

Institutional Arrangements

Issues for discussion



Application of Act (s 3)

Institution	Application of the Act
Procuring institutions ie departments, constitutional institutions, local government entities, schedule 2 and 3 public entities	The whole Act
Parliament and Provincial legislatures	Section 1 and chapter 4 (preferential procurement) Note: PPPFA applies to Parliament and provincial legislatures (s 1 of PPPFA)
Tertiary institutions (universities, universities of technology, TVET colleges)	Not applicable? Are tertiary institutions covered by s 217(1)? They do not qualify as organs of state "national, provincial or local sphere of government" or as "any other institution identified in national legislation".
Private bodies?	Private bodies may attract public law duties when exercising public power or performing a public function eg <i>AllPay</i> . The Bill is silent on this.
Problem of fragmentation will continue if certain organs of state are excluded or only partially covered	

Institutional Arrangements

Structure	Function
Public Procurement Office & PTs	Enforcement, monitoring & regulatory
Procuring Institutions	Conduct procurement in accordance with the Act
Public Procurement Tribunal	Powers of review
Minister of Finance	Powers to issue regulations
CIDB	Retains regulatory power, subject to certain amendments
Shareholding Departments	No Mention

Key issues

Public Procurement Office (s 5)

- Composition? Qualification?
- Within NT v An independent body accountable to Parliament?
- Who polices NT's procurement?
- Power to issue binding instructions and prohibit certain practices – opportunity for comment?
- Determine a model policy – prescriptive? Advisory?
- Review institution's policies and advise on amendments.
- Authorise deviations from regs or instruction (s 57). No mention of contract variations?
- Powers of search and seizure, including warrantless searches (ss 50-52)
- **No powers of reconsideration**
- Powers in relation to municipalities – PTs may review SCM policies (s 6(4))

Procuring Institutions (s 7,8)

- Must procure in accordance with Act
- **Powers to review own decisions – implications of *Oudekraal and Kirland*?**
- Develop own policies (s 38(1)(a)(iii) and 51(1)(a)(iii) of PFMA)
- Role of accounting officers/accounting authorities
- Responsible for making procurement decisions (s 7) but at same time must stay in their lane.
- Policy-making and oversight role is more in keeping with King IV and Co Act
- May procure from other organs of state (s 19)
- What is the role of shareholding departments?

Institutions must be properly capacitated to operate effectively

Key issues

Tribunal (s 32 to 49)	Minister (s 58)
<ul style="list-style-type: none">• Award of tenders and debarment decisions may be reviewed• Exercise powers of review, not appeal• Doesn't involve a redetermination based on the merits, additional evidence etc• Review is restricted to the record of the procuring institution• Limited grounds for review• Bottlenecks• Capacity	<ul style="list-style-type: none">• May make regs regarding "any matter required by this Act to be prescribed".• Cf: PPPFA's "necessary or expedient" to achieve object of the Act• Publish a consultation report – highlighting issues raised and responses to issues• Exempt procuring institutions from any provision of the Act for reasons of (a) national security and (b) donor funding (s 56) – no "public interest exemption".

Key issues

CIDB (schedule of amendments)

- CIDB retains power to develop and standardize policies and processes
- Power must be exercised in consultation with PPO.
- Minister of Public Works can issue regs only with the concurrence of the Minister of Finance.
- In the event of a conflict between Public Procurement Act and any other legislation eg CIDB Act, the PPA prevails.

Shareholding Departments

- Not mentioned in the Bill
- SOCs are answerable to their shareholder, the Government through shareholder departments.
- Shareholding departments play an important oversight role in ensuring good governance.
- Need to avoid a duplication of function and blurred lines of authority between S/holding departments, boards and PPO
- S/holder must be empowered to make strategic interventions when board unable to address systemic failures



End of Presentation