

**JUDICIAL COMMISSION OF INQUIRY INTO
ALLEGATIONS OF STATE CAPTURE, CORRUPTION
AND FRAUD IN THE PUBLIC SECTOR INCLUDING
ORGANS OF STATE**

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ACRONYMS

BBBEEA	Broad-based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003)
Constitution	Constitution of the Republic of South Africa Act, 1996
OCPO	Office of the Chief Procurement Officer
MFMA	Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003)
MSCM	Municipal Supply Chain Management Regulations made under the MFMA
Municipal Systems Act	Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000)
PAIA	Promotion of Access to Information Act, 2000 (Act No. 2 of 2000)
PAJA	Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)
PFMA	Public Finance Management Act, 1999 (Act No. 1 of 1999)
PPPFMA	Preferential Procurement Policy Framework Act, 2005 (Act No. 5 of 2000)
SCM	supply chain management
SITA	State Information Technology Agency
SITA Act	State Information Technology Agency, 1998 (Act No. 88 of 1998)
SOC	State-owned- company

1. INTRODUCTION

- 1.1 I, Ndleleni Willie Mathebula, am the Acting Chief Procurement Officer, at the National Treasury of the Republic of the South Africa ("the National Treasury"). This is a position that I have occupied since September 2017.
- 1.2 The Office of the Chief Procurement Officer ("the OCPO") is responsible for regulating procurement and modernizing the supply chain management ("SCM") system across all spheres of Government. This office also plays an oversight role on procurement, so as to improve efficiency and effectiveness in the system. Included in the mandate of the OCPO is the responsibility of promoting, supporting and enforcing transparent and effective management of the SCM system.
- 1.3 Since 2002 and prior to the establishment of the OCPO, I was employed as the Chief Director: Contract Management, under the Specialist Functions Division within the National Treasury. In this position I was responsible for facilitating the arrangement of transversal (cross-cutting) term contracts on behalf of government.
- 1.4 In 2015 I assumed the position of Chief Director: SCM Policy and Legal within the OCPO at the National Treasury. In this position I was responsible for SCM policy development including the setting of norms and standards for implementation thereof. I discharged these responsibilities with oversight over all spheres of government,
- 1.5 The Specialist Functions Divisions of the National Treasury was established in 2001 with a mandate to, *inter alia*, implement a new procurement system in keeping with the Constitution of the Republic of South Africa, 1996 ("the Constitution"), the Preferential Procurement Policy Framework Act, 2005 ("PPPFA") and the Public Finance Management Act, 1999 ("the PFMA") and replace the outdated provisioning system under the now defunct State Tender Board ("STB").
- 1.6 These functions included assuming the responsibility of regulating the SCM and procurement system across all spheres of government in keeping with the Constitution, PPPFA, PFMA and the Local Government: Municipal Finance Management Act of 2003 ("MFMA") until the establishment of the OCPO in 2013.



- 1.7 The PFMA together with the MFMA provide a legal basis upon which a comprehensive oversight function is created. The procurement system in South Africa is underpinned by the Constitution, PPPFA, PFMA and MFMA. Although there are other pieces of legislation that have an impact on procurement, it must be noted, however, that even these prescripts must conform to section 217 of the Constitution.

2. CONTEXT

- 2.1 Procurement is generally described as the function of purchasing goods and services from suppliers. Government is the single largest procurer of goods and services. Government has taken a policy decision to leverage public procurement to support the achievement of broader socio-economic objectives. The size of government procurement spend does, however, give rise to the unintended but considerable potential for abuse of the system.
- 2.2 The Constitution provides that when organs of state procure goods or services, they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness.² This means that organs of state must have reference to the above imperatives when procuring goods or services.
- 2.3 The aim should be to ensure the attainment of value for money – i.e. public money should be spent in an effective and efficient manner.³ In addition, those who participate in competitive bidding processes must be treated fairly and without bias.⁴
- 2.4 The use of a public call for tenders is generally regarded as best practice. In the case of South Africa, the use of open competitive bidding process is considered the best way to ensure compliance with the imperatives in section 217(1) of the Constitution, as these underscore what is best practice. Sections 217(2) and (3) are of equal relevance in giving effect to the constitutional imperatives that mandate a public procurement function.

² Section 217(1) of the Constitution

³ On 'cost-effectiveness', see Collins *English Dictionary* 380 and 524; s 33(3)(c), 195(1)(b) and 215(1) of the Constitution. The COED <http://www.askoxford.com> 25 Jan also defines the word 'cost-effective' as "working productively with minimum wasted effort or expense".

⁴ On 'fairness', see Collins *English Dictionary* 586; Claassen *Legal Words and Phrases* 228; Burton *Legal Thesaurus* 228; OED <http://www.oed.com/> 28 Oct; COED <http://www.askoxford.com> 25 Jan.

2.5 The PPPFA was enacted to fulfill 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.

2.6 It is a known fact that public procurement in South Africa is currently a challenging area of state administration. These are matters that occupy the review of government policy, and review of the procurement regulatory framework.

3. PUBLIC PROCUREMENT IN SOUTH AFRICA

3.1 Public procurement is conducted within a decentralised legal framework in South Africa. It is important to emphasise that in South Africa the procurement architecture is centre-led in that policy development is centralized whereas execution thereof is decentralized, save for strategic transversal goods and services. In this latter regard, the National Treasury facilitates the procurement of transversal goods and services. Outside of transversal goods and services, operationally, the actual day to day procurement of goods and services is conducted by SCM units within individual organs of state, entities, and/or departments.

3.2 The distinct rules that govern individual procurement are formulated at entity/department level as part of the SCM policies and are the responsibility of an entity's accounting officer/authority. The same accounting officer/authority is also primarily tasked with ensuring compliance with the rules.

4. LEGISLATIVE FRAMEWORK

4.1 Regulatory overview

The regulatory landscape is impacted by various pieces of legislation, as noted below.

4.2 Primary procurement legislation

An overview of the national regulatory landscape reveals ten 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:

- (a) PPPFA
- (b) PFMA
- (c) MFMA
- (d) State Tender Board Act, 1968 (Act No. 86 of 1968)
- (e) Broad-based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003)
- (f) Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004)
- (g) Construction Industry Development Board Act, 2000 (Act No. 38 of 2000)
- (h) National Land Transport Act, 2009 (Act No. 5 of 2009)
- (i) National Supplies Procurement Act, 1970 (Act No. 89 of 1970)
- (j) State Information Technology Agency Act, 1998 (Act No. 88 of 1998)

4.3 Procurement legislation specific to entities/sectors /industry/products

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

- (a) Financial Management of Parliament and Provincial Legislatures Act, 2009 (Act No. 10 of 2009)
- (b) Road Traffic Management Corporation Act, 1999 (Act No. 20 of 1999)
- (c) Armaments Corporation of South Africa, Limited Act, 2003 (Act No. 51 of 2003)
- (d) Administrative Adjudication of Road Traffic Offences Act, 1998 (Act No. 46 of 1998)
- (e) Nursing Act, 2005 (Act No. 33 of 2005)
- (f) Public Audit Act, 2004 (Act No. 25 of 2004)
- (g) Health Professions Act, 1974 (Act No. 56 of 1974)
- (h) Housing Act, 1997 (Act No. 107 of 1997)
- (i) Disaster Management Act, 2002 (Act No. 57 of 2002)
- (j) Correctional Services Act, 1998 (Act No.111 of 1998)

4.3.2 While the statutes discussed below 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 sector, industry or product.

- 4.3.3 In most cases these statutes prescribe procurement rules in addition to the rules that would apply to the procurement activities mentioned above, in terms of the more general legislation above. In some instances, however, the specific legislation operates to the exclusion of general rules such as in the case of the Financial Management of Parliament and Provincial Legislatures Act, which governs public procurement by Parliament to the exclusion of the PFMA.
- 4.3.4 The level of detail found in these specific pieces of legislation varies significantly. Thus the Financial Management of Parliament and Provincial Legislatures Act contains an entire chapter setting out procurement rules for Parliament 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" 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".
- 4.3.5 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". "Defence matériel" is defined as "any material, equipment, facilities or services used principally for military purposes". 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.
- 4.3.6 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.
- 4.3.7 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". Premiers and municipal councils have similar powers in respect of provincial and local disasters respectively.

- 4.3.8 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 at fair and reasonable prices as may be determined by the Minister of Finance".

4.4 **Other laws which are relevant for procurement**

When dealing with public procurement, the following statutes are relevant:

- (a) PAIA
- (b) PAJA
- (c) Local Government: Municipal Systems Act, 2000

4.5 **Constitution of the Republic of South Africa, 1996**

- 4.5.1 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 in South Africa. The first reason is the supremacy of the Constitution, which has the result that all other law is subject to the Constitution's prescripts and must be formulated and interpreted in a way that accords with the Constitution. The second reason is that the Constitution expressly creates the foundation for public procurement regulation in South Africa. A third reason is that while the Constitution provides the supreme basis for public procurement regulation it does so only in broad principled terms.
- 4.5.2 To the extent that the public sector relies on public procurement to give effect to 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.
- 4.5.3 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 provisions 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.

4.5.4 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, the following constitutional provisions are of direct relevance:

- (a) section 217, dealing with the basic constitutional requirements of public procurement;
- (b) 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
- (c) section 195, setting out the constitutional values for public administration in South Africa.

4.5.4.1 *Section 217 of Constitution*

4.5.4.1.1 Section 217 of the Constitution is the most relevant for public procurement regulation and provides:

“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.”

4.5.4.1.2 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.

4.5.4.1.3 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).

4.5.4.1.4 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.

Legally binding and justiciable

4.5.4.1.5 The principles set out in section 217(1) create binding legal obligations. 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). From the perspective of challenging procurement decisions in review proceedings the legislative basis for the challenge will be PAJA rather than section 217 itself.

4.5.4.1.6 More generally, the validity of a procurement decision must be determined in terms of the legislative framework creating the system that section 217 (1) calls for in each particular case.

Scope of application

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

- (a) the entity involved; and
- (b) the transaction concluded.

(a) 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". The courts have held that the PPPFA and PFMA are legislation as contemplated in section 217(1) (and by parity of reasoning the MFMA).

(b) 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. The section also does not apply to transactions involving immovable property, i.e. land.

4.5.4.2 Section 33 of Constitution

- 4.5.4.2.1 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.
- 4.5.4.2.2 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. 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. As a result, the rules of administrative law apply to public procurement decisions, which rules are based on section 33 of the Constitution.
- 4.5.4.2.3 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. Reliance must rather be placed on the relevant provision 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.
- 4.5.4.2.4 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 the imperatives of section 33 for their compliance with the constitutional guarantee of administrative justice.

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

4.5.4.3 *Section 195 of Constitution*

4.5.4.3.1 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.
- (c) ...;
- (d) Services must be provided impartially, fairly, equitably and without bias;
- (e) ...;
- (f) Public administration must be accountable;
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information."

4.5.4.3.2 The courts have on a number of occasions assessed particular public conduct for compliance with section 195. 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.

4.5.4.3.3 Section 195 also has an expansive entity coverage and applies to-

- (a) administration in every sphere of government;



- (b) organs of state; and
- (c) public enterprises.

4.5.4.3.4 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 therefore on occasion subjected decisions taken by organs of state *in terms of* existing contracts to administrative law scrutiny, *inter alia*, on the basis of section 195.

4.6 Specific regulatory instruments

Within the constitutional framework set out above, the specific statutory instruments that regulate public procurement should 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 the National Treasury under each.

4.6.1 Preferential Procurement Policy Framework Act

4.6.1.1 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 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.

Preferential procurement policies

4.6.1.2 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. 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.

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

4.6.2 Preferential Procurement Regulations, 2011

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

- 4.6.2.2 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 for how bids are to be adjudicated, both at qualification and award stages, and how to select 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 alignment of the PPPFA to broad-based black economic empowerment under the BBBEEA. The thresholds for the application of the different preference points systems are also set out in the regulations.

- 4.6.2.3 The Preferential Procurement Regulations, 2011 introduced provision for local-content and production in terms of which preference could be given to locally produced goods to support local industrial development. The National Treasury is given a broad mandate to issue "instructions, circulars and guidelines" to facilitate the implementation of such provision. It 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.

4.6.3 Preferential Procurement Regulations, 2017

- 4.6.3.1 The Minister of Finance has, in terms of section 5 of the PPPFA promulgated the Preferential Procurement Regulations, 2017 which took effect on 1 April 2017. These regulations repealed the 2011 regulations discussed above.
- 4.6.3.2 The revision of the Preferential Procurement Regulations of 2011 was largely influenced by the need to provide for a mechanism to empower certain categories

(Small Medium and Micro Enterprises (SMME's) also classified as EMEs or QSEs and enterprises owned by designated groups, (black Co-operatives, youth, women, Township and Rural enterprises, people with disabilities and military veterans) through procurement.

- 4.6.3.3 The revised regulations are also aligned to a pronouncement by government in the 2015 State of the Nation Address, that it would set-aside 30% of appropriate categories of State procurement for purchasing from SMMEs, co-operatives as well as township and rural enterprises. The highlights of the revision are-
- (a) introduction of prequalification criteria which allow for the advancement of selected categories of persons by limiting competition only amongst themselves. This restricts the inclusion of well established companies unless they meet further requirements of subcontracting to these groups should they (established companies) be successful;
 - (b) provision of subcontracting as a condition of tender for tenders above R30 million, which is an acknowledgement that, in the main, high value tenders in the region of R30 million and above tend to be awarded to established companies due to economies of scale and affordability, thereby leaving out categories of aspiring businesses. This provision in the regulations requires all those with the ability to deliver the required service to demonstrate the element of subcontracting to the designated groups already at tendering stage;
 - (c) Increase of the threshold for the application of the 80/20 p reference point system from R1 million to R50 million in order to address the outcry of designated groups who felt that the threshold of R1 million is too insignificant for them to grow to a level of established companies. By increasing this threshold to R50 million, smaller companies now have greater chances to compete in the economy in a meaningful way.
- 4.6.3.4 The regulations aim to use public procurement as a lever to promote socio-economic transformation, empowerment of small enterprises, rural and township enterprises, designated groups and promotion of local industrial development.
- 4.6.3.5 In the main these regulations regulate the following:
- (a) Identification of preference point system, designated sector, pre-qualification criteria, objective criteria and subcontracting;
 - (b) Pre-qualification criteria;
 - (c) Tenders to be evaluated on functionality;
 - (d) 80/20 preference point system;

- (e) 90/10 preference point system;
- (f) Local production and content;
- (g) Subcontracting as condition of tender;
- (h) Award of contracts to tenderers not scoring highest points;
- (i) Subcontracting after award of tender;
- (j) Cancellation of tender;
- (k) Remedies;
- (l) Circulars and Guidelines.

4.6.4 Public Finance Management Act

- 4.6.4.1 Following the Constitution, the PFMA and the MFMA (which is also discussed below) are the most general statutes governing public procurement. The object of the PFMA is "to secure transparency, accountability, and sound management" of all aspects of public finance, hence including public procurement. The PFMA applies to departments,⁵ public entities listed in Schedule 2 or 3, constitutional institutions and provincial legislatures, with the exception of Parliament.
- 4.6.4.2 According to sections 38(1)(a)(iii) and 51(1)(a)(iii) of the PFMA an accounting officer of a department, trading entity or constitutional institution and the accounting authority for a public entity, respectively, must ensure that the institution has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.
- 4.6.4.3 Section 76(4)(c) of the PFMA provides that the National Treasury may make regulations or issue instructions applicable to all institutions to which the PFMA applies concerning the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.
- 4.6.4.4 Section 79 of the PFMA provides that the National Treasury may on good grounds approve a departure from a treasury regulation or instruction or any condition imposed in terms of the PFMA and must promptly inform the Auditor-General in writing when it does so.

⁵ Section 1 of the PFMA defined 'department' to mean a national or provincial department or a national or provincial government component

- 4.6.4.5 Section 92 of the PFMA provides that the Minister, by notice in the *Gazette*, may exempt an institution to which the PFMA applies, or any category of those institutions, from any specific provisions of the PFMA for a period determined in the notice.

Institutional arrangements

- 4.6.4.6 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.
- 4.6.4.7 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". 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 so created.
- 4.6.4.8 The National Treasury and provincial treasuries fulfill an oversight function in respect of financial management within organs of state, including the procurement function.
- 4.6.4.9 The PFMA and the MFMA are the National Treasury's most significant source of legal power in respect of procurement regulation. The PFMA grants National Treasury 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. The National Treasury'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"⁶. In order to fulfill these functions, the National Treasury-

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

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

⁶ Section 6(1) PFMA

- (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 fulfill its responsibilities effectively."⁷

4.6.4.10 At provincial level each provincial treasury fulfills largely similar functions in respect of the particular province. However, the powers of provincial treasuries are intended to be concurrent with those of the National Treasury, rather than operating to the exclusion of the National Treasury's powers. That the National Treasury's powers also extend to provinces is *inter alia* clear from the references to "department" in section 6(2), which is defined in section 1 of the Act as "a national or provincial department or a national or provincial government component" and the reference in section 6(2)(f) to intervention under section 100 of the Constitution, which governs national intervention in provincial administration.

4.6.4.11 The National Treasury's legal mandate in respect of the regulatory regime under the PFMA can be classified into three broad categories:

- (a) Create norms and standards;
- (b) enforce the regulatory regime;
- (c) assist organs of state in implementing the regime.

It is worth noting that the broad ancillary or facultative powers granted in section 6(2)(g) above, which only limit the National Treasury's mandate to the objective of fulfilling its obligations under the Act. There are no restrictions on the nature or form of action taken under that mandate.

4.6.4.12 The National Treasury's general mandate under section 6 is amplified by section 76 of the Act, which grants the National Treasury the more specific power to make

⁷ Section 6(2) PFMA



regulations or issue instructions to institutions covered by the PFMA. Section 76(4)(c) in particular authorises the National Treasury 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 the National Treasury.

- 4.6.4.13 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 the National Treasury and under its supervision.

4.6.5 Treasury Regulations

- 4.6.5.1 Acting in terms of section 76 of the PFMA, the National Treasury has made the Treasury Regulations, which include regulations on public procurement. These regulations set out the framework in terms of which institutions must determine their procurement systems. However, it is important to note that regulation 16A has a limited scope of entity application and does not apply to institutions listed in schedules 2 (major public entities), 3B (national government business enterprises) and 3D (provincial government business enterprises) to the PFMA. The regulation does, however, apply to transactions beyond procurement narrowly, and also includes transactions involving disposal and letting of state assets.
- 4.6.5.2 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.
- 4.6.5.3 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.

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

4.6.5.5 Treasury Regulations also grant the National Treasury and provincial treasuries a reporting mandate in terms of which entities must report on their procurement functions to the National Treasury and provincial treasuries and the latter must report to the National Treasury. In terms of this regulation entities are obliged to comply with the reporting requirements and the National Treasury is given a wide mandate to formulate the information to be included in such reports. The National Treasury 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.

4.6.6 Treasury Instructions/Practice Notes

4.6.6.1 The PFMA authorises the National Treasury to issue instructions to institutions on procurement. The courts have held that where these instructions are issued in terms of legislation or regulations they are legally binding.⁸ Courts have thus assessed the validity of particular procurement decisions against compliance with specific treasury instructions.⁹

4.6.6.2 The National Treasury 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 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.

⁸ *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.

⁹ *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).

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.

4.6.6.3 Deviations

4.6.6.3.1 Regulation 16A6.4 of the Treasury Regulations provides for deviation from the normal procurement processes. The circumstances for deviation should not be taken lightly. Cases where deviation may be permitted would be in cases of emergency, where the goods or services are from a sole supplier. This is made clear by the Treasury Instruction Note 6 of 2007/2008. In other words, there are very limited circumstances when deviation from normal procurement processes would be permitted. This is understandable considering that procurement principles stem from the Constitution.

4.6.6.3.2 The accounting authority is then required to report to the relevant treasury and the Auditor General in the cases of deviation. This is provided for in paragraph 3.4.3 of the Treasury Instruction Note 8 of 2007/2008 which reads as follows:

“Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer/authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer/authority or his/her delegate.”

4.6.6.3.3 Accounting officers/authorities are required to report within ten working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process.

4.6.6.3.4 When deviation (from normal procurement) is sought to be employed, it is important that it is done in accordance with the requirements stated above.

4.6.6.3.5 Due to the abuse of Treasury Regulation 16A6.4, in 2008, National Treasury issued

Practice Note No. 8 of 2007/8 with threshold values for the procurement of goods, works and services by means of petty cash, verbal/written price quotations or competitive bids, directing accounting officers and accounting authorities of departments, constitutional institutions and public entities listed in Schedule 3 to the PFMA that should it be impractical to invite competitive bids for specific procurement like urgent or emergency cases or where there is a sole supplier, the required goods or services may be procured by other means such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. However, where such exceptional case is identified, the affected accounting authority must report within 10 working days to the relevant treasury and Auditor-General all transactions of more than R1 million where Treasury Regulation 16A6.4 was applied to procure goods and services. The objective of this practice note was to prevent the use of Treasury Regulation 16A6.4 to circumvent competitive bidding processes.

4.6.6.3.6 Following the issuance of Practice Note No. 8 of 2007/8, there was a trend that developed regarding expansion and variation of contracts which required another intervention. Therefore, National Treasury issued Instruction Note 32 on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management on 31 May 2011 directing departments, constitutional institutions and public entities listed in Schedule 3 to the PFMA on how to manage expansion or variations of orders against the original contract in exceptional cases as well as prescribing a threshold for contract variations. The limit for normal goods and services was set at 15% or R15 million whichever is the lowest and for construction related contracts at 20% or R20 million of the original contract value whichever is the lowest (including all applicable taxes). Any deviation in excess of the set threshold will only be allowed subject to prior written approval of the relevant treasury.

4.6.6.3.7 However, the implementation of the provision for obtaining relevant treasury approval was postponed through a Supply Chain Management Circular dated 24 April 2012 until a revised instruction was issued. In the result, in the period April 2012 to 2016, the accounting officers and authorities of departments, constitutional institutions and public entities listed in Schedule 3 to the PFMA had to report deviations above R1 million approved by that officer or authority to the Auditor-General.

4.6.6.3.8 In 2016, National Treasury issued Instruction No. 3 2016/17 as the revised instruction to manage deviations, and variations directing departments, public entities listed in

schedules 2 & 3 and constitutional institutions to only deviate from inviting competitive bids in cases of emergency or sole supplier status as well as re-emphasizing the limits set in Instruction Note No. 32 of May 2011 in terms of contract expansion or variations. Paragraph 8 of Instruction No. 3 of 2016/17 dealing with deviations from normal bidding process provides as follows:

- "8.1 The Accounting Officer/Accounting Authority must only deviate from inviting competitive bids in cases of emergency and sole supplier status.*
- 8.2 An emergency procurement may occur when there is a serious and unexpected situation that poses an immediate risk to health, life, property or environment which calls an agency to action and there is insufficient time to invite competitive bids.*
- 8.3 Sole source procurement may occur when there is evidence that only one supplier possesses the unique and singularly available capacity to meet the requirements of the institution.*
- 8.4 The Accounting Officer/Accounting Authority must invite as many suppliers as possible and select the preferred supplier using the competitive bid committee system.*
- 8.5 Any other deviation will be allowed in exceptional cases subject to the prior written approval from the relevant treasury."*

4.6.6.3.9 This means that departments, public entities and constitutional institutions may dispense with a competitive bidding process as long as it is an emergency (e.g. natural disaster) or where there is a sole source service provider. Further it means that departments, public entities and constitutional institutions may vary contracts as long as they remain within the set thresholds.

4.6.6.3.10 Deviations from normal competitive bidding processes are an exception. However, the number of applications for deviations submitted to National Treasury for consideration in the recent past demonstrates the level of poor planning by departments and public entities. Deviations appear to be the norm rather than exception and this resulted in unintended institutionalisation of deviations which is contrary to section 217 of the Constitution, sections 38 and 51 of the PFMA.

4.6.6.3.11 The potential risk in this practice is that certain service providers and suppliers get preferential treatment in the allocation of government contracts, it opens up room for potential abuse of the SCM system, it may promote corruption, it leads to the exclusion of broader participation of suppliers, creates the opportunity for anti-

competitive practices to take root, supports the promotion of monopolies; constrains the assessment of opportunity cost for value for money, and leads to the creation of barriers to entry of new players, SMMEs and enterprises owned by designated persons.

4.6.6.3.12 Despite numerous instructions that the National Treasury has issued to regulate the management of procurement through deviations, there has been an increase in such requests. Weak contract management and poor planning contributed to the so called emergencies that underpinned the deviations requested. As a consequence, some government institutions apply deviations as the norm rather than the exception.

4.6.6.3.13 The intention of the aforementioned instruction was to combat the abuse of deviations at institutional level. The unintended consequence thereof was that most applications for deviations were submitted to the National Treasury for consideration. The National Treasury is of the view that some of these approvals ought not to have been supported. The positive spin off for the National Treasury is that it now knows what is happening and is able to deal with these matters. A second positive development is that whereas not all public entities under the PFMA were previously covered under Treasury Regulation 16A, this Instruction applies to also all public entities.

4.6.6.3.14 The National Treasury is reviewing the framework for deviations.

4.6.6.4 Contract variations and expansions

4.6.6.4.1 The existing prescripts provide accounting officers and accounting authorities of departments, public entities and constitutional institutions with authority to vary or extend contracts within the set limit of 15% or R15 million and 20% or R20 million without the approval of the relevant treasury.

4.6.6.4.2 The risks for approving contract expansions or variations beyond the above threshold is that relevant treasuries may not have the full background, terms and conditions including risks involved in the conclusion of the original contract. At times it becomes very difficult to respond to the requests for variations without full details and background which in many instances relevant institutions do not disclose fully to enable relevant treasuries to make informed decisions.

- 4.6.6.4.3 The information submitted to support and motivate variations at times is insufficient and this tends to delay responses and therefore impact turnaround time and service delivery.

4.6.7 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.

Institutional arrangements

- 4.6.7.1 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.
- 4.6.7.2 The National Treasury and provincial treasuries exercise an oversight function over municipalities under the MFMA. The National Treasury'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. As with the PFMA, the National Treasury has the general power to "take any other appropriate steps necessary to perform its functions effectively". The Minister of Finance may also make regulations or guidelines in order to facilitate the implementation of the MFMA. Departures from these regulations may only occur with approval from the National Treasury, although non-compliance may also be condoned. The National Treasury and provincial treasuries furthermore have the power to require municipalities to report to them on matters related to the MFMA.

Procurement rules

- 4.6.7.3 Unlike the PFMA, the MFMA contains significant procurement rules in the Act itself. These rules apply generally to all procurement undertaken by municipalities, with the exception of contracts between the municipality and another organ of state. 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, albeit within the much narrower framework prescribed by the MFMA.

Municipal Supply Chain Management Regulations

- 4.6.7.4 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 ("the MSCM Regulations"). While remaining true to the basic point of departure that individual municipalities will formulate their own supply chain 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 detailed prescriptions set out in the MSCM Regulations, little discretion is left to municipalities in formulating their own supply chain management policies.
- 4.6.7.5 Unlike the PFMA, the MFMA does not expressly provide the National Treasury 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. Guidelines made under this power will only bind municipalities if the council of the municipality has adopted those guidelines.
- 4.6.7.6 While the MFMA contemplates National Treasury standards, these will only be binding on municipalities if issued in one of the two forms set out above, i.e. regulations or guidelines. There is 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 instructions. An important example is the thresholds for the use of various procurement methods, which are set out in the MSCM Regulations. This is distinct from the approach under the PFMA where the determination of thresholds could be prescribed in regulations.

4.6.8 State Tender Board Act

4.6.8.1 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. The STBA does not seem to be utilised in practice at present.

4.6.8.2 In contrast to the decentralised approach to procurement introduced by the PFMA, 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. In terms of that enactment, the Minister of Finance is granted broad powers to make regulations to facilitate the implementation of the STBA.

4.6.8.3 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-

- (a) issue directives to government departments in respect of procurement;
- (b) take remedial steps to sanction abuse of and enforce compliance with the procurement system;
- (c) accord preference to local content in procurement.

4.6.9 Broad-based Black Economic Empowerment Act

The Black Economic Empowerment regime under the BBBEEA has now been incorporated into the procurement regulation by way of the Preferential Procurement Regulations, 2017. Preference in the award of public contracts is subsequently given on the strength of bidders' status level certificates issued in terms of the BBBEEA, SMMEs and subcontracting to designated groups.

4.6.10 Prevention and Combating of Corrupt Activities Act (Anti - Corruption Act)

4.6.10.1 The Anti - 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.

4.6.10.2 Included in the offences created by this Act are a number of procurement-

specific offences. These pertain to "corrupt activities relating to contracts", "corrupt activities relating to procuring and withdrawal of tenders" and corrupt activities relating to "acquisition of a private interest in any contract, agreement or investment emanating from or connected with" a public body by a public officer.

- 4.6.10.3 The Anti - Corruption Act also creates sanctions specific to procurement offences. The Act authorises the Minister of Finance to establish the Register for Tender Defaulters within the National Treasury, and to appoint an official as the Registrar and to make regulations pertaining to the register. When a person is found guilty of the offence of corruption under section 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 a period determined by the National Treasury. Once endorsement has been ordered, the National Treasury is authorised to impose a number of additional sanctions such as termination of any agreement with the endorsed person or consider claiming damages.

4.6.11 Construction Industry Development Board Act (CIDB Act)

- 4.6.11.1 Construction procurement is governed by the Construction Industry Development Board Act ("the CIDB Act") in addition to the general procurement laws set out above.
- 4.6.11.2 The Construction Industry Development Board ("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". The CIDB is authorised to "promote the standardisation of the procurement process with regard to the construction industry".
- 4.6.11.3 To this end the CIDB "must publish a code of conduct for all construction-related procurement and all participants involved in the procurement process." Significantly, the CIDB's powers relating to standardisation of procurement are expressly restricted to being undertaken "within the framework of the procurement policy of Government". From this provision it is thus clear that the CIDB's powers in relation to public procurement do not trump that of the National Treasury or exclude general procurement regulation. In other words, the CIDB's procurement regulation

must comply with general procurement regulation.

4.6.11.4 The CIDB is mandated to establish a register of contractors "which provides for categories of contractors in a manner which facilitates public sector procurement". The Minister of Public Works is authorised to prescribe the "manner in which public sector construction contracts may be invited, awarded and managed within the framework of the register", but also subject to general procurement policy. Organs of state are obliged to award construction contracts with reference to the register.

4.6.11.5 The Minister of Public Works has issued the Construction Industry Development Regulations under section 33 of the CIDBA. 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. The regulations also require organs of state to comply with the Standard for Uniformity in Construction Procurement ("CIDB Standard"), published by the CIDB Board, in their construction procurement.

4.6.11.6 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. The Standard also contains standard documents to be used in construction procurement.

4.6.11.7 The CIDB Standards requires all parties engaged in construction procurement to comply with the CIDB Code of Conduct.

4.6.12 National Land Transport Act

4.6.12.1 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. These rules are in addition to general procurement laws and the Act specifically requires compliance with general procurement regulation. The Minister of Transport is given the power to prescribe requirements for tenders and contracts under the Act, including standard documents.

4.6.12.2 The Minister of Transport has made regulations under the Act containing further detailed rules on public transport services contracts, including rules on

qualification criteria for such contracts.

4.6.13 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 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".

4.6.14 State Information Technology Agency Act

4.6.14.1 The State Information Technology Agency Act creates the State Information Technology Agency ("SITA") for the purpose of providing information technology ("IT") services to the state administration. The Act obliges all national and provincial departments to obtain IT goods and services from SITA as provider and other IT goods and services through SITA. 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.

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

4.6.15 Local Government: Municipal Systems Act

4.6.15.1 The Municipal 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.

4.6.15.2 Of particular relevance are the provisions governing the delivery of municipal services by means of private contractors. The Municipal Systems Act expressly authorises municipalities to procure the services of private parties to render municipal services. The Act sets out specific procedures to be followed in deciding whether to procure such private services. When the municipality has decided to procure such services from a private contractor, the Municipal Systems Act

obliges the municipality to follow a competitive bidding procedure that complies with the procurement rules set out in Chapter 11 of the MFMA in appointing such service provider.

5. 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 impact on public procurement activities. Apart from PAJA discussed above, a few of these merit attention as being of particular relevance for public procurement law.

5.1 Promotion of Access to Information Act

5.1.1 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.

5.1.2 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, protection of the privacy of natural persons, commercial information of third parties, confidential information of third parties, the economic interests and financial welfare of the Republic and the commercial activities of public bodies.

5.2 Promotion of Administrative Justice Act (PAJA)

5.2.1 As noted in the discussion of section 33 of the Constitution above, PAJA is the legislation that gives effect to the administrative justice rights found in section 33. Since procurement decisions are generally regarded as administrative action it follows that PAJA applies to the procurement process.

5.2.2 PAJA thus plays an important role as one of the primary mechanisms to enforce procurement rules. Section 217 of the Constitution and the PFMA 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.

5.2.3 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 action and what the requirements are for providing reasons for administrative action. 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 a contract. Since these decisions often also amount to administrative action and no specific procedures are created for taking such decisions, PAJA will be the key statutory source setting out the procedure to be followed.

6. PUBLIC PROCUREMENT REFORMS

- (a) It is evident from the regulatory overview that public procurement is regulated in a large number of different statutory instruments. This results in a less-than-ideal regulatory regime which justifies reforms.
- (b) The process to reform public procurement in South Africa is underway. The reform process discussed below involves-
 - (a) review of delegations processes
 - (b) strengthening of procurement planning
 - (c) strengthening of contract management
 - (d) Revision of the Treasury Regulations
 - (e) development of the Public Procurement Bill

6.1 Delegations of authority

- 6.1.1 Delegations of authority with appropriate thresholds are being revised to give effect to the ongoing reforms.
- 6.1.2 Approval procedures to consider requests for deviations and contract variations applications are being enhanced to ensure that no single official has sole and exclusive authority over this process. This includes the review of the procedure to report to the Auditor-General.
- 6.1.3 The review of the treasury regulations is being undertaken so that in future deviations are dealt with in terms of sections 79 and 92 of the PFMA. This exercise includes the review of all other treasury instructions dealing with requests to dispense with competitive bidding process.
- 6.1.4 The intention is that a threshold value be set for requests that need consideration by the National Treasury in terms of section 79 of the PFMA to avoid submission of requests with insignificant values thereby unnecessarily delaying service delivery.
- 6.1.5 Delegations to provincial treasuries in terms of the PFMA up to a specified threshold for section 79 departures to optimize efficiency and service delivery may be a consideration.

6.2 Strengthening of procurement planning

- 6.2.1 The implementation of procurement planning is being enhanced to monitor what is advertised against what is planned to ensure that where there is no plan submitted, government institutions are prohibited from advertising unplanned tenders.
- 6.2.2 The Auditor-General will be requested to include non-compliance with the above procurement planning requirement as part of its audit. Every application will be mapped to submitted procurement plans. Where there is no procurement plan no approval may be granted unless in exceptional circumstances.

6.3 Strengthening of contract management

Capacity for contract management at all spheres of government is to be improved



to ensure that contracts are managed properly and renewed on time to avoid unnecessary contract variations and expansions.

6.4 Revision of Treasury Regulations

Pending Government's process and thereupon the Parliamentary process to consider the Public Procurement Bill, procurement reforms for national and provincial organs of state are envisaged to be introduced through revised Treasury Regulations. Draft regulations will be released for comment soon. The chapters of the draft regulations dealing with supply chain management, infrastructure delivery management and public private partnerships contain procurement rules in much more detail than the current Treasury Regulations, and incorporate many aspects currently regulated through instructions.

6.5 Public Procurement Bill

6.5.1 Due to the current state of procurement legislation discussed above, it has been decided, taking into account the history of South Africa and the developments since the coming into operation of the Constitution, to have a law which creates a single framework regulating procurement. This enactment is to be in line with all applicable stipulations of the Constitution, which remedial measure is intended to contribute to addressing the economic and social challenges of South Africa.

6.5.2 The Public Procurement Bill has been developed and is envisaged to be released for public comment soon. The Public Procurement Bill aims to create a single regulatory framework for public procurement and eliminate fragmentation in laws which deal with procurement in the public sector by, among others—

- (a) determining general procurement requirements;
- (b) providing for an enabling framework for preferential procurement;
- (c) establishing a Public Procurement Regulator within the National Treasury and defining its functions;
- (d) defining the functions of provincial treasuries;
- (e) defining the functions of procuring entities;
- (f) providing for measures to ensure the integrity of the procurement process;
- (g) providing for the power to prescribe different methods of procurement and bidding process;
- (h) setting out a framework for supply chain management;


- (i) providing for infrastructure delivery management;
- (j) providing for a framework on the disposal of assets;
- (k) providing for dispute resolution mechanisms; and
- (l) providing for the repeal and amendment of certain laws.

6.5.3 The Bill proposes to repeal-

- (a) the State Tender Board Act, 1968
- (b) the National Supplies Procurement Act, 1970
- (c) Preferential Procurement Policy Framework Act, 2000
- (d) Chapter 11 of the Municipal Finance Management Act, 2003.

6.5.4 The Bill also proposes, among others, consequential amendments to the Public Finance Management Act, 1999 and the State Information Technology Agency Act, 1998.

Signed and Dated at Pretoria on this the 15th day of August 2018



NDLELENI WILLIE MATHEBULA