article from the Ghanaian Public Procurement Act 2003, which states the functions of the Public Procurement Board as:

- "(a) make proposals for the formulation of policies on procurement;
- (b) ensure policy implementation and human resource development for the public procurement process;
- (c) develop draft rules, instructions, other regulatory documentation on public procurement and formats for public procurement documentation;
- (d) monitor and supervise public procurement and ensure compliance with statutory requirements;
- (e) have the right to obtain information concerning public procurement from contracting authorities;
- (f) establish and implement an information system relating to public procurement;

³²⁰ UNCITRAL *Guide to Enactment* 16-18.

³²¹ COMESA Public Procurement Regulations 2009, article 34.

COMPARATIVE PERSPECTIVES

- (g) publish a monthly Public Procurement Bulletin which shall contain information germane to public procurement, including proposed procurement notices, notices of invitation to tender and contract award information;
- (h) assess the operations of the public procurement processes and submit proposals for improvement of the processes;
- (i) present annual reports to the Minister on the public procurement processes;
- (j) facilitate the training of public officials involved in public procurement at various levels;
- (k) develop, promote and support training and professional development of persons engaged in public procurement, and ensure adherence by the trained persons to ethical standards;
- (l) advise Government on issues relating to public procurement;
- (m) organise and participate in the administrative review procedures in Part VII of this Act;
- (n) plan and coordinate technical assistance in the field of public procurement;
- (o) maintain a register of procurement entities and members of and secretaries to tender committees of public procurement entities;
- (p) maintain a register of suppliers, contractors and consultants and record of prices;
- (q) investigate and debar from procurement practice under this Act suppliers, contractors and consultants who have seriously neglected their obligations under a public procurement contract, have provided false information about their qualifications, or offered inducements of the kind referred to in section 31 of this Act;
- (r) maintain a list of firms that have been debarred from participating in public procurement and communicate the list to procurement entities on a regular basis;

(s) hold an annual procurement forum for consultations on issues related to public procurement and to deal with complaints and appeals on public procurement;

(t) assist the local business community to become competitive and efficient suppliers to the public sector; and

(u) perform such other functions as are incidental to the attainment of the objects of this Act."³²²

One aspect of procurement regulation that is notable both in institutional and functional terms is that of enforcement of procurement rules, which is discussed in the next section.

6.2.4 Enforcement of procurement rules

The approach to the enforcement of procurement rules merit separate discussion since it does not closely follow the trend set out above. In particular, the institutional and consequent functional approaches to enforcement of procurement rules are not as closely linked to the establishment or existence of a general, distinct procurement regulatory body.

6.2.4.1 Distinct enforcement agencies

It is not uncommon to find distinct entities tasked with the enforcement of procurement rules across systems following the two main approaches to procurement regulation, that is those systems in which procurement regulation is located within a government department and those systems where such function is located in an autonomous body.

This trend is also found in international and model instruments on procurement law. As noted above, the UNCITRAL Model Law on Procurement does not itself contain provisions on a central regulatory entity, although the creation of such entity is supported in the *Guide to Enactment*. However, the Model Law does contain extensive provisions on distinct administrative enforcement agencies. Article 67 of the Model Law thus provides:

"1. A supplier or contractor may apply to the [*name of the independent body*] for review of a decision or an action taken by the procuring entity in the procurement

³²² Public Procurement Act 2003, article 3.

proceedings, or of the failure of the procuring entity to issue a decision under article 66 of this Law within the time limits prescribed in that article."

The article continues to provide in detail for enforcement by such independent body. The same approach is evident in the ABA Model Procurement Code. While the ABA expresses itself in favour of a distinct procurement policymaking body in the Code, it also allows for the combination of operational and regulatory functions within government as an alternative within article 2. In other words, the Code provides in article 2 options for both main approaches to procurement regulation, which was a departure in the 2000 Code from the original 1979 Code, which only provided for a split between regulatory and operational entities. However, the 2000 Code retains the provisions on a Procurement Appeals Board to deal with challenges to procurement decisions, i.e. as a distinct enforcement entity as part of the optional part E to article 9. Thus, regardless of which institutional approach a State would opt for under article 2, the creation of a distinct enforcement agency would be option under either approach.

6.2.4.2 Systems without distinct regulatory bodies

In systems with no formal split between the operational and regulatory procurement functions, i.e. those systems without autonomous procurement bodies, the establishment of a distinct enforcement agency seems even more imperative than in systems with independent regulatory bodies. UNCITRAL's *Guide to Enactment* thus emphasises the importance of the independence of enforcement entities. In this regard the *Guide to Enactment* states:

"States will wish ... to consider in particular whether the independent body should include or be composed of outside experts, independent from the Government. Independence is also important as a practical matter: if decision-taking in review proceedings lacks independence, a further challenge to the court may result, causing lengthy disruption to the procurement process.

Enacting States are therefore encouraged, within the scope of their national systems, to provide the independent body with as much autonomy and independence of action from the executive and legislative branches as possible, in

order to avoid political influence and to ensure rigour in decisions emanating from the independent body. The need for an independent mechanism is particularly critical in those systems in which it is unrealistic to expect that reconsideration by the procurement entity of its own acts and decisions will always be impartial and effective."³²³

Despite these evident advantages of having an autonomous enforcement body in the absence of a distinct procurement regulatory entity, there are many examples of systems, of which South Africa is one, which have neither of these structures.

6.2.4.3 Systems with distinct regulatory bodies

In systems that do have autonomous procurement regulatory bodies there is also notable variation in how independent enforcement agencies are set up. UNCITRAL's *Guide to Enactment* again recognises this variation when it advises that an independent review body "may, for example, be one that exercises overall supervision and control over procurement in the State ... or a special administrative body whose competence is exclusively to resolve disputes in procurement matters".³²⁴

One of the functions of a general procurement regulatory body could thus be enforcement of procurement rules, including the function to deal with challenges to individual procurements. This function is typically fulfilled by a distinct unit within the regulatory body. For example, in Botswana the Public Procurement and Asset Disposal Board has a statutorily-created standing committee, the Independent Complaints Review Committee, dealing with procurement disputes.³²⁵ In Ghana, a similar function is fulfilled by the Appeals and Complaints Panel of the Public Procurement Board.³²⁶

There are also examples of systems with autonomous procurement regulatory bodies that have independent enforcement entities, distinct from the regulatory body. Ethiopia provides one example. The Procurement and Disposal Complaints Review Board exists independently of the Federal Public Procurement and Property Administration Agency, the

³²³ UNCITRAL *Guide to Enactment* 233.

³²⁴ UNCITRAL *Guide to Enactment* 234.

³²⁵ Public Procurement and Asset Disposal of 2003, section 95.

³²⁶ Dagbanja *The Law of Public Procurement in Ghana* 231-233.

central regulatory body (see 6.2.2.1.2 above). The Board is appointed by the Minister of Finance and Economic Development and is accountable to the Minister. Members are "drawn from persons representing the private business sector, the relevant public bodies and public enterprises".³²⁷

In a third model, distinct bodies are established to perform the general procurement regulatory function and the enforcement function, but a specific link is created between the two entities. Hungary provides an example of this type of arrangement. In addition to the Public Procurement Authority and its Council, the Hungarian Procurement Act creates the distinct Public Procurement Arbitration Board to deal with procurement disputes.³²⁸ However, the Council also provides oversight over the functions of the Board, *inter alia* by appointing the chairperson, deputy chairperson and commissioners of the Board.³²⁹

6.2.4.4 Procurement ombudsman

One particular model of a public procurement enforcement structure that is worth noting is that of the Canadian Office of the Procurement Ombudsman ("OPO"). In essence this structure takes the familiar form of an ombudsman, but with specific focus on public procurement.

The Procurement Ombudsman ("PO") and its OPO are expressly mandated under the Department of Public Works and Government Services Act³³⁰ to fulfill an oversight and enforcement function in respect of public procurement. The Act in particular mandates the OCPO to

"(a) review the practices of departments for acquiring materiel and services to assess their fairness, openness and transparency and make any appropriate recommendations to the relevant department for the improvement of those practices;

³²⁷ The Ethiopian Federal Government Procurement and Property Administration Proclamation No.649/2009, article 71(1).

³²⁸ Act CVIII of 2011 on Public Procurement, article 134.

³²⁹ Act CVIII of 2011 on Public Procurement, article 172.

³³⁰ S.C. 1996, c. 16.

(b) review any complaint respecting the compliance with any regulations made under the *Financial Administration Act* of the award of a contract for the acquisition of materiel or services by a department to which the Agreement, as defined in section 2 of the *Agreement on Internal Trade Implementation Act*, would apply if the value of the contract were not less than the amount referred to in article 502 of that Agreement;

(c) review any complaint respecting the administration of a contract for the acquisition of materiel or services by a department; and

(d) ensure that an alternative dispute resolution process is provided, on request of each party to such a contract."³³¹

The PO is appointed by the Governor in Council for a fixed term.³³² He reports to Parliament via the Minister of Public Works and Government Services.

6.3 Conclusion

The comparative views presented in this chapter provide a range of options, both in terms of structure and function that may be considered when approaching reform of any particular procurement system.

In South Africa, these examples may be of particular value in light of recent developments towards the establishment of a central regulatory function in procurement to compliment the decentralisation of procurement functions introduced by the PFMA. The analysis presented here highlights the type of structural (institutional) and functional questions that will have to be addressed in developing a central regulatory entity. The key question, and point of departure, in this exercise is whether central regulation should be located within a government department or in a distinct regulatory agency. If the latter option is adopted, a close second question will be what level of independence such distinct body should enjoy. The answers to these questions will greatly facilitate the type of structure that is created and consequently what functions are given to it as is evident from the analysis above.

³³¹ Section 22.1(3).

³³² Department of Public Works and Government Services Act (S.C. 1996, c. 16) section 22.1(1).

COMPARATIVE PERSPECTIVES

The analysis presented here provides examples of different answers to these questions and ways to operationalise the long-standing proposal for the creation of a central oversight entity.³³³



³³³ See e.g. the proposal to establish a Procurement Compliance Office in the *Green Paper on Public Sector Procurement Reform in South Africa* (1997); the Black Economic Empowerment Commission's 2001 proposal to create a National Procurement Agency and the recommendation in the World Bank CPAR of 2003 to establish a National Procurement Compliance Office.

7 OCPO REGULATORY FRAMEWORK

7.1 Introduction

The findings presented in the preceding parts of this report point to a significant need for public procurement regulatory reform in South Africa. Both at the levels of design and implementation public procurement regulation in South Africa are lacking.

The system itself is highly fragmented with the rules applying to procurement activity spread out over a vast range of different regulatory instruments. There is little indication of coherence and alignment between these different instruments. The system is as a result unwieldy and difficult to implement.

On the implementation level there is ample evidence to show that compliance with public procurement regulation is very low. This is not only intrinsically problematic, but also impacts adversely on overall good governance in public administration, including on key administrative mandates such as service delivery.

The first step in initiating reform of public procurement regulation is the establishment of a fit for purpose institutional focal point. That is to say, there is a need to create an institutional structure that can facilitate reforms and drive effective implementation of the regulatory regime.

The appointment of the CPO and creation of the OCPO are steps in this direction. The main strategic objectives of the OCPO focus on strengthening monitoring and oversight of all public procurement and developing the procurement system.

This final part of the report will present the case of how efficiently and effectively the OCPO can achieve the purpose for its creation and its subsequent mandate. In particular and in line with the overall focus of the Project, the case presented here focuses on the legal framework needed to facilitate the contemplated functions of the OCPO.

7.2 The regulatory problem

Public procurement is conducted within a decentralised legal framework in South Africa. This framework involves decentralisation at two distinct levels, namely operational and regulatory. *Operationally*, the actual procurement of goods and services is conducted by SCM units within individual organs of state. The result is very high volumes of smaller transactions concluded at entity level across all levels and spheres of administration.

The *regulatory function* is also largely decentralised. The distinct rules that govern individual procurements are formulated at entity level as part of SCM policies and are the responsibility of an entity's accounting officer/authority. The same authority is also primarily tasked with ensuring compliance with the rules. There is no consolidated, single regulatory instrument that governs all these SCM policies. Distinct aspects of the entity-level rules governing procurement are guided and/or prescribed by various statutory instruments, with divergent fields of application.

Within this framework there is no distinct and overarching regulatory footing for a central oversight structure such as the OCPO. The result is the absence of clear and comprehensive legal powers on the part of the OCPO to provide regulatory coordination and oversight from a central perspective. In addition there is no clear legal mandate for a structure such as the OCPO to fulfil a central regulatory function.

The abovementioned state of public procurement regulation greatly undermines the potential for coordinated oversight of public procurement through the OCPO as an effective institutional mechanism to engage with the demonstrably low levels of public procurement regulatory compliance in South Africa.

7.3 The recommended solution

In order to address the regulatory problem set out above, it is recommended that the current regulatory and operational functions of the OCPO be split and assigned to two distinct entities. The regulatory function should be assigned to a central public procurement regulator ("the Regulator"), with an exclusive public procurement regulatory mandate

incorporating the characteristics set out below, drawing on international experience in this regard. The operational function should remain with NT.

It is pointedly not recommended that the broader public procurement regulatory framework be revised in any drastic manner at this stage. Such a step would be premature at this time as further explained in paragraph 7.4 below.

7.3.1 The Regulator as an autonomous entity

The proposed Regulator should be positioned autonomously from any particular government department. It should thus be a free-standing entity. Ideally the Regulator should be accountable to Parliament and be funded directly from Parliament and not via any government department or ministry.

The autonomy and subsequent measure of independence created through such an institutional arrangement is important in moving from a model of essentially self-regulation to one of effective regulatory oversight. Given the highly fragmented nature of public procurement functions and regulation in South Africa and the subsequent proliferation of individual sets of rules governing transactions as well as large volumes of procurement transactions concluded by a multitude of public entities at various levels and spheres of the state, the most promising way to introduce effective regulation is to establish an entity that stands apart from this marshland of procurement operations. Autonomy will greatly facilitate the detached perspective that is necessary for the Regulator to provide control and guidance across the entire fragmented system aimed at developing coherence and alignment to a single regulatory framework.

Autonomy will furthermore assist in minimising the possibility of undue (political) influence on the regulatory function. This is especially important in respect of the enforcement function to be fulfilled by the Regulator. Without adequate levels of independence it is questionable whether the Regulator will be able to introduce an effective administrative enforcement mechanism, including administrative resolution of bid challenges. If suppliers perceive the Regulator not to be sufficiently independent from procurement operations it is doubtful that they will be satisfied with administrative remedies provided by the Regulator. In such a scenario it is to be expected that aggrieved bidders will pursue further legal

redress beyond the administrative remedies, such as for example by means of judicial review. The result will be the failure to achieve regulatory efficiency in respect of dispute resolution in the context of public procurement since high levels of procurement litigation will remain, while an additional step in challenging procurement decisions would have been introduced leading to further time delays. The net result will be a more burdensome regulatory system rather than efficiency gains.

A third key benefit in establishing an autonomous Regulator that is not per definition (on the basis of its institutional structure) aligned to the policy mandate of any particular government department or ministry is that it facilitates an integrated perspective on public procurement regulation. This is especially important in South Africa where public procurement regulation exists across a broad range of different policy arenas as emerged clearly from the statutory landscape set out above e.g. public finance management within the policy mandate of NT, broad-based black economic empowerment within the mandate of DTI, local industrial and economic development within the mandates of DTI and EDD, state-owned companies within the mandate of DPE, infrastructure development and service delivery, which in itself is spread out over various departments such as DPW, Transport and Cooperative Governance, and public service within the mandate of DPSA. It is not feasible that a single entity existing within the institutional structure of any given department will be able to steer public procurement regulation effectively through this broad range of different (and at times competing) regulatory mandates. Locating the public procurement regulatory node within any given department will necessarily result in preference for that department's policy perspective (even if only in perception). An autonomous entity can avoid such (perceived) regulatory capture and pursue a range of different policy perspectives and importantly the need for balance between such objectives in a more objective and authoritative manner.

Autonomy also facilitates the splitting of regulatory and operational functions (as explained further below). This is important in a context, such as that in South Africa, where there is significant usage of public procurement for horizontal policy objectives. If an end-user in the procurement chain does not see the immediate benefit of pursuit of a particular horizontal policy in its procurement it may be less than keen to rigorously implement that aspect of procurement regulation or may be prone to tweak the application of those rules to its own

mission even though the procurement system as a whole may value the particular horizontal policy objective. Within this context, an autonomous Regulator with an exclusive regulatory mandate can meaningfully guide the uniform and consistent application of horizontal policy objectives in procurement. However, this justification for an autonomous Regulator also raises the need for retaining a link with NT. The introduction of horizontal policy objectives into public procurement may also have significant budgetary implications. For example, the introduction of sustainable or "green" procurement may generate desirable environmental protection aims as part of the Department of Environmental Affairs' initiatives, but may involve costs for other departments where environmentally friendly products are for example more expensive. In order to facilitate this use of public procurement it is thus important for budgetary allocations to take account of this increase in procurement costs on the part of end-users. There is accordingly a strong need for the Regulator charged with implementing the procurement rules pertaining to this policy use of procurement to collaborate with NT in order for the latter to accommodate the increased costs in budgetary processes.

Thus, despite these evident benefits in establishing an autonomous public procurement Regulator, a good argument can be made for the continued alignment or linkage between the Regulator and NT. Apart from the argument in the previous paragraph, a number of reasons have been put forward for retaining this link. One reason is the instant regulatory credibility that the Regulator can enjoy based on its link with NT. The latter obviously enjoys significant regulatory regard in respect of all aspects of public funding vis-à-vis other organs of state on which the Regulator can trade, especially during its early existence.

In the final analysis a continued link between the procurement Regulator and NT is supported by the basic recognition that public procurement involves the spending of public funds. Public procurement thus has a close relationship with budgeting processes, which is the main focus of NT's functions. The latter seems to provide a fairly strong functional justification for maintaining linkages between the Regulator and NT.

Institutional autonomy (and even independence) of the Regulator and linkages with NT are, however, not conflicting notions. It is possible and desirable to have both. This raises

particular objectives in alignment of the institutional structure of the Regulator and assignment of operational procurement functions at a central government level.

7.3.2 The institutional structure alignment

The Regulator structure should be aligned in terms of two main bodies, namely an administrative agency and an oversight board, with additional recognition of a third distinct structure in the form of an enforcement arm to the agency.

7.3.2.1 Agency and board

The administrative agency of the Regulator should be headed by an executive official and be staffed by public servants. This agency should be responsible for the day-to-day regulatory functions of the Regulator. A non-executive board, headed by a non-executive chairperson, should oversee the work of the agency, provide strategic guidance and take high-level regulatory decisions. The executive head of the agency should be accountable to the board. The board in turn should be accountable to Parliament on behalf of the entire Regulator organisation. The non-executive nature of the board is another important institutional characteristic in support of the autonomy of the Regulator balanced with a continued link to NT and other governmental stakeholders.

The executive head of the agency and the members of the board, including the chairperson, should be appointed in terms of a statutorily defined structured process involving key stakeholders such as the presidency, relevant national ministries, provincial executives, organised local government as well as Parliament. Key qualifying characteristics should be included in legislation for the position of the executive head focusing on knowledge of and experience in public procurement. The composition of the board should be defined in order to ensure broad representation of key interests, both in the public sector and the private (supplier) sector. This should include direct representation of the key line departments concerned with public procurement and in particular NT. In this manner the linkage with government departments can be maintained within an autonomous institutional structure. Achieving a balance in the constitution of the board between independent members and members drawn from government environments, especially NT, is a key way to pursue autonomy and linkage simultaneously. This balancing act can be further supported by

clearly defining the distinct roles of the various board member groups with reference to the interests they are required to promote on the board as well as setting out their accountability to defined stakeholders in relation to their work on the board. As noted above, the non-executive nature of the board also greatly facilitates the balance between autonomy and linkages to stakeholders, in particular NT.

A process for appointment of the head of the agency and board members akin to the appointment of the Auditor-General, Public Protector and members of chapter nine institutions set out in section 193 of the Constitution is recommended. Alternative appointment mechanisms that may be considered are the processes defined for appointing the Financial and Fiscal Commission as set out in section 221 of the Constitution and the Financial and Fiscal Commission Act 99 of 1997 and/or commissioners of the Public Service Commission as set out in section 196 of the Constitution read with the Public Service Commission Act 46 of 1997 and/or the executive director of the Independent Police Investigative Directorate in terms of the Independent Police Investigative Directorate Act 1 of 2011.

Institutional linkages between the procurement Regulator and NT should furthermore be strengthened by statutorily obliging NT to render infrastructure support to the Regulator. It is thus proposed that despite its functional autonomy, the Regulator continue to operate within close institutional proximity with NT.

The agency body within the Regulator should not only consist of the current regulatory units of the OCPO (SCM Policy and Strategy; SCM Governance, Monitoring and Compliance and SCM Client Support), but also incorporate units dealing with particular areas of procurement regulation, which are currently located within different organs of state. Examples include the procurement regulatory functions of the CIDB and SITA. It is thus proposed that the Regulator agency also include units dealing for example with construction procurement regulation and IT procurement regulation and other areas of specific procurement regulation.

7.3.2.2 Enforcement structure

The final institutional structure alignment is to consider an enforcement body within the ambit of the Regulator. It is proposed that a distinct institutional mechanism be statutorily created under the umbrella of the Regulator to deal with enforcement of procurement rules, including deciding on supplier challenges.

In order to strengthen this key regulatory function it is important to clearly define the structure of the enforcement structure. A two-pronged structure is recommended in this regard consisting of a PO and an enforcement committee.

The structure of the Canadian OPO provides a good model for the proposed PO.³³⁴ The PO can be appointed by the board of the Regulator and be accountable to the board. The function of the PO will be to investigate compliance with procurement rules and to review complaints submitted to the Regulator. The PO will institutionally function within the operations of the Regulator agency. The PO should be considered as the first line of enforcement of procurement rules in particular instances. However, in line with general approaches to ombudsman institutions the powers of the PO should be restricted to recommendations to relevant contracting authorities and/or to facilitate voluntary mediation or arbitration processes in respect of particular disputes.

An enforcement committee should be constituted as a substructure of the board of the Regulator. The enforcement committee of the Financial Services Board ("FSB") as set out in the Financial Services Board Act 97 of 1990³³⁵ provides a good example on which the procurement enforcement committee can be modelled.³³⁶ The FSB enforcement committee is constituted as follows: it

"(i) must consist of sufficient persons with appropriate knowledge and experience so as to enable the committee to perform the functions entrusted to it by this Act or any other law; and

³³⁴ See para 6.2.4.4 above.

³³⁵ Sections 10A, 26A, 26B.

³³⁶ Alternative models that may be considered are the appeal board created in the Financial Services Board Act 97 of 1990 sections 26A and 26B; the appeal committee provided for in the Health Professions Act 56 of 1974 section 10 or the appeal board contemplated in the Liquor Products Act 60 of 1989 section 22.

(ii) must include advocates or attorneys with at least ten years experience; and

(iii) may include a judge."³³⁷

The chairperson of the FSB enforcement committee must be drawn from the latter two categories of members. The FSB enforcement committee functions in terms of panels consisting of at least three members of the committee.

Based on the FSB model, procurement matters should be dealt with by the procurement enforcement committee on the basis of referral by the PO following an investigation by the latter and in the absence of resolution of the dispute by the PO. The enforcement committee should be authorised to review and remit procurement decisions referred to it.

This approach will take maximum advantage of the clear administrative-law preference for resolving administrative-law problems by means of internal remedies rather than judicial review as expressed in section 7(2) of PAJA.

In setting up the enforcement structure within the Regulator it will be important to align the enforcement functions of the Regulator with similar functions of other, existing organs of state. Currently the PP plays a significant role in investigating compliance with procurement rules and making recommendations on enforcement action (see chapter 4 above). Particular attention will thus have to be given to the continued mandate of the PP in respect of public procurement following the creation of the PO. Along the same lines it will be necessary to set out the distinct enforcement functions of the procurement Regulator's enforcement structures (PO and enforcement committee) vis-à-vis enforcement structures within the broader criminal justice system. The former should have exclusive powers in respect of administrative enforcement of procurement regulation without impacting on the exclusive criminal justice functions of the latter. Particular provision will have to be made for instances of interaction between these enforcement spheres such as under the Corruption Act where endorsement on the Register for Tender Defaulters is concluded administratively following conviction via the criminal justice system (see 3.4.6 above). It is feasible that the Regulator's enforcement committee could play a role in completing the endorsement

³³⁷ FSB Act 97 of 1990 section 10A(1)(a).

function in respect of setting the period of endorsement and any consequential sanctions to be imposed following endorsement.

7.3.3 The Regulator's legal mandate

The objectives and powers of the procurement Regulator must be expressly set out in dedicated empowering legislation. It is not feasible to contemplate the legal mandate of the proposed Regulator with reliance on existing public procurement legislation. As pointed out in the discussion of the legislative framework above (see chapter 3), there are no statutory provisions currently creating consistent and overarching legal powers to effect central regulation of all aspects of public procurement across the entire administration in all three spheres of government, as to the required intentions for the creation and establishment of the OCPO.

It is accordingly of critical importance that this legislative mandate be formulated in such a manner as to provide the Regulator with overarching powers to regulate public procurement across all levels and spheres of administration notwithstanding any other public procurement regulation. It follows that this dedicated legislation will function between section 217 of the Constitution and all other related public procurement regulation.

Creating the legal mandate of the Regulator by means of an overarching statute is a first and essential step in establishing a consolidated public procurement regulatory regime. It is only by means of such a focused enactment that a central authority can effectively regulate all aspects of public procurement spanning the entire range of distinct regulatory instruments currently governing public procurement in South Africa.

The legal mandate created in this manner will not depart from the basic decentralised framework of public procurement existing in terms of current legislation. Accounting authorities will remain primarily responsible for the implementation of procurement rules and the procurement function of their particular entities. However, these authorities will be legally and uniformly subjected to the regulatory oversight and guidance of the proposed newly aligned Regulator.

OCPO REGULATORY FRAMEWORK

A framework for the proposed statute is included in Annexure B.

Limited amendments to current legislation will be necessary to remove potential conflict between the contemplated central legal mandate of the Regulator and regulatory powers currently granted to distinct regulatory agencies. The following is a non-exhaustive list of such necessary amendments:

- Section 76(4)(c) of the PFMA currently grants NT the power to make regulations or issue instructions concerning "the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective". This subsection should be repealed in favour of similar powers granted to the new Regulator.
- Section 168 of the MFMA grants the Minister of Finance the power to make "regulations or guidelines" towards implementation of the Act, which would generally include matters pertaining to procurement. It would be necessary to exclude from this power matters pertaining to public procurement in order to avoid parallel powers between the Minister of Finance acting under the MFMA and the new Regulator.
- Section 5(1) of the PPPFA mandates the Minister of Finance to make regulations on any matter relating to the implementation of that Act. This section should be amended to subject the Minister's regulatory power to recommendations made by the new Regulator.
- The regulatory powers granted to the STB in terms of the 2003 regulations under the STBA should be repealed.
- The Corruption Act should be amended so that the Register for Tender Defaulters and its Registrar are located within the new Regulator rather than NT. The power granted to the Minister of Finance under the Corruption Act to make regulations pertaining to the Register should be subjected to recommendation by the new Regulator.
- The CIDBA should be amended by adding a provision that subjects the power of the Minister of Public Works and the CIDB under that Act in respect of procurement to regulations emanating from the new Regulator's empowering provisions and the

general regulatory functions of the Regulator in respect of public procurement, including construction procurement.

- The Minister of Transport's power under the National Land Transport Act to prescribe requirements for tenders and contracts under that Act, including standard documents,³³⁸ should be made subject to consultation with the new Regulator.
- The SITA Act should be amended to subject the SITA's procurement functions to the new Regulator's mandate in addition to the PPPFA.³³⁹ The Minister for the Public Service and Administration's power to make regulations pertaining to IT procurement under the SITA Act³⁴⁰ should also be subjected to approval by the new Regulator.
- The defence procurement system contemplated in the Armaments Corporation of South Africa, Limited Act must in addition to compliance with the basic requirements of the PFMA³⁴¹ also be subjected to compliance with the regulatory prescripts and functions of the new Regulator.

7.3.4 The Regulator's functions

The key to the functional arrangements regarding the proposed realigned Regulator is the recognition of a strict split between regulatory and operational procurement functions currently fulfilled by the OCPO. The proposed new Regulator will be responsible exclusively for the regulation of public procurement and will not perform any procurement operations. In other words, the Regulator will not procure on behalf of any state entity.

This functional divide is important to achieve unbiased and independent regulation of public procurement. Since the Regulator does not itself procure on behalf of public entities it stands apart from actual procurement. This is important in a system with as diverse sites of procurement as in South Africa. If the Regulator is also a procurement entity there is the real risk that it may view procurement from its particular operational perspective, which will inevitably be at a national level and somewhat removed from the usage of the goods or services procured. Such a perspective may consequently narrow the Regulators' regulatory

³³⁸ National Land Transport Act sections 42(6), 43(3), 44.

³³⁹ SITA Act section 7(8)(c)(iv).

³⁴⁰ SITA Act section 23(1)(a).

³⁴¹ Armaments Corporation of South Africa, Limited Act section 17.

function, thus undermining the possibility of the Regulator developing an overarching and comprehensive view of procurement practices.

The functional ring-fencing of the regulatory function is furthermore important in order to facilitate the role of the Regulator as enforcer of public procurement rules and as an administrative dispute resolution mechanism. If the Regulator is also a contracting authority it will be difficult for it to fully perform the function of enforcer of public procurement policy and adjudicator on public procurement disputes as its independence will be compromised.

The regulatory functions statutorily assigned to the proposed Regulator should include the following:

- **Policy and rule making:** developing and coordinating policy on public procurement approaches; issuing legally-binding rules to augment public procurement regulation and to provide guidance on implementation of existing rules; contributing to the refinement and development of the regulatory regime by initiating reforms and statutory amendments; developing standard documents.
- **Monitoring:** scrutinising compliance with procurement rules including conducting investigations into particular procurement transactions; identifying shortcomings and common concerns; capturing and maintaining comprehensive data on public procurement.
- **Enforcement:** providing mechanisms through which compliance with procurement rules can be enforced, including supplier challenge procedures.
- **Capacity building:** developing training materials and professionalization opportunities for procurement officials; ensuring adequate levels of capacity; setting standards for procurement qualifications.
- **Support:** providing advice to contracting authorities; developing systems in support of procurement functions, including IT systems.
- **Research:** generating and analysing information on procurement practices; analysing trends; researching markets.

Included in all the regulatory functions listed above should be specific regulation of particular areas of public procurement such as construction procurement, IT procurement or defence procurement.

7.3.5 Operational functions

As noted above, the proposed Regulator should not fulfil any central operational procurement functions. That is, it should not procure on behalf of any organ of state.

This is not to say that all centralised public procurement should disappear. The arguments for and against centralised procurement are separate from the case for centralised regulatory functions. Whether there should be more or less actual procurement conducted at central level on behalf of organs of state is a question that lies beyond the scope of this Project. The issue of central operational functions is only raised here to the extent that it impacts on the issue of centralised regulatory functions.

It is perfectly feasible for NT to continue to fulfil centralised operational functions in respect of public procurement, such as the conclusion of transversal term contracts, after the realignment of the OCPO into a Regulator and an operational procurement unit within NT. In fact, the consolidation of procurement regulatory functions within a distinct Regulator is conceptually related to central operational functions.

When the regulatory functions are shifted from NT to the Regulator, the potential is created for the remainder of the OCPO within NT to fulfil a purely operational procurement function. The OCPO can hence develop a focus on this particular aspect of public procurement in contrast to current attempts at fulfilling both a regulatory and operational function without clear boundaries between the two functions. This would at least have the potential to support greater strategic procurement and aligns the subsequent purely operational function of the OCPO to private-sector CPO structures. On the other hand, an increased focus on centralised procurement, such as the mandatory participation in transversal term contracts proposed in the draft Treasury Regulations under the PFMA published in November 2012³⁴² and the President's remarks in his 2014 State of the Nation

³⁴² GN1005 in GG 35939 of 30 November 2012.

address,³⁴³ increases the need for a strong, autonomous regulatory function to create effective checks and balances on the heightened central operational function.

7.3.6 OCPO institutional implications

The creation of the proposed Regulator need not have drastic institutional (or cost) implications. It may largely involve aligning the current OCPO structure into the new one proposed above. Current OCPO staff and infrastructure can thus be utilised in setting up the new agency. Additionally, staff currently working within particular regulatory bodies dealing with public procurement, such as the CIDB and SITA, could be transferred to the new Regulator to continue their work within the new structure.

Only the staff and infrastructure pertaining to the OCPO's regulatory functions, namely SCM Policy and Strategy; SCM Governance, Monitoring and Compliance and SCM Client Support are to be transferred to the new Regulator. The residual, operational functions of the current OCPO Strategic Procurement and Transversal Contracting units will remain as an institutional function with NT and continue to function as the OCPO under the guidance of the CPO.

7.4 Wider public procurement regulatory reforms

The creation of a dedicated Regulator along the lines set out in paragraph 7.3 above is a necessary first step in addressing the clear need for broader public procurement regulatory reform in South Africa. The long-term objective of these reforms should in all likelihood be the formulation of a single public procurement statute governing all aspects of public procurement and at all levels and spheres of the state, i.e. the enactment of a consolidated Procurement Act.

However, at this stage it should not be contemplated that the broader reform project can proceed simultaneously with or in short succession to the establishment of the proposed Regulator. The available data on non-compliance with current public procurement

³⁴³ The President stated in his speech that "To prevent corruption in the supply chain system, government has decided to establish a central tender board to adjudicate tenders in all spheres of government. This body will work with the chief procurement officer whose main function will be to check on pricing and adherence to procedures as well as fairness."

prescripts raises important questions about public procurement regulation in South Africa. For example, the AG's findings that high levels of non-compliance with procurement rules commonly involve a failure to obtain three quotations when using the written quotation method of procurement presents a particular regulatory puzzle. The rule at stake here is not a difficult one to understand or to implement and leaves very little discretion to the contracting authority. Yet, non-compliance with this simple rule is right at the top of procurement rules violated. Before one can sensibly attempt to address this regulatory problem a significant effort will have to be exerted to understand the regulatory failure here. Another telling example is the AG's common findings regarding public contracts concluded with public servants at national, provincial and local government levels despite the noteworthy difference in the applicable legal rules. At local government level such contracts are outlawed whereas there is no such legal prohibition at national and provincial levels. The comparable regulatory failure in the face of divergent rules requires careful scrutiny before an attempt can be made to formulate a new regulatory approach to this issue.

These examples show that there is significant work still to be done by the proposed Regulator *before* an attempt can be made to formulate a new, consolidated procurement statute. It is thus not advisable to pre-empt and hence potentially undermine one of the main founding mandates of the proposed Regulator, namely the initiation of a proper and extensive reform programme.

7.5 Proposed roadmap

In line with the discussion above, a roadmap is proposed here that captures short-, medium- and long term steps to implement the recommendations flowing from this Project.

7.5.1 Short term action plan

The first step towards implementing the recommendations contained in this report is to develop stakeholder consensus around the revised regulatory approach advocated here. The process of stakeholder engagement needs to be differentiated to engage particular constituencies in a focused and meaningful manner in order to have the best chance of building consensus. Stakeholders in public procurement include both those that are internal

to the procurement process and those that are external.³⁴⁴ Structured consultation with the stakeholders within each of these areas will have to be designed and actively managed.

The overarching outcome and hence purpose of the stakeholder engagement process should be broad agreement on the key recommendations of this report. Further outcomes should be the identification of particular problems in implementing the key recommendations; the specific form that implementation of the key recommendations can take; the timeline for implementation and the resolution of any tensions or uncertainties that may be created during the transition period of implementation.

The stakeholder consensus process should start with engagement within the OCPO and subsequently NT on the key recommendations of this report. Once consensus have been reached within NT, a project team from NT, including but not limited to officials from the OCPO, with input from outside experts where necessary, must be appointed to drive the initial consultation process with a direct mandate from the Minister of Finance. Consultation should be conducted on the basis of a policy statement based on this report.

Internal stakeholders to consult will include chief financial officers of all government departments, the AG, PP, SITA, organised local government and SOCs. External stakeholders should include supplier organisations and regulatory bodies such as the CIDB. Eventually, wider public participation processes on an advanced policy statement is recommended following the normal policy-participation processes in terms of a green paper.

7.5.2 Medium term action plan

Once broad consensus have been developed around the need for a revised institutional approach to public procurement regulation and the basic steps necessary to implement such revision, the next phase would be to draft the legislation necessary to implement this approach. The content of the draft will be dictated by the policy position that emerges from the stakeholder consultation process.

³⁴⁴ S.L. Schooner, D.I. Gordon & J.L. Clark "Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations (Working Paper)" (2008) *GWU Legal Studies Research Paper No. 1133234* (SSRN eLibrary <http://ssrn.com/abstract=1133234>) 15-25.

It is advisable that the drafting process again be conducted by a designated project team consisting of officials from different stakeholder environments assisted by outside experts where necessary. Caution should be taken to draw on expertise on domestic conditions in this phase and to develop a draft statute that is fit for purpose in the South African context rather than excessively relying on foreign experience in this regard in order to avoid the risks of comparative methodology highlighted in this report.

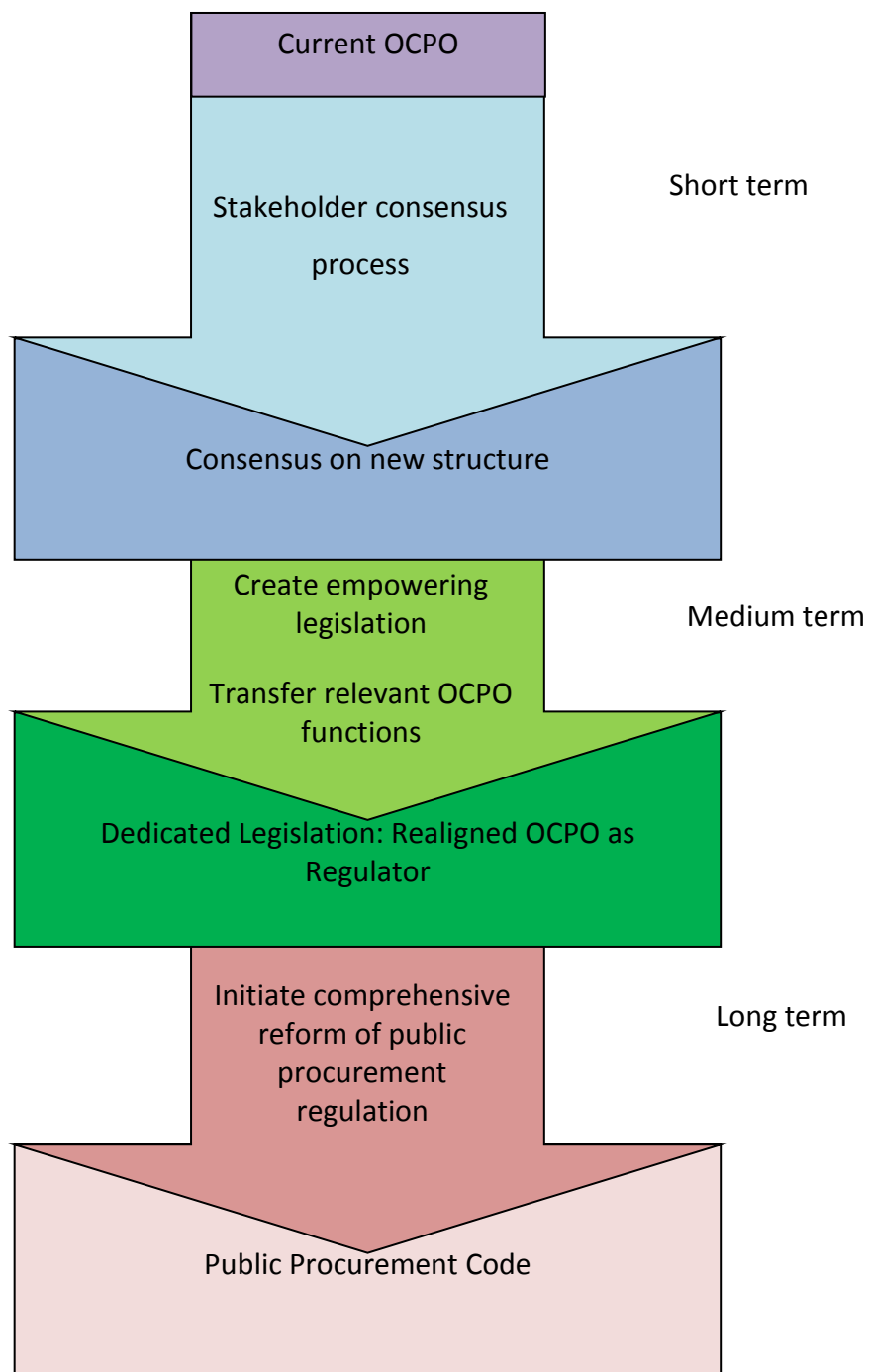
Once a draft statute has been created the normal parliamentary process should follow leading to the enactment of the new empowering legal mandate and statute for the proposed Regulator.

Following the promulgation of the contemplated statute, institutional arrangements will have to be made to facilitate the transfer of the current OCPO organisation to the proposed Regulator institutional framework. An important consideration at this stage will be the splitting of operational and regulatory functions. Only the staff and infrastructure pertaining to the OCPO's regulatory functions such as SCM Policy and Strategy; SCM Governance, Monitoring and Compliance and SCM Client Support are to be transferred to the new Regulator. The residual, operational functions of the current OCPO Strategic Procurement and Transversal Contracting units will remain as an institutional function with NT and continue to operate as the OCPO. An institutional basis for this remaining function will consequently have to be established within NT, e.g. in the form of a central tender board for the awarding of high-value and complex tenders. The STBA could potentially be used to ground the operational function of the OCPO within NT.

7.5.3 Long term action plan

Once the proposed Regulator is in place and functional, the longer-term objective of comprehensive reform of public procurement regulation in South Africa can proceed under the auspices of the Regulator. The final objective of this process should be the enactment of a comprehensive, integrated public procurement code.





Proposed roadmap for public procurement reform in South Africa



SOURCES

South African legislation

Administrative Adjudication of Road Traffic Offences Act 46 of 1998

Armaments Corporation of South Africa, Limited Act 51 of 2003

Broad-based Black Economic Empowerment Act 53 of 2003

Constitution of the Republic of South Africa, 1996

Construction Industry Development Board Act 38 of 2000

Correctional Services Act 111 of 1998

Disaster Management Act 57 of 2002

Financial and Fiscal Commission Act 99 of 1997

Financial Management of Parliament Act 10 of 2009

Financial Services Board Act 97 of 1990

Health Professions Act 56 of 1974

Housing Act 107 of 1997

Local Government: Municipal Finance Management Act 56 of 2003

Local Government: Municipal Systems Act 32 of 2000

Independent Police Investigative Directorate Act 1 of 2011

Liquor Products Act 60 of 1989

National Land Transport Act 5 of 2009

National Supplies Procurement Act 89 of 1970

Nursing Act 33 of 2005

Preferential Procurement Policy Framework Act 5 of 2000

Prevention and Combating of Corrupt Activities Act 12 of 2004

Promotion of Access to Information Act 2 of 2000

Promotion of Administrative Justice Act 3 of 2000

SOURCES

Public Audit Act 25 of 2004

Public Finance Management Act 1 of 1999

Public Service Commission Act 46 of 1997

Road Traffic Management Corporation Act 20 of 1999

State Information Technology Agency Act 88 of 1998

State Tender Board Act 86 of 1968

Foreign legislation

Act CVIII of 2011 on Public Procurement (Hungary)

COMESA Public Procurement Regulations 2009

Department of Public Works and Government Services Act S.C. 1996 (Canada)

Ethiopian Federal Government Procurement and Property Administration Proclamation No.649/2009

Kenya Public Procurement and Disposal Act 2005

Law N° 63/2007 of 30/12/2007 (Rwanda)

Public Procurement Act 2003, Act 663 (Ghana)

Public Procurement Act, 2004 (Bulgaria)

Public Procurement Act, 2007 (Nigeria)

Public Procurement Act, 2011 (Tanzania)

Public Procurement and Asset Disposal Act of 2003 (Botswana)

Public Procurement and Disposal of Public Assets Act, 2003 (Uganda)

Public Procurement Law, Act of 29 January 2004 (Poland)

Case law

Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others [2013] ZACC 42 (29 November 2013)

SOURCES

AllPay Consolidated Investment Holdings & others v The Chief Executive Officer of the South African Social Security Agency & others [2013] ZASCA 29 (27 March 2013)

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC)

Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others 1999 (1) SA 324 (CKH)

Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd, Chairman of the State Tender Board v Sneller Digital (Pty) Ltd and Others 2012 (2) SA 16 (SCA)

Chairman of the State Tender Board and Another v Supersonic Tours (Pty) Ltd 2008 (6) SA 220 (SCA)

Chief Executive Officer, SA Social Security Agency NO v Cash Paymaster Services (Pty) Ltd 2012 (1) SA 216 (SCA)

Coetzee v National Commissioner of Police and Others 2011 (2) SA 227 (GNP)

CSHELL 271 (Pty) Ltd v Oudtshoorn Municipality, Oudtshoorn Municipality v CSHELL 271 (Pty) Ltd [2012] ZAWCHC 25 (30 March 2012)

Dr JS Moroka Municipality v The Chairperson of the Tender Evaluation Committee of the Dr JS Moroka Municipality [2013] ZASCA 186 (29 November 2013)

Eskom Holdings Limited and Another v New Reclamation Group (Pty) Ltd 2009 (4) SA 628 (SCA)

Freedom Stationery (Pty) v MEC for Education, Eastern Cape [2011] ZAECELLC 1, 16 March 2011

Gauteng MEC for Health v 3P Consulting (Pty) Ltd 2012 (2) SA 542 (SCA)

Greys Marine Houtbay (Pty) Ltd and Others v Minister of Public Works and Others 2005 (6) SA 313 (SCA)

Haw and Inglis Civil Engineering (Pty) Ltd v MEC of Police Roads and Transport: Free State Provincial Government and Others [2010] ZAFSHC 51 (28 May 2010)

Inyameko Trading 189 CC t/a Masiyakhe Industries v Minister of Education [2007] ZAWCHC 74

Johannesburg Municipal Pension Fund and Others v City of Johannesburg and Others 2005 (6) SA 273 (W)

KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others 2013 (4) SA 262 (CC)

SOURCES

Logbro Properties CC v Bedderson N.O. and Others 2003 (2) SA 460 (SCA)

Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit [2009] ZAFSHC 21, 27 February 2009

Londoloza Forestry Consortium (Pty) Ltd v South African Forestry Company Ltd 2008 JDR 0816 (T)

MACP Construction (Pty) Ltd v Greater Tzaneen Municipality and Another [2012] ZAGPPHC 55 (12 April 2012)

Magasana Construction CC v City of Tshwane Metropolitan Municipality and Others [2013] ZAGPPHC 196 (12 July 2013)

Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC)

MEC for Education, Northern Cape v Bateleur Books (Pty) Ltd 2009 (4) SA 639 (SCA)

Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others 2008 (2) SA 481 (SCA)

Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)

Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another 2010 (4) SA 359 (SCA)

Municipal Manager: Qaukeni and Others v F V General Trading CC 2010 (1) SA 356 (SCA)

Olitzki Property Holdings v State Tender Board and Another 2001 (3) SA 1247 (SCA)

Piet Bok Construction CC v Minister of Public Works and Others [2012] ZAGPPHC 168 (15 August 2012)

Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others (No 1) 2008 (3) SA 91 (E)

Rainbow Civils CC v Minister of Transport and Public Works, Western Cape [2013] ZAWCHC 3 (6 February 2013)

Sanyathi Civil Engineering & Construction (Pty) Ltd v eThekweni Municipality, Group Five Construction (Pty) Ltd v eThekweni Municipality 2012 (1) BCLR 45 (KZP)

Section 27 and Others v Minister of Education and Another 2013 (2) SA 40 (GNP)

Simunye Developers CC v Lovedale Public FET College and Another [2010] ZAECGHC 121 (9 December 2010)

SOURCES

South African Post Office v De Lacy and Another 2009 (5) SA 255 (SCA)

Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC)

Steradian Consulting (Pty) Limited v Armaments Corporation of South Africa Limited [2011] ZAGPPHC 99 (10 May 2011)

TBP Building & Civils v the East London Industrial Development Zone (Pty) Ltd 2009 JDR 0203 (ECG)

TEB Properties CC v MEC, Department of Health and Social Development, North West [2012] 1 All SA 479 (SCA)

Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works 2008 (1) SA 438 (SCA)

Telkom SA Limited v Merid Training (Pty) Ltd; Bihati Solutions (Pty) Ltd v Telkom SA Limited [2011] ZAGPPHC 1 (7 January 2011)

Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality 2008 (4) SA 346 (T)

Treatment Action Campaign v Minister of Health 2005 (6) SA 363 (T)

Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere [1997] 2 All SA 548 (SCA)

Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another 2011 (1) SA 327 (CC)

WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality and Another 2013 (5) SA 461 (KZD)

Zondi v MEC for Traditional and Local Government Affairs 2005 (3) SA 589 (CC)

SOURCES

Reports, books, articles

ABA *The 2000 Model Procurement Code for State and Local Governments* (2000)

African Development Bank Group *COMESA Public Procurement Reform and Capacity Building Projects Project Performance Evaluation Report* (2012)

AG *Consolidated General Report on the Audit Outcomes of Local Government 2011-12* (2013)

AG *Consolidated General Report on the Audit Outcomes of Local Government 2010-11* (2012)

AG *Consolidated General Report on the National and Provincial Audit Outcomes 2012-2013* (2013)

AG *Consolidated General Report on National and Provincial Audit Outcomes of 2011-12* (2012)

AG *Report of the Auditor General of South Africa on a Performance Audit on the Use of Consultants at Selected National Departments* (2013)

AG *Report of the Auditor-General of South Africa on an investigation into certain alleged procurement irregularities at the Department of Water Affairs* (2010)

AG *Report of the Auditor-General of South Africa on an investigation into the procurement of various contracts at the Gauteng Provincial Department of Roads and Transport* (2011)

AG *Report of the Auditor-General on an investigation into the procurement of the enterprise content management system at the Companies and Intellectual Property Registration Office in South Africa* (2010)

S. Arrowsmith, J. Linarelli and D. Wallace *Regulating Public Procurement* (2000)

T.H. Bahta "The regulatory framework for public procurement in Ethiopia" in G. Quinot & S. Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013)

M. Couzens "Procurement adjudication and the rights of children: *Freedom Stationery (Pty) Ltd v MEC for Education, Eastern Cape* 2011 JOL 26927 (E)" 2012 (15)1 *Potchefstroom Electronic Law Journal* 391

D.N. Dagbanja *The Law of Public Procurement in Ghana* (2011)

DPME MPAT *Report on results of assessment process for 2011/2012* (2012)

DPME MPAT *Report on results of assessment process for 2012/2013* (2013)

SOURCES

- A. Leach *School book procurement in SA needs stronger controls*. (2011) <http://apperi.org/2011/08/04/school-book-procurement-in-sa-needs-stronger-controls/> (downloaded 30/01/2014)
- S.R. Karangizi "The COMESA Public Procurement Reform Initiative" (2005) 14 *Public Procurement Law Review* NA51
- R. Kumar & E. Caborn "The regulatory framework for public procurement in Botswana" in G. Quinot & S. Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013)
- P.J.H. Maree *Investigating an Alternative Administrative-Law System in South Africa* (2013) LLD dissertation, Stellenbosch University
- PP Report No 10 of 2012/13 (2012)
- PP Report No 19 of 2013/14 (2013)
- PP Report No 25 of 2013/14 (2014)
- PP Report 1 of 2012/13 (2012)
- PP Report on an Investigation into Complaints Relating to the Improper Awarding of Tenders by Municipalities in the Limpopo and North West Provinces (2010)
- M. Metcalfe *Report: Verification of Text Books Deliveries in Limpopo* (2012)
- B. Pharasi & J. Miot "Medicines Selection and Procurement in South Africa" 2012/13 *South African Health Review* 177
- G. Quinot "Promotion of social policy through public procurement in Africa" in G. Quinot & S. Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013)
- G. Quinot "Public Procurement" (2011) 1 *Juta's Quarterly Review of South African Law*
- G. Quinot *State Commercial Activity: A Legal Framework* (2009)
- G. Quinot "Worse than Losing a Government Tender: Winning It" (2008) 19 *Stellenbosch Law Review* 101
- J.I. Schwartz "Learning from the United States' Procurement Law Experience: on 'Law Transfer' and its Limitations" (2002) 11 *Public Procurement Law Review* 115
- Report of the Presidential Task Team established to investigate the non-delivery and/or delays in the delivery of Learner, Teacher Support Material (LTSM) in Limpopo schools* (2012)
- I. Rugema "The regulatory framework for public procurement in Rwanda" in G. Quinot & S. Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013)

SOURCES

S.L. Schooner, D.I. Gordon & J.L. Clark "Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations (Working Paper)" (2008) *GWU Legal Studies Research Paper No. 1133234* (SSRN eLibrary <http://ssrn.com/abstract=1133234>)

K. T. Udeh "The regulatory framework for public procurement in Kenya" in G. Quinot & S. Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013)

K.T. Udeh & M.L. Ahmadu "The regulatory framework for public procurement in Nigeria" in G. Quinot & S. Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013)

UNCITRAL *Guide to Enactment of the UNCITRAL Model Law on Public Procurement* (2012)

K. Wall, R. Watermeyer & G. Pirie "Supply chain management and service delivery - 'wagging the dog' : service delivery" (2013) 38:9 *IMIESA* 44-51

S. Williams-Elegbe "The World Bank's Influence on Procurement Reform In Africa" (2013) 21 *African Journal of International and Comparative Law* 95

World Bank *Ghana Country Procurement Assessment Report Volume 1* (2003)

World Bank *Nigeria Country Procurement Assessment Report Volume I* (2000)

World Bank *Nigeria Country Procurement Assessment Report Volume II* (2000)

World Bank *Tanzania Country Procurement Assessment Report Volume II* (2003)

P. Zubane *Alternative Service Delivery Models for the South African Public Service for the Year 2020*. MPhil, Stellenbosch University (2011)



ANNEXURE A

AG Report of the Auditor General of South Africa on a Performance Audit on the Use of Consultants at Selected National Departments (2013) pp 37 - 38

List of findings of non-compliance with applicable public procurement prescripts on the procurement of consultancy services:

SUPPLY CHAIN MANAGEMENT PRACTICE NOTE 3 OF 2003

Non-compliance with *Supply Chain Management Practice Note 3 of 2003* (PN-32003) and the SCM guide were identified. The following are examples of the more common and significant areas:

Planning

- Internal skills/resources were not always considered for a project/duty/study prior to appointing consultants (PN 3-2003 par. 1.5; SCM guide par. 5.1.5)
- Departments sometimes appointed consultants and did not consider appointing persons on a contractual basis in terms of the Public Service Act. Persons appointed in a post on the fixed establishment should be appointed on contract in terms of the Public Service Act (PN 3-2003 par 3; SCM guide par. 5.3.1)
- Consultants were sometimes hired for assignments that were in conflict with

their prior or current obligations. For example, consultants hired to prepare an engineering design for an Infrastructure project should not be engaged to prepare an Independent environmental assessment for the same project. (PN 3-2003 par. 5; SCM guide par. 5.5.1).

Administration

- The standard form of contract was not always signed by the parties involved (PN 3-2003 par. 1.6; SCM guide par. 5.1.6)
- Where projects included important components for the transfer of skills, the terms of reference did not always indicate the objectives, nature, scope and goals of the training programme. It also did not always include details of trainers and trainees, skills to be transferred, timeframes and monitoring and evaluation arrangements (PN 3-2003 par. 8; SCM guide par. 5.8.1)
- The terms of reference documents were not always detailed and did not always comply with the requirements of PN 3-2003 and the SCM guide (PN 3-2003 par. 9.3.1; SCM guide par. 5.9.3.1; 5.9.3.2).

Appointment

- Departments did not always use a competitive bidding process to appoint consultants (PN 3-2003 par 4.1; SCM guide par. 5.4.1)
- Departments classified transactions as urgent or emergency cases, but reasons were sometimes not clearly recorded and approved as required. Urgent cases are cases where early delivery is of critical importance and the invitation of competitive bids is either impossible or impractical. A lack of proper planning does not constitute an urgent case (SCM guide par. 4.7.5).

Tender process

- Tax clearance certificates and proof of registration with controlling authorities and

ANNEXURE B

An outline framework for a statute to create a new public procurement Regulator in South Africa.

THE PUBLIC PROCUREMENT REGULATOR OF SOUTH AFRICA ACT

CHAPTER 1: INTERPRETATION, OBJECT, APPLICATION

1. Definitions
2. Objects of the Act
3. Application

[This section should clarify the overarching application of this statute encompassing all public procurement in South Africa notwithstanding any other legislation]

CHAPTER 2: THE PUBLIC PROCUREMENT REGULATOR

4. Creation of the public procurement Regulator of South Africa
5. Functions of the Regulator
6. Powers of the Regulator
7. Funding of the Regulator
8. Accountability of the Regulator
9. Institutional support to the Regulator

[This section should assign duties to existing organs of state, such as NT, to provide institutional support to the Regulator]

CHAPTER 3: BOARD OF THE PUBLIC PROCUREMENT REGULATOR

10. Constitution of the Board of the Regulator
11. Appointment of members of the Board

[Apart from the appointment procedures in respect of all members of the Board, this section should also set out the procedure to be followed in respect of occasional vacancies on the Board.]

12. Accountability of members of the Board

[This section should set out the particular interests that board members appointed by particular constituencies should represent on the board as well as general accountability duties of board members vis-à-vis their constituencies.]

13. Terms of office, resignations & removal from office of members of the Board
14. Functions and powers of the Board
15. Operating procedure of the Board

16. Committees of the Board

17. Delegation of functions

CHAPTER 3: PUBLIC PROCUREMENT REGULATOR ADMINISTRATION

18. Executive Head of the Administration

19. Appointment of the Executive Head of the Administration

[Apart from the appointment procedure, this section should also set out the qualification criteria for appointment as Head of the Administration as well as filling of occasional vacancies.]

20. Term of office, resignation & removal from office of Executive Head of the Administration

21. Staff of the Administration

[This section should also provide for the transfer of current staff of organs of state fulfilling procurement regulatory functions to the Regulator Administration.]

22. Functions of the Administration

23. General powers of the Administration

CHAPTER 4: ENFORCEMENT COMMITTEE

24. Constitution of enforcement committee

25. Functions and powers of enforcement committee

26. Procedures of enforcement committee

27. Delegation

[This section should set out the power of the enforcement committee to delegate functions to sub-structures of the committee such as panels, in particular to deal with specific cases.]

CHAPTER 5: PROCUREMENT OMBUD

28. Establishment of procurement ombud

[This section should also clarify the relationship between the procurement ombud and the other structures of the Regulator, including the obligation on the other structures to fund and provide institutional support to the office of the ombud.]

29. Appointment of procurement ombud

[Apart from the appointment procedure, this section should also set out the qualification criteria for appointment as procurement ombud as well as filling of occasional vacancies.]

30. Term of office, resignation & removal from office of procurement ombud

31. Accountability of procurement ombud

32. Functions and powers of procurement ombud

33. Delegation

34. Operating procedures of procurement ombud

35. Procurement challenges

[This section should create the right to challenge procurement decisions before the procurement ombud and set out the procedure to be followed by interested parties to challenge procurement decisions.]

36. Staff of the procurement ombud

CHAPTER 6: GENERAL

37. Regulations

[This section should provide for regulations to be made to implement this Act, including listing those matters on which regulations must/may be made. This list should include at least regulations governing the work of the enforcement committee and of the procurement ombud. It is not recommended that this section be used to confer the power to create regulations governing public procurement as such. That power should rather be set out under the sections dealing with the powers of the Board and Administration respectively.]

38. Amendments to statutes

[This section should detail all the consequential amendments to existing legislation necessary to implement the scheme of the procurement Regulator, including those amendments listed in section 7.3.3 of the report.]

39. Transitional arrangements

[This section should provide for transitional arrangements to govern procurement regulation during the establishment of the Regulator, including ongoing regulatory action by existing organs of state, such as the OCPO. The section should also set out the continued operation of current procurement regulatory instruments issued by NT (such as guidelines, circulars, practice/instruction notes and standard procurement documents) and for the transfer of control over those instruments to the Regulator.]

40. Short title and commencement