

## MINOR DISSERTATION

**“Public Procurement Challenges and Reforms for  
Infrastructure Development in South Africa”****Grant Sinclair Caswell**

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## Introduction

Since the advent of democracy in 1994, the South African government has recognised that in order to sustain and advance economic growth and social development in the country, electricity, water, transport and telecommunications infrastructure will have to be maintained and expanded. Most recently this has been articulated in the National Development Plan 2030 (the 'NDP'),<sup>1</sup> the South African government's latest long-term policy strategy to eliminate poverty and reduce inequality by 2030. The NDP recognises that the development of economic infrastructure is a precondition for the provision of basic services and that while South Africa has a 'good core network of national economic infrastructure', this infrastructure needs to be robust and extensive enough to meet the country's industrial, commercial and household needs.<sup>2</sup> Accordingly, the NDP identifies that government will need to make large investments to propel economic activity and given government's limited finances, it further recognises that seeking private funding is central to achieving the developmental outcomes. The result is that given the scale and complex nature of investing in infrastructure, partnering with the private sector through procurement mechanisms such as public-private partnerships has become fundamental.<sup>3</sup>

Public procurement has taken centre stage in democratic South Africa and it is therefore unsurprising that it is regulated not only at constitutional level, but also by a robust regime of laws and policy mechanisms at national, provincial and local level. In addition to this, the South African courts have also emerged as key role players in the field of South African public procurement law, as they regularly interpret and rule on contentious legal issues which emerge during the procurement process - a natural consequence of the fact that the role and operation of the procurement law regime continues to evolve as government makes increased use of public procurement. The courts' involvement in the development of procurement and administrative law in so far as it relates to procurement is particularly evident where the procurement process relates to large-scale infrastructure projects in fields such as transport and energy. Procurement for the purposes of the development of large infrastructure tends to involve a multitude of administrative processes and decisions which are interrelated and which

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<sup>1</sup> The South African National Planning Commission, *The National Development Plan* (2013) available at <http://goo.gl/1pwFtU> (accessed 23 July 2015).

<sup>2</sup> Ibid at 160.

<sup>3</sup> Ibid.

increasingly demand complex and nuanced responsibilities and considerations for government decision-makers to take into account. As a result of this increasingly intricate matrix of responsibilities and considerations, it is very often the case that the procurement of large infrastructure takes place over extended periods of time. Notwithstanding the robust regime of laws which governs public procurement, the South African procurement system remains plagued by an array of problems. These problems include unnecessary tenders, over-charging, false-billing, poor demand management, scope-creep, unjustifiable escalating costs and the unfortunately ever-present element of corruption.

The direct result of these mounting problems is that the South African government is presently faced with a substantial number of legal and other challenges to its procurement processes - these challenges are launched by a host of interested parties which range from the unsuccessful private sector bidders competing to develop infrastructure projects to, amongst others, civil society organisations and the communities affected by the procurement of the infrastructure. The intricate nature of the procurement process for large infrastructure and the time it takes to conclude the process mean that almost inevitably the legal challenges are launched before the full gamut of administrative decisions have been made and the tender finally awarded. The effects of these challenges are manifest: they create a tension between the need for government to efficiently provide much needed infrastructure in South Africa on the one hand and, on the other, the need for unlawful, unreasonable or procedurally unfair public procurement processes to be legally reviewed.

This tension forms the core subject matter of what will follow. Firstly, the paper will provide an overview of the regulatory regime governing procurement in South Africa, then it will turn to outline the typical process followed when the public-private partnership mode of procurement is used. The paper will then provide a critical analysis of the legal facets of and challenges faced by the South African government's public procurement and administrative law processes in relation to using the public-private partnership model to procure infrastructure. The paper will conclude with final remarks which shall summarily recapitulate some of the core issues which were raised.

## Chapter 1 – Infrastructure Procurement in South Africa

### 1.1 *The regulatory regime governing public procurement in South Africa*

It is the aim of this chapter to provide an overview of the regulatory regime governing the procurement of infrastructure in South Africa. This will be done by firstly examining the nature of the procurement regime under the Constitution and then the laws and some of the policy objects which guide and inform procurement process will be reviewed.

#### 1.1.1 *Public procurement and the Constitution*

It is apposite to acknowledge at the outset that at the centre of South Africa's procurement regulatory regime are the guiding principles articulated in the Constitution.<sup>4</sup> Specifically, section 217(1) stipulates that when an organ of state in the national, provincial or local sphere of government (or any other institution identified in national legislation, for that matter) contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. The corollary of this is that all of the legislation, related regulations and government policies which comprise the regulatory regime in South Africa must serve, protect and promote these five principles outlined in the Constitution. These principles will each be considered in turn.

Bolton notes that the principle of 'competitiveness' has a number of meanings. More formalistically, it has been defined as a process 'involving or determined by rivalry; relating to or characterised by an urge to compete', while more broadly it has been defined to mean a process which is 'free to all' and 'open to the public'.<sup>5</sup> Ultimately however, including competitiveness in section 217(1) is most likely to stem from that part of the definition of the term which speaks to the process whereby commercial entities 'engage in similar economic activities, whether the activity be the production, distribution, sale or purchase of goods or services...as a struggle or contention for superiority.'<sup>6</sup> The clear benefits of including this element in the Constitution is that it compels the state, through its laws, policies and processes, to ensure that it is in a position to compare elements such as pricing and quality when it procures goods and services. Moreover, a further consequence is that government contracts may only then be awarded after a number of entities have been afforded an opportunity to compete for a particular contract – effectively allowing the state to 'shop around' before it spends. Evidently, the manner in which the principle has been included in the Constitution allows the state a degree

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<sup>4</sup> The Constitution of the Republic of South Africa, 1996 (the 'Constitution').

<sup>5</sup> P Bolton, *The Law of Government Procurement in South Africa* (2007), 40-41.

<sup>6</sup> *Ibid.*

of flexibility in order to ensure the outcome is realised. The competition can therefore take the form of solicitation for tenders, getting quotes or competitive negotiations, amongst others.<sup>7</sup> The implications for the private sector are similarly positive: not only is there an incentive to innovate, research and develop in order to remain competitive, but there is also pressure to increase efficiency and reduce production costs and prices for the goods and services they seek to provide.<sup>8</sup> The knock-on advantages of the including ‘competition’ in section 217(1) are therefore manifest.

Closely linked to the competitive element of the procurement process is the principle of cost effectiveness or efficiency. At its core it refers to the ability to provide adequate or optimum return in relation to expenditure and it often serves as a limitation or qualification on the effects which increased competition brings.<sup>9</sup> The principle is a recurring theme in both the Constitution and legislation relating to government administration and procurement: In relation to the Constitution, section 33(3)(c), for example, requires that legislation be enacted to ‘promote an *efficient* administration’, section 195(1)(b) similarly provides for the promotion of the ‘*efficient, economic and effective* use of government resources’ and finally section 251(1) provides that ‘national, provincial and municipal budgets and budgetary processes must... promote the *effective* financial management of the economy, debt and the public sector’.

In relation to procurement, cost-effectiveness is a principle which must permeate the entire process; from planning stage right through to the maintenance and administration of the contract. These stages and the effects of the principle will be discussed in greater detail below; however, as an interim observation it is important to acknowledge that cost-efficiency is not (and should not) be the sole consideration when the state procures goods or services, nor should it refer only to the pricing of the goods or services.<sup>10</sup> Attaining the lowest price should not be determinative; instead, considerations such as the efficiency with which the goods or service can be delivered, reliability, maintenance and operating costs should all be factored into an assessment of the cost-effectiveness of a particular state procurement process.<sup>11</sup> In regard to its limiting effects on the use of competitive procedures, Bolton notes that at all times the principles of cost-effectiveness and competition are interrelated and interconnected. Therefore, notwithstanding the apparently peremptory phrasing of section 217(1), the state is not

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<sup>7</sup> Ibid, 42.

<sup>8</sup> Ibid, 41.

<sup>9</sup> Ibid, 43.

<sup>10</sup> Ibid, 44.

<sup>11</sup> C Turpin, *Government Procurement and Contracts* (1989) at 66.

necessarily required to use competitive procedures in order to obtain value-for-money or a cost-effective result. Where such results may be obtained through limited forms of competitive processes or by none at all, then cost-effectiveness must prevail. Naturally, whether procuring goods or services warrants the use of a fully competitive process, a limited form of competition or none at all depends entirely on the particular circumstances and a diligent consideration of the other variables at play such as efficiency, productivity and the other principles at stake in terms of section 217(1).<sup>12</sup>

In the context of procurement the ‘fairness’ element in section 217(1) requires that processes be free from discrimination, just and appropriate in the circumstances, impartial, in conformity with the rules or standards and one which is uncorrupted or unprejudiced.<sup>13</sup> Thus, in accordance with a constitutional conception of fairness, ‘fairness’ must be understood in both its substantive and procedural forms. Government procurement is administrative in nature and for that reason the use of the word ‘fair’ in section 217(1) of the Constitution could be said to refer to the procedural rather than substantive conception of fairness. In this regard, Bolton notes that procedural fairness finds application in two relationships in the government context: that is, the relationship between the state and private contracting parties, and the relationship between the state and private contracting parties in relation to each other.<sup>14</sup> With regard to the former relationship, procedural fairness implies at the very least that the state should afford potential contractors sufficient access to the procurement process through wide advertisement of government contracts, sufficient time to participate in the process and certainty in relation to the rules of the competition. With regard to the latter relationship, procedural fairness would require that the state treat all competing contracting parties fairly in relation to each other by, for example, allowing the same timelines for the submission of tenders and making the same information available to all tenderers.<sup>15</sup>

The ‘equity’ requirement in section 217(1) is significant in the South African context and is another recurring theme in the Constitution. Formally, it is defined as being that which is fair and right. It serves as one of the broader principles of justice which may be relied on to correct or supplement the law as applied to particular circumstances.<sup>16</sup> Du Plessis explained the equity principle as a mechanism by which general legal norms can be individualised to ensure that

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<sup>12</sup> Bolton op cit (n2) at 45.

<sup>13</sup> Ibid, 47.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid, 48.

<sup>16</sup> Ibid.

those norms can cater to different situations. Thus, in the context of the Constitution, he notes that the values of dignity, equality and freedom all serve as means by which equity can be achieved when dealing with rights-related problems by allowing the broad values to be invoked to tailor norms so that they may be effectively applied particular circumstances.<sup>17</sup> In essence therefore, the ‘equity’ principle ensures that achieving justice may require us to recognise differences in resources, development, race, circumstances and to provide remedies which speak those differences.<sup>18</sup> In the context of procurement the equity principle comes into play most visibly in the context of affirmative action. Given that the Constitution recognises a substantive conception of equality, equity (in the context of procurement) speaks directly to the responsibility on the state to ensure that it uses its contracting power as an empowerment tool in accordance with the requisites of section 9(2) of the Constitution and the aims of section 217(2) and 217(3) which allow for preferential procurement.<sup>19</sup>

The final principle from section 217(1) to be discussed is the requirement for a ‘transparent’ procurement system. The principle refers to the idea of ‘openness’ and it is one of the core values of South Africa’s democratic state. Its inclusion in the section is based on the rationale that interested or affected parties should be free to scrutinise the procurement procedures to foster confidence in government processes. In addition it requires reasoned and rational decision-making to ensure accountability.<sup>20</sup> In the procurement context, transparency is closely linked to the elements of competitiveness and fairness and some of its requirements do overlap. Accordingly, if the ‘transparency’ principle is to be realised during state procurement the process, it has been argued that the process would need to contain the following elements: the terms of the procurement and the criteria upon which decisions will be made must be codified as far as possible, the final decision awarding the contract as well as any interim decisions should be publicised together with reasons where appropriate and finally, the publicised decisions and reasons must be verifiable.<sup>21</sup> This element will be discussed in greater detail below.

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<sup>17</sup> LM Du Plessis, ‘Just legal institutions in an Optimally Just South Africa under the 1996 Constitution’ (1998) 3 *Stell LR* 239 at 244.

<sup>18</sup> Bolton *op cit* (n2) at 50.

<sup>19</sup> *Ibid*, 53.

<sup>20</sup> *Ibid*, 54.

<sup>21</sup> SJ Evenett & BM Hoekman, ‘Transparency in Government Procurement: What can we expect from International Trade Agreements?’ in S Arrowsmith & M Trybus (eds), *Public Procurement: The Continuing Revolution* (2003) at 272. (as cited in Bolton *supra*)

The fact that the aforementioned principles have been constitutionally enshrined, *prima facie* warrants that they should all be complied with whenever the state contracts for goods or services. However, the variable nature of state procurement processes (which very often turns on the nature of the goods or services being procured) means that the weight attached to each of the principles is similarly variable. The total effect must therefore be that the principles in section 217(1) must permeate the entire procurement process and the individual elements must be balanced to ensure overall compliance.<sup>22</sup>

A further consequence of this is that any legislation which is directly aimed at procurement processes must be construed in accordance with the constitutional principles and, if it is found to be inconsistent, it may be declared invalid for its inconsistency with the principles. The legislation governing state procurement processes largely stems from sections 217(2) and (3) of the Constitution. These sections allow organs of state to implement ‘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’ and that ‘national legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented’. In addition, the sections establish a mechanism through which state procurement can be used as a policy tool to realise certain constitutional outcomes, such as the achievement of equality, through preferential or differential treatment of contractors in certain circumstances.

Evidently, even though section 217(1) lists five principles, sections 217(2) and (3) create a mechanism through which justifiable limitations may be placed on the former section. For example, even though section 217(1) requires procurement processes to be ‘fair’ which would mean that contractors would have to be treated equally, sanctioning the use of preferential treatment of contractors in section 217(2) allows equity to prevail to ensure that the award of government contracts take levels of disadvantage into account and the related differing levels of resources and development of vulnerable groups in South Africa.<sup>23</sup> The constitutional provisions in section 217 therefore demonstrably ensure that state funds are spent efficiently, economically and lawfully. The fact that South Africa has constitutionally regulated procurement provides a solid grounding of core principles which should in theory ensure for a good procurement system.

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<sup>22</sup> Bolton op cit (n2) at 56.

<sup>23</sup> Ibid, 60 – 61.

### 1.1.2 *The public procurement legislative framework*

A host of legislation has been enacted to directly give effect to the principles articulated in section 217 of the Constitution and there are a number of provisions in other pieces legislation which incidentally find application in procurement.

Beginning with the legislation constitutionally mandated in section 217(2) and (3), the Preferential Procurement Policy Framework Act (the ‘PPPFA’)<sup>24</sup> seeks to directly regulate the process through which organs of state implement their preferential procurement policies by establishing uniform processes which seek to improve and develop the participation of historically disadvantaged persons or groups as well as small businesses. Naturally, the Regulations to the PPPFA<sup>25</sup> contain the real substance of the legislation and they detail the manner in which the procurement framework created by the PPPFA should operate.<sup>26</sup> Both the PPPFA and the Regulations to the PPPFA make it compulsory for organs of state to implement their preferential procurement policies within the legislated framework. This is done by way of a preference point system for the award of contracts to redress the effects of the discriminatory practices of the apartheid government.

Practically, in regard to the procurement of infrastructure, tenders are called for and bids are evaluated in terms of a point system which takes into account firstly the price and secondly the achievement of goals such as the advancement of previously disadvantaged persons and the implementation of policy objectives such as those contained in the government’s Reconstruction and Development Programme.<sup>27</sup> The PPPFA therefore provides that for government contracts between R30 000 and R1 000 000 the 80/20 points system applies, in terms of which bidders are awarded points out of 80 for price and a maximum of 20 points for preference.<sup>28</sup> For contracts above R1 000 000 the 90/10 points system applies, with points out of 90 for price and a maximum of 10 points for preference.<sup>29</sup> Contracts must be awarded to the bidder who scores the highest points in terms of the applicable point system unless there are objective criteria that justify the award of the contract to another bidder.<sup>30</sup>

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<sup>24</sup> Act 65 of 2000.

<sup>25</sup> GNR 502 of 8 June 2011: Preferential Procurement Regulations, 2011 (Government Gazette No. 34350)

<sup>26</sup> Bolton *op cit* (n2) at 62.

<sup>27</sup> P Bolton, ‘The Regulation of Preferential Procurement in State-Owned Enterprises’ (2010) 1 *TSAR* 101 at 103.

<sup>28</sup> Section 2(b)(ii), PPPFA and regulation 5 of the PPPFA regulations.

<sup>29</sup> Section 2(b)(i), PPPFA and regulation 6 of the PPPFA regulations.

<sup>30</sup> Section 2(1)(f), PPPFA. See also regulation 9 of the PPPFA regulations, which provides for the award of a tender to a bidder that does not necessarily score the highest points provided there are “reasonable and justifiable” grounds for doing so.

Another important legislative consideration is the applicability of the Public Finance Management Act (the ‘PFMA’)<sup>31</sup> during the infrastructure procurement process. The South African National Treasury (the ‘National Treasury’) has referred to the PFMA as ‘one of the most important pieces of legislation passed by the first democratic government in South Africa’.<sup>32</sup> Its key objective is to promote good financial management in order to maximise service delivery through the effective and efficient use of state resources, and it accordingly seeks to modernise public financial management, enhance accountability through improved access to information related to public finance and eliminate wasteful expenditure and corruption.<sup>33</sup> It is undoubtedly relevant to the infrastructure procurement process, particularly with regard to the financing elements of infrastructure development.

One of the foundational functions of the PFMA is that it provides a link between the PPPFA and the Constitution in relation to state-owned enterprises. This is important because state-owned enterprises such as Eskom, Telkom, Transnet, the South African National Roads Agency, the Industrial Development Corporation and South African Airways amongst others, do not fall within the “national, provincial or local sphere of government” as referred to in section 217(1). These entities are however identified in the PFMA, which draws a distinction between national and provincial public entities as well as the different categories of state-owned entities which are listed in schedules 2 and 3. The net effect is that these entities are bound by the Constitution, the PFMA and the PPPFA. State-owned enterprises are thus bound by the financial management provisions in the PFMA when they develop infrastructure just as they are obliged to develop preferential procurement policies in accordance with section 217(2) and (3) of the Constitution read together with the PPPFA and its regulations.

With regard to the PFMA’s regulatory role, there are a number of key provisions relevant for present purposes which may be broadly highlighted. Chapter Five of the PFMA ensures that all national and provincial institutions and entities have accounting officers,<sup>34</sup> sets out their responsibilities<sup>35</sup> and the disciplinary sanctions that apply in the event of negligence in fulfilling these responsibilities. This chapter obliges accounting officers to produce monthly

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<sup>31</sup> Act 1 of 1999. The PFMA must be read together with the Public Finance Management Amendment Act (Act No. 29 of 1999). The two Acts do not make sense on their own - the initial consolidated bill had to be separated into two bills for technical reasons to comply with the Constitution which determines various procedures for the passage of bills through Parliament.

<sup>32</sup> The South African National Treasury, ‘Public Finance Management Act’, *National Treasury* available at <http://www.treasury.gov.za/legislation/pfma/> (accessed 13 July 2015)

<sup>33</sup> *Ibid.*

<sup>34</sup> Section 36, PFMA.

<sup>35</sup> Section 38, PFMA.

and annual financial reports for their relevant political heads in order to prevent overspending on budgets.<sup>36</sup> In accordance with the aforementioned objectives, the chapter clearly clarifies the division of responsibilities between the relevant chief executives or heads of department (the accounting officer) and the political heads (called the ‘executive authority’ – either a Minister or an MEC) when government departments and state organs spend public money.<sup>37</sup>

The ostensible benefits of such a regulatory framework in the context of large infrastructure development programmes is notable. It clearly establishes that the relevant executive authority, as it is termed in the PFMA, is responsible for policy choices and outcomes, while the accounting officer implements the policy and achieves the outcomes by taking responsibility for delivering the outputs defined in the departmental budget. In this way, the PFMA empowers accountability through by unambiguously conferring on parties clear sets of responsibilities: Specifically, the accounting officer prepares the departmental budget (specified in terms of measurable objectives) for the Minister or MEC to approve and present to the legislature for voting and thereafter the accounting officer is responsible for implementing and managing the approved budget.<sup>38</sup>

Chapter Six of the PFMA, similarly regulates the state-owned companies as per the schedules and outlines the fiduciary and other responsibilities of the governing boards of these entities, which are similar to the responsibilities of accounting officers.<sup>39</sup>

Chapter Eight of the PFMA outlines general principles on borrowing and the issuing of guarantees. This chapter gives effect to section 218 of the Constitution on the issuing of guarantees and also regulates the borrowing operations of the national government and determines the person who can borrow or issue a guarantee, indemnity or security on behalf of any national or provincial government entity. In addition, it delineates clearly the purposes for which money can be borrowed for a national or provincial department<sup>40</sup> and similarly sets out the consequences of unauthorised transactions,<sup>41</sup> making illegal any other forms of borrowing or financial commitment, with strict sanctions applying.

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<sup>36</sup> Section 39 - 42, PFMA.

<sup>37</sup> Sections 38(1)(l) and 40(4)(c), PFMA.

<sup>38</sup> The South African National Treasury, ‘Guideline for Accounting Officers – Public Finance Management Act’, *National Treasury* available at

<http://www.treasury.gov.za/legislation/pfma/guidelines/Accounting%20Officers%20Guide%20to%20the%20PFMA.pdf> (accessed 21 July 2015).

<sup>39</sup> Sections 46 – 56, PFMA.

<sup>40</sup> Section 71, PFMA.

<sup>41</sup> Section 68.

Chapter Ten of the PFMA defines financial misconduct, and deals with the procedures for disciplining those public officials guilty of financial misconduct. Importantly, it includes a provision for criminal prosecution to apply where there is gross financial misconduct.<sup>42</sup> Given the financial constraints of the South African government, it frequently seeks financing from the private sector and regional and international lending institutions, particularly for infrastructure development projects. Regulating this process constitutionally and through legislation is therefore paramount in ensuring that public funds are spent efficiently and effectively.

Finally, it is certainly worth examining the constitutional and legislative regime governing local government procurement. The gamut of rules governing local government services, and particularly the contracting out of the delivery of municipal goods and services, which includes the development of municipal infrastructure, is largely found in the Municipal Systems Act.<sup>43</sup> In this regard, the five principles set out in section 217(1) of the constitution, are repeated in section 83(1)(a) of the Municipal Systems Act, however they do only find applicability when a municipality uses a private party for the delivery of a municipal service.

Similarly, with regard to financial management, as is the case with the PFMA, section 14(5) of the Municipal Finance Management Act<sup>44</sup> (the ‘MFMA’) repeats the principles set out in section 217(1), albeit with a limitation set out in section 14(6).<sup>45</sup> Notwithstanding the internal limitations in both the Municipal Systems Act and the MFMA, Bolton adopts the view that municipalities should always comply with the principle of transparency as a foremost objective because ‘the public, as tax payers, have a right to government contracting procedures that are open and transparent... in line with the core aims of the Constitution’<sup>46</sup> particularly where commercial entities exercise public power or carry out public functions.

With regard to the particular provisions of the MFMA, on a broad level the financial regulatory regime it establishes mirrors the provisions of the PFMA with obvious changes as it relates to local government. As Conradie terms it, in the spirit of the Constitution, the MFMA provides for the functions of national and provincial government in the monitoring and support of local

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<sup>42</sup> Section 86, PFMA.

<sup>43</sup> Act 32 of 2000 (as amended by Act 44 of 2003).

<sup>44</sup> Act 56 of 2003.

<sup>45</sup> Section 14(6) provides that ‘This section does not apply to the transfer of a capital asset to another municipality or to a municipal entity or to a national or provincial organ of state in circumstances and in respect of categories of assets approved by the National Treasury, provided that such transfers are in accordance with a prescribed framework.’

<sup>46</sup> Bolton op cit (n2) at 70.

government<sup>47</sup> - and accordingly its import for the regulation of municipal procurement with regard to infrastructure development is manifest.

## ***1.2 The infrastructure procurement process***

Developing infrastructure such as roads and electricity power stations, as opposed to procuring other types of goods and services, is a costly endeavour for any government. The South African context is no exception and since the advent of the country's constitutional democracy in 1994, the government has resorted to the use of public private partnerships (PPPs) to mitigate the fiscal burden that infrastructure development places on the developing economy.

Government's undertaking to procure infrastructure via PPPs is a policy choice demonstrating yet another way in which the state is using procurement as a catalyst for social welfare and economic growth. Procurement via PPPs is certainly not novel; it has been used around the world and it is a particularly prevalent trend amongst developing countries. In South Africa, the use of PPPs to develop infrastructure forms part of government's broader developmental strategy to meet international and national developmental goals such as those contained in the United Nations' Millennium Development Goals,<sup>48</sup> the Accelerated and Shared Growth Initiative for South Africa,<sup>49</sup> the Medium Term Strategic Framework<sup>50</sup> and the National Development Plan,<sup>51</sup> amongst others.<sup>52</sup> Evidently, in South Africa, a link can be established between social welfare and economic growth, the development of infrastructure and government's use of PPPs as a means to procure these ends. The direct consequence of the interconnectedness of these elements is that any challenges which government may face in its infrastructure procurement system in relation to infrastructure PPPs directly impacts its ability

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<sup>47</sup> J Conradie, 'The Municipal Finance Management Act' (2004), 5(1) *Official Journal of the Institute of Municipal Finance Officers* at 12.

<sup>48</sup> United Nations General Assembly Res 55/2 (18 September 2000). The United Nations' Millennium Development Goals were formulated at the United Nations Millennium Summit in 2000. At the summit, 192 member states including South Africa and a contingent of other international organisations, formulated eight critical economic and social development priorities to be achieved by 2015 in key areas such as education, equality, child welfare, the reduction of HIV/AIDS and other diseases, water and sanitation and environmental sustainability. Available at <http://www.un.org/millennium/declaration/ares552e.pdf> (accessed 23 July 2015).

<sup>49</sup> A South African government strategy for raising economic growth and reducing poverty and unemployment by 2014. Available at <http://www.thepresidency.gov.za/docs/reports/asgisa/part2.pdf> (accessed 23 July 2015).

<sup>50</sup> The Medium Terms Strategic Framework (MTSF 2009 – 2014) is a government policy document which identifies developmental challenges in South Africa and outlines a medium-term strategy to achieve those developmental goals. It focuses on ten priority areas intended to improve the living conditions of South Africans. Available at <http://www.thepresidency-dpme.gov.za/news/MTSF/MTSF%202014-2019.pdf> (accessed 23 July 2015).

<sup>51</sup> The National Development Plan op cit (n1).

<sup>52</sup> MC Fombad, 'Enhancing Accountability in Public-Private Partnerships in South Africa' (2014) 18(3) *South African Business Review* 66 at 66.

to achieve economic growth and social welfare goals. For that reason, it is vital to understand the procurement system and the internal and external challenges the South African government faces in order to posit reforms to improve government's ability to achieve developmental goals. Thus, what follows is a critical overview of the typical PPP procurement process in the context of infrastructure development as well as an analysis of some of the key legislative, regulatory and external challenges encumbering the system and hindering infrastructure development.

### 1.2.1 Public-Private Partnerships

National Treasury's PPP Unit defines PPPs, at their most fundamental level, as long term contracts between the public and private sector concluded with 'the main objective of ensuring the delivery of well-maintained, cost-effective public infrastructure or services, by leveraging private sector expertise and transferring risk to the private sector'.<sup>53</sup> This definition accords with international characterisations such as the definition used by international finance agency, Standard and Poor's, which defines PPPs as 'any medium to long-term relationship between the public and private sectors, involving the sharing of risks and rewards of multisector skills, expertise and finance to deliver desired policy outcomes'.<sup>54</sup> For present purposes however the following abbreviated definition will be relied on primarily, in accordance with the definition in Treasury Regulation 16 to the PFMA ('Regulation 16'):<sup>55</sup> A PPP is a contract between a government institution and private party, where the private party performs an institutional function and/or uses state property in terms of output specifications, substantial project risk (financial, technical, operational) is transferred to the private party and the private party benefits through mechanisms such as unitary payments from government budgets and/or user fees generated through use of the infrastructure.<sup>56</sup>

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<sup>53</sup> National Treasury: Public-Private Partnership Unit, 'Introducing Public Private Partnerships in South Africa' (2007). Available at <http://goo.gl/DkTA4O> (accessed on 25 July 2015) at 4.

<sup>54</sup> Standard and Poor's, 'Public Private Partnerships: Global Credit Survey 2005' (2005) *Standard and Poor's New York*.

<sup>55</sup> Regulation 16 of GNR 225 of 15 March 2005: Amendment of Treasury Regulations in terms of Section 76 (Government Gazette No. 27388).

<sup>56</sup> Ibid. Regulation 16 defines public-private partnership as follows:

*"public-private partnership" or "PPP" means a commercial transaction between an institution and a private party in terms of which the private party—*

- (a) performs an institutional function on behalf of the institution; and/or*
- (b) acquires the use of State property for its own commercial purposes; and*
- (c) assumes substantial financial, technical and operational risks in connection with the performance of the institutional function and/or use of State property; and*
- (d) receives a benefit for performing the institutional function or from utilising the State property, either by way of:*

At the outset it is important to note that while PPPs certainly constitute a form of public procurement, in certain key respects they differ from the more traditional procurement mechanism. Typically, during a traditional procurement processes, government bears the costs of capital and operating costs and carries the associated risks such as, for example, any additional costs incurred for late delivery or materials cost overruns. The hallmark of the traditional procurement method is that while the expertise and experience of a private company may be procured for the design and construction of infrastructure, once the asset is delivered, the private company is paid and then leaves and the state or state-owned enterprise bears responsibility for staffing, maintenance, and operation of the goods or services. PPPs diverge from this model in that the public sector procures a full set of services, which includes the infrastructure and related services, from the private sector. The public sector then pays for these over the term of the PPP agreement, based on successful delivery of the infrastructure.

The contrasting hallmark of the PPP model of procurement is thus that the private sector typically puts its own capital at risk, funding its investment in the project with debt and shareholder equity. Accordingly, because of the financial risk the private sector takes, it is motivated to provide a high level of service, as good returns on equity will depend on the quality of services it delivers. Some PPPs, where fees are generated on a user-pay basis, such as toll roads, derive income from which government departments or municipalities can share benefits.<sup>57</sup> Evidently, there are significant benefits of using PPPs to reduce risk to government, particularly in developing countries with limited financial resources. In the South African context, the benefits of the PPP model dovetail with the principles in section 217(1) of the Constitution and other government-driven policy and social objectives, such as black economic empowerment, through aligning the incentives of the private party with the achievement of those objectives. This is borne out in the very tests which Regulation 16 prescribes in order to determine whether the state or a state-organ may make use of the PPP procurement model.

In terms of the section, three tests must be met: firstly, it must be determined whether using the PPP model will ensure that substantial technical, operational and financial risk transferred to the private party to the benefit of government's risk profile; secondly, it must be determined

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- (i) consideration to be paid by the institution which derives from a revenue fund or, where the institution is a national government business enterprise or a provincial government business enterprise, from the revenues of such institution; or*
  - (ii) charges or fees to be collected by the private party from users or customers of a service provided to them; or*
  - (iii) a combination of such consideration and such charges or fees.”*

<sup>57</sup> National Treasury: PPP Unit op cit (n50) at 4.

whether the state or state organ can afford envisaged fee; finally it must be determined, in accordance with the principle in section 217(1) of the Constitution, whether undertaking the project as a PPP is suitable and will result in the state obtaining a value-for-money solution.<sup>58</sup>

Turning to the PPP procurement process itself, the provisions of the PFMA and Regulation 16 form the natural starting point. As described above, Regulation 16 provides a definition of a PPP and, in addition, explicitly sets out the phases and tests that a PPP must progress through: it establishes two broad phases of the PPP project, namely the feasibility study and the procurement phase, and it then superimposes these two broader phases on six more detailed stages. The aim of the process is to ensure that the state institution and the private market bidders who intend to do develop the infrastructure satisfy certain tests and meet the legal requirements set out in the PFMA and Regulation 16.<sup>59</sup>

The feasibility phase is the first of the broad phases that the PPP must progress through. Regulation 16 requires that relevant accounting officer undertake a feasibility study in order to show that commencing with the infrastructure development as a PPP project is beneficial in terms of its ability to meet the state's strategic objectives and other broader government policy aims.<sup>60</sup> The feasibility study must also clearly explain the nature of the institutional function that the PPP will perform and must detail the extent to which the public function may legally be performed by a private party.<sup>61</sup> Perhaps most importantly, in accordance with the section 217(1) constitutional requirement of cost-effectiveness, the study must demonstrate that the PPP project is affordable,<sup>62</sup> that the state will obtain value-for-money<sup>63</sup> and it must clearly chart the financial, technical and operational risks (and mitigation measures in place) for the state.<sup>64</sup> Ultimately, the feasibility study must demonstrate that the state institution undertaking the PPP project has the capacity 'to procure, implement, manage, enforce, monitor and report on the PPP'.<sup>65</sup> It must be noted that satisfying all of the requirements at the feasibility stage is peremptory for the PPP project to progress and determining whether the requirements have indeed been satisfied is the responsibility of the National Treasury. Accordingly, National

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<sup>58</sup> National Treasury: PPP Unit op cit (n50) at 13.

<sup>59</sup> National Treasury: PPP Unit Practice Note 02 of 2004, 'Public Private Partnership Manual', Module 1: South African Regulations for PPPs at ii.

<sup>60</sup> Regulation 16.4.1(a).

<sup>61</sup> Regulation 16.4.1(b)(ii).

<sup>62</sup> Regulation 16.4.1(c).

<sup>63</sup> Regulation 16.4.1(e).

<sup>64</sup> Regulation 16.4.1(d).

<sup>65</sup> Regulation 16.4.1(f).

Treasury will only grant what is referred to as ‘Treasury Approval: I’ in terms of PFMA Regulations 16.4.2 and 16.4.3 should the requirements be met - the state institution will not be allowed to proceed to the procurement phase otherwise.

The procurement phase of the PPP projects is the second of the broad phases. It commences once the state institution has demonstrated to the National Treasury, in terms of the aforementioned feasibility study, that proceeding with the infrastructure project as a PPP is viable. It is thus only at this stage that the state institution will be authorised to invite private market entities to submit bids to undertake the infrastructure project. The process begins with the state institution preparing the request for qualification (‘RFQ’) documents. The RFQ documents enable private market bidders to present to the state institution appropriate information about themselves in a uniform manner allowing bidders to be uniformly evaluated at this stage.<sup>66</sup> The entire object of this stage is to limit the number of private parties eligible to participate in the PPP procurement at the outset, ensuring ‘that the successful bidder will have not only the qualifications to undertake the project but also the capacity to execute it effectively and timeously’.<sup>67</sup> However, it is important to note that before the documents can even be issued to any prospective bidders, the state institution must obtain ‘Treasury Approval: IIA’,<sup>68</sup> the approval of the institution’s designated accounting officer in terms of the PFMA and Regulation 16, as well as any other approvals which may be required in terms of the institutions internal processes.<sup>69</sup> It is only once these approvals have been obtained, that the RFQ can be advertised and the state institution may receive and evaluate the bids.<sup>70</sup>

Once all bids have been received and evaluated by the state institution at the RFQ stage, the state institution will publicise the names of only those bidders it selected as having best met the criteria. This smaller select group of bidders is now deemed to be ‘pre-qualified’ to submit formal bid proposals.<sup>71</sup> The state institution will call for these formal proposals by way of a request for proposals (‘RFP’) document. At this stage it may be noted that while the RFQ stage is predominantly focused on the private entities’ demonstrating their capacity to manage the infrastructure project (by focusing on information such as the entities’ skills, expertise, financial standing, employment equity, amongst others), the RFP stage is predominantly

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<sup>66</sup> National Treasury: PPP Unit Practice Note 06 of 2004, ‘Public Private Partnership Manual’, Module 5: PPP Procurement at 23.

<sup>67</sup> Ibid at 19.

<sup>68</sup> Regulation 16.5.1 – 16.5.2.

<sup>69</sup> National Treasury: PPP Unit op cit (n63) at 24.

<sup>70</sup> Ibid at 25.

<sup>71</sup> Ibid.

focused on the state institution's requirements for the project. The RFP document therefore sets out essential minimum requirements for the infrastructure project, project timelines, payment mechanisms, penalty regimes and other legal requirements such as the draft PPP agreement.<sup>72</sup>

Once the pre-qualified bidders receive the institutions RFP document, they submit their formal proposals for evaluation by the state institution and the bidders' proposals are evaluated on three levels: Firstly, the technical evaluation committee will analyse the bidders' proposals in detail by evaluating bidders for their technical approach to the infrastructure project (scoring factors such as the proposed engineering and design of the project), their legal approach (scoring factors including the bidders' proposed amendments to the standardised draft PPP agreement, which governs the entire relationship between the state and the private entity for the duration of the project), the financial approach (scoring affordability, projected costs and value-for-money, amongst others), black economic empowerment (scoring factors including black ownership of the private entity) and, finally, the total costing or price.<sup>73</sup> Secondly, the evaluation and co-ordination committee (the 'ECC') of the state institution will compile and manage the results obtained by the technical evaluation process, they will assess the scoring and make recommendations regarding the 'best and final offers' process, which allows bidders to amend aspects of their bids to improve their chances of being selected as preferred bidder.<sup>74</sup>

Finally, the project evaluation committee (the 'PEC') is tasked with the final evaluation and appointment process. The PEC consists of the state institution's designated accounting officer and other committee members which the accounting officer appoints. The PEC is tasked with examining the recommendations of the ECC, calling for best and final offers to be made by the bidders' and then appointing a preferred and reserved bidder.<sup>75</sup> As a matter of definition, the preferred bidder is the bidder who the state institution prefers over the others to conclude the final PPP agreement with and develop the infrastructure project. The reserved bidder, as the title suggests, 'waits in reserve' but plays a crucial role as the state institution may require that the reserve bidder replace the preferred bidder should the preferred bidder withdraw from the project or where final negotiations with the preferred bidder compromise the value-for-money aspect of the project.<sup>76</sup>

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<sup>72</sup> Ibid at 27.

<sup>73</sup> Ibid at 45 – 49.

<sup>74</sup> Ibid at 49 – 50.

<sup>75</sup> Ibid at 50 – 54.

<sup>76</sup> Ibid at 58.

The process governing the call for best and final offers from bidders as well as announcing and appointing a preferred and reserved bidder can only take place after the state institution has obtained ‘Treasury Approval: IIB’,<sup>77</sup> which requires that the state institution once again conduct affordability, risk and value-for money assessments.<sup>78</sup> Importantly, at this stage, it must be borne in mind that the PPP agreement has not been concluded between the state institution and either of the bidders. Obtaining Treasury Approval: IIB as well as appointing the preferred and reserved bidder is the penultimate stage, it merely entitles the state institution to commence final negotiations with the preferred bidder with the aim of concluding the PPP agreement which, up until this stage, has merely been in draft stage with various amendments proposed by the bidder. Once final negotiations commence, the object is to ‘bridge gaps, eliminate confusion, and formally clarify terms and conditions’ as well as structure a robust agreement that protects the interests of both the state and the private entity.<sup>79</sup> The aim remains to develop infrastructure in terms of the PPP procurement mechanism in a manner that promotes constitutional and government policy objectives.

As a matter of course, once negotiations have been concluded regarding proposed amendments to the PPP agreement but before the agreement is signed by the institution’s accounting officer and the bidder’s authorised representatives, the state institution must apply for ‘Treasury Approval: III’.<sup>80</sup> This approval amounts to a declaration by the parties that the PPP agreement meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfer in terms of Regulation 16, that the state institution has the requisite capacity to implement, manage, enforce and account for the PPP project and that the state institution has conducted relevant due diligences and that the private entity has the capacity to enter into the PPP agreement.<sup>81</sup> Obtaining Treasury Approval: III is usually included as one of the conditions precedent to the conclusion of the PPP agreement and consequently, once it has been obtained, the agreement may be finally concluded between the state institution and the bidder.

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<sup>77</sup> Regulation 16.5.4 – 16.5.5.

<sup>78</sup> National Treasury: PPP Unit op cit (n63) at 57.

<sup>79</sup> Ibid at 59.

<sup>80</sup> Regulation 16.6.

<sup>81</sup> Ibid.

## Chapter 2 – Challenges in public procurement and proposals for reform

Measuring the efficacy of any procurement system entails not only examining the appropriate rules and regulations governing the system but also the challenges facing the system. As mentioned previously, public procurement in South Africa faces a number of challenges and some of these major challenges will be discussed in further detail in what follows.

### 2.1 *Lack of knowledge, skills and capacity*

It is arguable that a significant number of the problems which are apparent in public procurement in South Africa stems from the lack of proper knowledge, skills and capacity prevalent in the organs of state which use PPPs. This has been a persistent critique of public procurement systems in the country and it has been highlighted as the single greatest impediment to the success of public procurement.<sup>82</sup> Appropriate structures within the various organs of state as well as fully skilled professionals is fundamental to ensuring that procurement systems such as PPPs operate in accordance with constitutional and legislative prerequisites. The South African government has recognised this and has indeed embarked on programmes that educate officials on proper public procurement procedures: in line with the PFMA and the MFMA, departments' and entities' accounting officers and accounting authorities are responsible for education, training and development in accordance with a national framework.<sup>83</sup> However, despite this, research has indicated that many public procurement actors within the public sector continue to lack appropriate knowledge to ensure proper adherence to the rules and regulations.<sup>84</sup> This lack of knowledge serves as the genesis of many of the systemic problems such as unjustifiable costs and scope-creep and also allows for the corruption-related issues such as false billing and unnecessary tenders. On a broader level, the lack of knowledge contributes to the pockets of bad governance in organs of state throughout the three spheres of government and the various state-owned enterprises.

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<sup>82</sup> I.M Ambe & J.A Badenhorst-Weiss, 'A Review of Procurement Practices in the South African Public Sector' (2012) 6 *Journal of Transport and Supply Chain Management* 437 at 454.

<sup>83</sup> The South African National Treasury, 'Public Sector Supply Chain Management Review' (2015) *National Treasury* available at <http://www.treasury.gov.za/publications/other/SCMR%20REPORT%202015.pdf> (accessed 14 June 2016)

<sup>84</sup> S.O Migro & I.M Ambe, 'Evaluation of the Implementation of Public Sector Supply Chain Management and Challenges: A case study of the Central District Municipality, North West Province, South Africa' (2008) 2 *African Journal of Business Management* 230 at 235.

## 2.2 *Non-compliance with laws, regulations and tender conditions*

The review conducted earlier in this dissertation clearly indicates that there is an extensive regime of laws, regulations and policies that governs public procurement and specifically PPPs in South Africa. Given this extensive regime it is therefore unsurprising that the ostensibly simple issue of non-compliance with the various processes remains a challenge. The organs of state' and state owned entities' non-compliance with the legislative regime relates to a host of issues and ensuring compliance with this regime is essential to ensuring a lawful procurement process. There are a number of areas where the issue of non-compliance is particularly material, such as those instances where procuring entities have a tendency to not use competitive processes for bids when it is a requisite. However, there are also areas where non-compliance is less material but equally prevalent; such as those instances where the preference point system is used incorrectly, unqualified suppliers are selected, bids are passed over for incorrect reasons or where thresholds and time periods are unlawfully extended.<sup>85</sup> In what follows, one of the areas in which non-compliance frequently occurs will be considered.

### 2.2.1 *The regulatory regime governing non-compliance*

The legal regime governing public procurement explicitly requires that organs of state and state owned enterprises only consider compliant tenders. That is, only those tenders which have complied with all of the aspects of the invitation to tender and any of the other requirements stipulated by the procuring entity in its tender documents.<sup>86</sup> These requirements are usually indicated at the outset but are most patent at the RFQ and RFP stages. In essence they require that bidders comply with any tender conditions set by the procuring entity. Failing to comply would defeat the underlying purpose of supplying information to bidders for the purpose of preparing their tenders and would amount to unfairness if some bidders were allowed to circumvent tender conditions. Moreover, it also serves the purpose of ensuring equity amongst the bidders, promoting objectivity and encouraging wide competition for the same work on the same terms and conditions. There is also a legitimate expectation that by requiring compliant tenders, the procuring entity is bound to comply with its own tender conditions.<sup>87</sup>

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<sup>85</sup> I.M Ambe & J.A Badenhorst-Weiss op cit (n82) at 455.

<sup>86</sup> P. Bolton 'Disqualification for Non-compliance with Public Tender Conditions' (2014) 17(6) PER/PELJ 2314.

<sup>87</sup> Ibid at

It has been noted that very often, procuring entities provide insufficient motivation for deviations from the conventional lawful procurement processes and that these entities often do not have adequate controls and procedures when such deviations are required.<sup>88</sup> However there are certainly grounds to motivate that there are instances where strict adherence to tender conditions is not an inflexible rule.<sup>89</sup> Bolton raises a number of questions in this regard. She asks, for example, whether it is peremptory for a procuring entity to disqualify a tender that is not signed by a bidder where such a tender is deemed to be a non-compliant tender? Or where a particular bidder submits a copy of a tax clearance certificate and not an original one as stipulated in the tender invitation? Or further where the price in words in a tender document differs from the price stipulated in numbers?<sup>90</sup> It is clearly the case that there is a host of mistakes (ranging from the more substantive to the more ‘clerical’ in nature) which may occur during the tender process and it is important to distil where the line should be drawn before a tender is deemed to be non-compliant. These instances of variable degrees of non-compliance create their own issues. Namely, it warrants consideration of the extent of procuring entities’ discretion to condone mistakes or omissions in tenders, whether courts have the jurisdiction to order that a procuring entity exercise its discretion in a particular way as well as whether it may order that a bidder be allowed to correct a mistake or omission.<sup>91</sup>

At international level, the United Nations Commission on International Trade Law (UNCITRAL): Model Law on Public Procurement<sup>92</sup> deals with the examination and evaluation of tenders. It provides as follows in Article 43:

“1. (a) *...the procuring entity shall regard a tender as responsive if it conforms to all requirements set out in the solicitation documents in accordance with article 10 of this Law.*

(b) *The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviations*

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<sup>88</sup> I.M Ambe & J.A Badenhorst-Weiss op cit (n82) at 455.

<sup>89</sup> Bolton op cit (n 86) at 2314.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid at 2315.

<sup>92</sup> United Nations General Assembly Resolution 66/95 of 9 December 2011, *United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement*.

*shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.*

2. *The procuring entity shall reject a tender:*

(c) *If the tender is not responsive.”*

The guidelines provided by the World Bank similarly state as follows:

*“The Borrower shall ascertain whether the bids:*

*(a) meet the eligibility requirements specified in paragraph 1.8, 1.9, and 1.10 of these Guidelines;*

*(b) have been properly signed;*

*(c) are accompanied by the required securities or required declaration signed as specified in paragraph 2.14 of the Guidelines;*

*(d) are substantially responsive to the bidding documents; and*

*(e) are otherwise generally in order.*

*If a bid, including with regard to the required bid security, is not substantially responsive, that is, it contains material deviations from or reservations to the terms, conditions and specifications in the bidding documents, it shall not be considered further. The bidder shall neither be permitted nor invited by the Borrower to correct or withdraw material deviations or reservations once bids have been opened.”<sup>93</sup>*

The provisions of the international instruments above are largely uniform vis-à-vis the manner in which procuring entities’ treat the level of compliance with tender conditions. Both the UNCITRAL and World Bank provisions deem a compliant tender as one which complies with all of the ‘material’ or ‘substantial’ aspects of the tender conditions set out in the tender invitation. Accordingly, organs of state and state enterprises are allowed to consider tenders even if their bids contain minor deviations that are not materially different from the terms and conditions set out in the tender documents or if the mistakes are formal or ‘clerical’ in nature.

In South African context the legal and regulatory regime governing public procurement similarly emphasises the importance of compliance with both the relevant laws and regulations as well as the terms and conditions of the tender. While there are instances where the more peremptory language is used in the South African context, Bolton notes that throughout the

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<sup>93</sup> The World Bank, *The World Bank Procurement Guidelines: Procurement of Goods, Works and Non-Consulting Services Under IBRD Loans and IDA Credits & Grants by World Bank Borrowers* (Washington, 2011) at paragraph 2.48.

public procurement regulatory regime, reference is frequently made to the terms 'acceptable' tender as opposed to 'compliant' in certain instances.<sup>94</sup> This language is apparent in the PPPFA, which provides that procuring entities should only consider 'acceptable' tenders, which it defines in Section 1(i) as:

*'...any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.'*

National Treasury has further stated in a Practice Note that a tender will only be deemed to be 'acceptable' if:

- a) It complies in all respect with the specification and conditions of the bid;*
- b) The bidder completed and signed all the prescribed bid forms to enable the principal to evaluate the submitted bid;*
- c) The bidder submitted the required tax clearance certificate and other clearance/registration forms as prescribed by various acts and/or in the bid documentation; and*
- d) The bidder has the necessary capacity and ability to execute the contract.'*<sup>95</sup>

The Practice Note goes on to state further that:

*'...when any [tender] is passed over or regarded as non-responsive, the reasons for passing over such [tender] must be defensible in any court of law. Examples in this regard may include negative banking reports, non-submission of tax clearance certificates, not having the necessary capacity and / or capability, being listed on the Register for Tender Defaulters, etc. Deviation by more than a predetermined percentage from the cost estimate of the project / commodity cannot be regarded as a justifiable reason for the rejection of a [tender] and has, therefore, not been approved as an evaluation norm by the National Treasury.'*<sup>96</sup>

The more peremptory language used in the PPPFA differs from the broader definitions used in the international instruments which employ terms such as 'material' or 'substantial' compliance. There are also no provisions governing the waiver of immaterial instances of non-compliance. The result is that organs of state and state enterprises in South Africa are

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<sup>94</sup> Bolton op cit (n 86) at 2320.

<sup>95</sup> The South African National Treasury Practice Note 2 of 2006 at para 1.2.2.

<sup>96</sup> Ibid at paras 1.2.3. to 1.2.4.

obliged to exclude bids that fail to comply with the terms and conditions of the tender – there is no legislated discretion in this regard.<sup>97</sup>

### 2.2.2 *The South African courts' approach to non-compliance*

Given the lack of legislated discretion, it is vital to examine the South African courts' treatment of compliance with tender conditions. It was mentioned early on in this paper that the courts frequently rule on contentious issues such as these. Arguably, with PPPs for large infrastructure projects where the costs commonly run into billions of Rands, it is clear that the stakes are particularly high. Since the constitutionalisation of South Africa's public procurement regime in 1994, courts have been compelled to confront the issue of what constitutes an 'acceptable tender' as set out in the regime. Accordingly, what will follow is an overview of how the courts have dealt with the issue of compliance with the terms and conditions of tender.

The Supreme Court of Appeal (SCA) was one of the first divisions to tackle this in the case of *Metro Projects CC and Another v Klerksdorp Local Municipality and Others*<sup>98</sup> (the 'Metro Projects' case). In the *Metro Projects* case, the Municipality had put out a tender to have a large township within its jurisdiction developed. The tender was awarded to a bidder who was afforded an opportunity by a municipal official to amend its tender despite the fact that the formal tender process has been closed. The court did not rule on whether the deception that led to the opportunity was afforded negligently or actively perpetrated unlawfully by the official in cooperation with the bidder; however, what was apparent was that it allowed the bidder to ensure that its tender was acceptable.<sup>99</sup> The SCA referred to the seminal case of *Logbro Properties CC v Bedderson NO and Others*<sup>100</sup> in which Cameron JA referred to the 'ever-flexible duty to act fairly' that rested on a tender committee and then held that:

*'Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a [bidder] to explain an ambiguity in its tender; it may be fair to allow a [bidder] to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not*

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<sup>97</sup> Bolton op cit (n 86) at 2321.

<sup>98</sup> (2004) 1 All SA 504 (SCA).

<sup>99</sup> Ibid at paras 1 to 10.

<sup>100</sup> (2003) 1 All SA 424 (SCA) at paras 8 to 9.

*cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.’<sup>101</sup>*

The SCA held that the deception which occurred in the *Metro Projects* case denuded the tender process of the fundamental element of fairness which demanded that tenders were evaluated equally. Where this occurs, the court went on, the essence of a tender process was compromised and the other competing bidders were prejudiced, regardless of whether or not they in fact stood a chance of winning the tender or not.<sup>102</sup> The court reiterated that the PPPFA explicitly defines what constitutes an acceptable tender but noted that:

*‘There are degrees of compliance with any standard and it is notoriously difficult to assess whether less than perfect compliance falls on one side or the other of the validity divide. Whether or not there can in any particular case be said to have been compliance with ‘the specifications and conditions of tender’ may not be an easy question to answer.’<sup>103</sup>*

In the *Metro Projects* case however the court found that the tender before the municipality in question was not the non-compliant one initially made by the bidder.<sup>104</sup> Accordingly, the award of the tender was set aside.

The SCA pronounced on the meaning of ‘acceptable tender’ a year later in the case of *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*.<sup>105</sup> In this matter, the bidder submitted a tender which included reduced prices for services which would not need to be done as this work was already the subject of municipal tender which the provincial office was not aware of.<sup>106</sup> The tender was awarded to this bidder and an unsuccessful bidder challenged the award on the basis that other bidders who tendered on the basis that all the work had to be done were prejudiced.<sup>107</sup> Ultimately the court ruled that the successful bidder’s tender offended each of the core values set out in section 217(1) of the Constitution and that it would not be a tender which is ‘acceptable’ within the meaning of the Preferential Act. The court held as follows on the definition of ‘acceptable tender’ in terms of the definition articulated in the PPPFA:

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<sup>101</sup> The *Metro Projects* case op cit (n 98) at para 13.

<sup>102</sup> Ibid at para 14.

<sup>103</sup> Ibid at para 15.

<sup>104</sup> Ibid.

<sup>105</sup> (2005) 4 All SA 487 (SCA).

<sup>106</sup> Ibid at paras 1 to 10.

<sup>107</sup> Ibid at para 14.

*'The definition of 'acceptable tender' in the Preferential Act must be construed against the background of the system envisaged by s 217(1) of the Constitution, namely one which is "fair, equitable, transparent, competitive and cost-effective". In other words, whether "the tender in all respects complies with the specifications and conditions set out in the contract documents" must be judged against these values.'*<sup>108</sup>

The SCA's decision in the case of *Minister of Social Development and Others v Phoenix Cash & Carry PMB CC*<sup>109</sup> is similarly relevant to the issue of compliance with the terms and conditions of tender. In this case, the National Department of Social Development disqualified the bidder's tender for non-compliance in respect of certain financial aspects of its tender. Specifically, the Department of Social Development excluded the bidder on the basis that as a result of the fact that it had failed to provide mandatory information such as its financial statements.<sup>110</sup> The court invoked its findings in the *Metro Projects* case on the ever-flexible duty of a tender committee to act fairly and that fairness must be decided in the context of the circumstances of each case.<sup>111</sup> Ultimately the court found that the Department of Social Development placed undue emphasis on a relatively formal issue at the expense of substance and held, in relation to the provisions of section 217(1) of the Constitution, that there is a need for organs of state and state-owned enterprises to:

*'...appreciate the difference between formal shortcomings which go to the heart of the process and the elevation of matters of subsidiary importance to a level which determines the fate of the tender.'*<sup>112</sup>

This approach was also adopted by the SCA in the case *Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others* (the '*Millennium Waste Management*' case).<sup>113</sup> The case concerned the decision by the Provincial Department of Health and Social Development to award a tender to a consortium of companies for the provision of services relating to the removal, treatment and disposal of healthcare waste material from a number of hospitals in the province of Limpopo.<sup>114</sup> The appellant in the matter was an unsuccessful bidder who alleged that its tender should not have been disqualified merely

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<sup>108</sup> Ibid.

<sup>109</sup> (2007) 3 All SA 115 (SCA).

<sup>110</sup> Ibid at para 6 to 15.

<sup>111</sup> Ibid at para 19.

<sup>112</sup> Ibid at para 2.

<sup>113</sup> (2008) 2 All SA 145 (SCA).

<sup>114</sup> Ibid at

because it failed to sign a mandatory ‘declaration of interest’ which required bidders to indicate whether they had any ties to the department. The consortium had initialled every page of the document but failed to sign the last page.<sup>115</sup>

The department’s tender committee disqualified the consortium on two bases: Firstly, it believed that it did not have the power to condone the consortium’s non-compliance with the terms and conditions of the tender itself. Secondly, the department claimed that the consortium’s tender was not ‘acceptable’ in law in accordance with the definition of ‘acceptable tender’ as defined in the PPPFA.<sup>116</sup> On the first ground, the court relied on the regulations to the Northern Transvaal Tender Board Act,<sup>117</sup> which states as follows in Regulation 5(c):

*“... the Board may accept any offer notwithstanding the fact that the offer was not made in response to any particular tender invitation, or does not comply with the tender invitation in respect of which the offer has been made.”*<sup>118</sup>

Accordingly, the court found that the department did in fact have the power to legally condone the consortium’s non-compliance with the peremptory requirements of the tender. It further held that, as a general principle, condonation may be granted by the body in who’s whose benefit the condition was enacted provided that such condonation is not incompatible with public interest.<sup>119</sup> In the *Millennium Waste Management* case, the court found that condoning the consortium’s failure to sign the form would have been in the public interest because it would have promoted competition amongst the bidders in accordance with the requisites of section 217(1) of the Constitution.<sup>120</sup>

The second ground which the department relied on to disqualify the consortium’s bid was also rejected by the court. When dealing with the ‘acceptability’ of the bid in the context of the PPPFA, the court held that when Parliament promulgated the PPPFA:

*“...it was complying with the obligation imposed by s 217(3) of the Constitution which required that legislation be passed in order to give effect to the implementation of a*

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<sup>115</sup> Ibid at paras 5 and 11.

<sup>116</sup> Ibid at para 14.

<sup>117</sup> Act 2 of 1994.

<sup>118</sup> Regulation 5(c) Regulations in terms of the Northern Transvaal Tender Board Act, Provincial Notice 4 of 1997 (14 February 1997).

<sup>119</sup> *Millennium Waste Management* op cit (n 113) at para 17.

<sup>120</sup> Ibid.

*procurement policy referred to in s 217(2). Therefore, the definition in the statute must be construed within the context of the entire s 217 while striving for an interpretation which promotes "the spirit, purport and objects of the Bill of Rights" as required by s 39(2) of the Constitution.*<sup>121</sup>

The court held that the definition of an ‘acceptable’ tender cannot be given a literal meaning. Adopting this approach would mean that bidders would be compelled to have their offers comply with the terms and conditions of tender even if those terms and conditions are immaterial, unreasonable or unconstitutional.<sup>122</sup> In this instance, the correct approach would require that the department take into account the purpose of the declaration of interest form in relation to the entire tender process. The court held that the conditions of tender should not be applied mechanically without regard to the constitutional principles. The department’s decision was thus based on its erroneous belief that the consortium’s omission amounted to a failure to comply with a legislative condition in the PPPFA – a mistake in law as contemplated in section 6(2)(d) of the Promotion of Administrative Justice Act (the ‘PAJA’).<sup>123</sup> The result was that the tender process followed by the department was deemed to be inconsistent with the PAJA and the Constitution and its decision to disqualify the consortium had to be set aside.<sup>124</sup>

The foregoing review of the case law demonstrates that South African courts appear to be adopting a flexible approach to the issue of compliance with tender conditions. While the term ‘acceptable tender’ is defined narrowly in the PPPFA, the courts have linked it to section 217(1) of the Constitution and emphasised that organs of state and state owned enterprises must draw a distinction between shortcomings in tenders which are formal and those which are substantive. Bolton notes that section 217 of the Constitution mitigates the prescriptive wording contained in the PPPFA because procuring entities are obliged to interpret the definition of an acceptable tender with reference to the principles in section 217(1).<sup>125</sup> Consequently, in accordance with the international instruments referred to above, only substantial or material compliance is required. This allows tenders to be deemed to be ‘acceptable’ even if they contain minor deviations that do not materially alter or depart from the terms and conditions prescribed

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<sup>121</sup> Ibid at para 18.

<sup>122</sup> Ibid at para 19.

<sup>123</sup> Act 3 of 2000.

<sup>124</sup> *Millennium Waste Management* op cit (n 113) at para 21.

<sup>125</sup> Bolton op cit (n 86) at 2336.

by the tender documents, or if they contain errors or oversights that can be corrected without touching on the substance of the tender.<sup>126</sup>

Notwithstanding the historical case law review outlined above, it is worth noting that the SCA adopted a different approach in the case *Dr JS Moroka Municipality and Others v Betram (Pty) Limited* (the '*Dr JS Moroka Municipality*' case).<sup>127</sup> The municipality in question had published an advertisement calling for tenders for the provision of toilets. In the invitation to tender it was explicitly stated that a failure to submit the required documents would 'render a tender liable to rejection' and, in addition, it listed a number of documents as being 'minimum qualifying requirements' to be made available as 'the prerequisite for (tenderers) to qualify for evaluation'. As part of the terms and conditions of the tender bidders were thus required to be in good standing with the South African Revenue Service and it was therefore necessary for them to submit a tax clearance certificate.<sup>128</sup> The municipality received a number of tenders - the first respondent's tender was rejected on the basis that it submitted a copy of a tax clearance certificate and not an original. The tender was accordingly awarded to the second respondent instead despite the fact that the second respondent's quote was almost R2 million higher than that of the first respondent.

In the High Court, it was held that the disqualification of the first respondent's tender had been administratively unfair. The High Court therefore declared both the exclusion of the first respondent's tender and the consequent award of the contract to the second respondent to be invalid. The High Court did however recognise that the contract had already been partially completed and, in order to avoid the second respondent being unnecessarily prejudiced, it granted further relief similar to that issued by this court in the *Millennium Waste Management* case<sup>129</sup> - essentially obliging the municipality to evaluate the tender of the first respondent, compare it to that of the second respondent and then to accept whichever of the two was found to be preferable. The High Court reasoned that it was in any event the municipality's duty to determine whether the first respondent's tax affairs were in order and, for this purpose, the submission of an original tax clearance certificate was not a 'critical requirement'.<sup>130</sup>

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<sup>126</sup> Ibid at 2337.

<sup>127</sup> (2014) 1 All SA 545 (SCA).

<sup>128</sup> Ibid at para 2.

<sup>129</sup> *Millennium Waste Management* op cit (n 113).

<sup>130</sup> *Dr JS Moroka Municipality* op cit (n 127) at para 9.

The municipality unsurprisingly appealed this decision. The SCA found that the underlying reasoning of the High Court was ‘doubtful’ given the fact that the secrecy provisions contained in section 4 of the Income Tax Act<sup>131</sup> would have made it particularly challenging for a municipality to investigate the tax affairs of any tenderer.<sup>132</sup> However, more pertinently, the SCA held that:

*‘...it was for the municipality, and not the court, to decide what should be a prerequisite for a valid tender, and a failure to comply with prescribed conditions will result in a tender being disqualified as an ‘acceptable tender’ under by the PPPFA unless those conditions are immaterial, unreasonable or unconstitutional.’<sup>133</sup>*

The SCA added that the requirement that tenders should only be awarded to persons whose tax affairs have been declared by SARS to be in order is evident throughout the legislation and regulations governing public procurement and it was never argued that this requirement is in any way unconstitutional, unreasonable, irrelevant or immaterial. Moreover, it was noted that none of the respondents argued that it was unreasonable, irrelevant or immaterial for the municipality to have required an original, rather than a copy, of a tax clearance certificate.<sup>134</sup> The court also did not accept the first respondent’s argument that the municipality had discretion to condone non-compliance with a peremptory condition of tender. Referring to a previous decision of the SCA it was then held that an administrative authority has no inherent power to condone failure to comply with a peremptory requirement - it only has such power if it has been afforded the discretion to do so.<sup>135</sup> Similarly, the tender documents themselves did not afford the municipality any discretion to condone non-compliance with the terms and conditions of tender.<sup>136</sup>

Ultimately, seemingly contrary to the line of precedent which came before it, the court in the *Dr JS Moroka Municipality* case held as follows:

*‘...insofar as the judgment in the Millennium Waste Management case may be construed as accepting that a failure to comply with the peremptory requirement of a*

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<sup>131</sup> Act 58 of 1962.

<sup>132</sup> *Dr JS Moroka Municipality* op cit (n 127) at para 10.

<sup>133</sup> *Ibid* at para 10.

<sup>134</sup> *Ibid* at para 11.

<sup>135</sup> *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs v Smith* 2004 (1) SA 308 (SCA) para 31.

<sup>136</sup> *Dr JS Moroka Municipality* op cit (n 127) at paras 14 - 15.

*tender may be condoned by a municipal functionary who is of the view that it would be in the public interest for such tender to be accepted, it should be regarded as incorrect.*<sup>137</sup>

### 2.2.3 A critique of the courts' approach to non-compliance

It is trite that decisions to exclude bidders from a tender process amounts to administrative action and may be subjected to judicial review. Judicial oversight is fundamental to ensuring that these decisions are constitutively compliant and, as is evident from the review of the case law above, our courts have indeed exercised their oversight on many occasions with vastly divergent outcomes. This should not at all be surprising given the fact that the administration of justice is highly contextual and fact sensitive. What may amount to an administratively fair exclusion of a bidder on grounds of non-responsiveness in one context may not be regarded as fair in a different context. Judicial pronouncements on the issue of non-compliance must therefore be understood in the factual matrix of each decided case.<sup>138</sup>

The decision in the *Dr JS Moroka Municipality* case was decided in the context of the submission of tax clearance certificates, but the findings of the SCA will also naturally be applicable to compliance with tender conditions more generally. In that case, the court effectively adopted a stringent approach to compliance with tender conditions. Given the potentially far-reaching implications of this approach as well as the strong line of cases that came before it which appear to adopt a more flexible approach, it is essential to interrogate the SCA's findings in the matter. Bolton has opined that the overall reasoning in the *Dr JS Moroka Municipality* case is problematic for a number of reasons. Amongst others, she identifies the following issues in the courts reasoning:<sup>139</sup>

1. The finding that the definition of an "acceptable tender" in the PPPFA does not grant any discretion when evaluating compliance with tender conditions unless the conditions imposed are immaterial, unreasonable or unconstitutional;
2. The finding that a tender invitation itself may not necessarily afford procuring entities any discretionary power; and

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<sup>137</sup> Ibid at para 18.

<sup>138</sup> P. Volmink, 'Legal consequences of non-compliance with bid requirements' (2014) 1 APPLJ 41 at 41 – 42.

<sup>139</sup> Bolton op cit (n 86) at 2340.

3. The finding that there are a number of public policy considerations which play a role in the evaluation of tenders and therefore the decision in *SA Eagle Insurance* could not be relied upon in the context of the case.

Each of these findings will be considered in turn and refuted in order to demonstrate that adopting a flexible approach to the issue of non-compliance with the conditions of tender is the most constitutionally compliant one.

#### 2.2.3.1 *The definition of an 'acceptable tender'*

Bolton argues that the definition of 'acceptable tender' in the PPPFA can be interpreted to provide a degree of discretion to procuring entities when they evaluate a bidders' compliance with the terms and conditions of tender.<sup>140</sup> She notes that in light of the fact that the PPPFA was enacted to give effect to section 217(3) of the Constitution, it should be interpreted with reference to section 217 as a whole and, in particular, the principles contained in section 217(1).<sup>141</sup> This approach echoes the one adopted by the courts up until judgment in the *Dr JS Moroka Municipality* case was handed down by the SCA. It will be recalled that the court in the *Metro Projects* case reiterated the views of Cameron JA in the *Logboro Properties* case which referred to the 'ever-flexible duty' of a tender committee to act fairly and to the need for fairness to be decided on the circumstances of each case.<sup>142</sup> Similarly, the court in the *JFE Sapela Electronics* case emphasised the need to construe the definition of 'acceptable tender' against 'the background of the system envisaged by section 217(1) of the Constitution'.<sup>143</sup>

Evidently, a compelling case can be made to adopt a more flexible approach to condoning non-compliance with the terms and conditions of tender on the basis of the case law; however, Bolton does posit another alternative – amending the definition contained in the PPPFA. It will be recalled that section 1(i) of the PPPFA defines an 'acceptable tender' quite stringently when a literal interpretation is adopted. This differs markedly from the definitions of the term in international instruments enacted by the UNCITRAL and World Bank which are more flexible and make provision for the waiver of minor informalities or deviations.

Accordingly, Bolton suggests that an 'acceptable tender' could be defined in terms that more closely reflect the definition provided for in the UNCITRAL Model Law on Public

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<sup>140</sup> Ibid at 2342.

<sup>141</sup> Ibid.

<sup>142</sup> *Logboro Properties* op cit (n 100) at paras 8–9.

<sup>143</sup> *JFE Sapela Electronics* op cit (n 105) at para 14.

Procurement. This model law does after all serve as a framework or template for developing and reforming regulatory systems for public procurement around the world. She advances the following modified definition for the PPPFA:

- ‘1 (a) *subject to subparagraph (b) of this paragraph, the term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.*
- (b) *A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.*
- (c) *A tender shall be rejected if it is not acceptable.’*

Bolton’s revised definition may certainly be endorsed – it allows procuring entities a measure of discretion when they evaluate compliance with tender conditions. However, as she notes, until such time as an amendment is actually effected the argument for relying on a more flexible interpretation of the definition in the PPPFA based on the provisions of section 217(1) should be adopted.

### *2.2.3. Discretionary powers and condonation: a purposive approach*

The question as to whether or not a tender is compliant with the terms and conditions of tender turns not only on the definition of what an ‘acceptable tender’ is in the PPPFA, but also on the language used in the tender documents and the discretion that procuring entities have to condone bids where they do not conform precisely to the conditions of the tender in those documents. The Constitutional Court (CC) in the recent case of *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and Others*<sup>144</sup> (the ‘AllPay’ case) dealt with this very issue.

The salient facts of the case are as follows: The South African Social Security Agency (SASSA) put out a tender for a countrywide system which would manage the payment of social grants which the state provides. SASSA received many bids but the tender was ultimately

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<sup>144</sup> 2014 (1) SA 604 (CC).

awarded to Cash Paymaster Services (Pty) Ltd (the successful bidder). An unsuccessful tenderer, AllPay Consolidated Investment Holdings (Pty) Ltd (the unsuccessful bidder), contended that the award of the tender to Cash Paymaster that it was not constitutionally valid. As a result, it brought a review application in the North Gauteng High Court, Pretoria for the setting aside of the tender award. The High Court declared the tender process invalid, but declined to set the award aside because of the practical upheaval this would have involved. The unsuccessful bidder then appealed to the SCA against the refusal to set aside the award however the appeal was dismissed. The matter was then taken on further appeal to the CC.<sup>145</sup>

In the *AllPay* case the CC avoided both an overly rigid as well as an overly flexible approach to the issue of bid responsiveness and adopted a purposive approach instead. Justice Froneman noted that the crucial question that must be asked is whether what the applicant (bidder) did constituted compliance with the statutory provisions in light of their purpose.<sup>146</sup> Therefore, if the purpose of the terms or condition of tender was achieved despite the fact that the provision was not fully complied with, the bidder should be regarded as sufficiently compliant or responsive and not be disqualified.<sup>147</sup> The purposive approach is less stringent as it engages with the more fundamental issue of whether a bid requirement is material (that is, whether it serves an important purpose) and whether that purpose was in fact achieved despite imperfect compliance. It moves away from classifying the conditions of tender as mandatory or peremptory.<sup>148</sup> This approach is by no means novel in South African law. In fact, it was employed in the *Millennium Waste Management* case discussed earlier where the SCA held that there are certainly instances where substantial compliance with the terms and conditions of tender as opposed to perfect compliance would suffice.

One of the grounds raised by the unsuccessful bidder in the *AllPay* case was that the successful bidder, had failed to comply with a mandatory requirement of the RFP. The unsuccessful bidder did not prepare separate bids for each of the provinces in South Africa for which it intended to submit RFP responses but simply submitted one bid – failing to comply with the precise wording of the tender documents. The CC adopted a purposive approach with regard to the compliance with the conditions of tender and reasoned as follows:

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<sup>145</sup> Ibid at para 2-3.

<sup>146</sup> Ibid at para 30.

<sup>147</sup> Volmink op cit (n 138) at 52.

<sup>148</sup> Ibid.

*‘The purpose of separate bids for the provinces was surely to enable SASSA to assess whether the bidder would be able to provide the necessary services in each of the provinces for which it bid. This purpose was attained.’<sup>149</sup>*

Adopting this approach thus allowed the procuring entity a degree of discretion and the ability to condone an ostensibly ‘non-responsive’ tender as it did in fact comply with the material aspects of the conditions of tender. What can be distilled from this finding is that it is fundamental that procuring entities interrogate whether the *purpose* of the bid requirement was achieved.<sup>150</sup> Moreover, it is also important to determine whether the bid requirement itself is material i.e. whether it serves an essential purpose. In terms of the PAJA, an organ of state may be taken on review if ‘a mandatory and material procedure or condition prescribed by an empowering provision was not complied with’ (my emphasis).<sup>151</sup> The consequence of the CC adopting this purposive approach is that now, in order to launch a successful review application based on non-compliance with the conditions of tender, it must be established that the provision in question is both mandatory and material. Non-compliance with a requirement which has been categorised in the bid document as mandatory but which does not serve a material purpose should therefore not be regarded as a fatal irregularity.<sup>152</sup> In this regard, the wording of the RFP tender documents will play a central role in determining both the materiality and purpose of the bid requirements.

Procuring entities now appear to have powers to condone ostensibly non-responsive bids by adopting a purposive approach to interpreting compliance with the conditions of tender however this power is not entirely uncircumscribed. Indeed, it has been argued that the groundwork for the purposive approach laid down by the *Millennium Waste Management* case and confirmed in the *AllPay* case may be overly broad and imprecise.<sup>153</sup> Proponents for this view postulate that most administrators are not legal professionals yet they are frequently required to make decisions which have immense legal consequences. For this reason, they note that administrators require a clear and logical framework which will both guide their decision-making and circumscribe their discretionary powers.<sup>154</sup> While there is a degree of merit to this line of reasoning, administrators and courts must be cautioned against elevating immaterial,

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<sup>149</sup> Ibid at para 62.

<sup>150</sup> Volmink op cit (n 138) at 53.

<sup>151</sup> PAJA op cit (n 123) at section 6(2)(b).

<sup>152</sup> Volmink op cit (n 138) at 53.

<sup>153</sup> Ibid at 54.

<sup>154</sup> Ibid.

irrational and unreasonable bid requirements to a level where they are allowed to determine the fate of the bid. As such they are at odds with the principles outlined in the *AllPay* case.<sup>155</sup>

There are a number of somewhat relatively extreme examples in the South African case law where formalism prevailed over pragmatism and the purports of section 217 of the Constitution were overlooked. Volmink has cited a number of these as examples.<sup>156</sup> In *VE Reticulation (Pty) Ltd and Others v Mossel Bay Municipality and Others*<sup>157</sup> the Western Cape High Court upheld a municipality's decision to disqualify a bidder who failed to provide a certificate issued by the Electrical Contracting Board even though the certificate was irrelevant for the purposes of the services which the municipality tendered for and was erroneously included in the tender conditions. Similarly, in *Basadi JV & Others v MEC of Education, Province of the Free State & Others*<sup>158</sup> prima facie reasonable conditions of tender were applied in an unreasonable manner. In this case, the court upheld a decision taken by an administrative body to disqualify an unincorporated joint venture for failing to provide a valid tax clearance certificate, even though both companies which formed the joint venture submitted valid tax certificates and the unincorporated joint venture had no legal obligation to provide such a certificate.<sup>159</sup>

Ultimately, the CC's judgment in the *AllPay* case provides appropriate guidance on the principles governing how the state and state organs must deal with conditions of tender when procuring goods or services. Bidders and procuring entities may not disregard conditions of tender at a whim however they must simultaneously guard against applying adhering to those conditions in a formalistic or mechanical fashion. Administrators must ensure that not all the conditions of tender must be applied with the same degree of strictness when assessing bids. Not every instance of non-compliance with the conditions of tender should automatically disqualify a bid. The assessment process must be fair, accompanied by a clear framework to assist administrators and reasoning must be context-sensitive. An administrator's decision whether or not to exclude a non-compliant bidder from a tender process will depend on a host of factors such as the wording of the RFP, the materiality of the unfulfilled conditions, the degree of non-compliance and the purpose of the condition. This approach would ensure that

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<sup>155</sup> Ibid at 57.

<sup>156</sup> Ibid.

<sup>157</sup> 2013 (2) SA 489 (WCC).

<sup>158</sup> 2004 ZAFSHC 74 (29 July 2004).

<sup>159</sup> Volmink op cit (n 138) at 57.

the entire tender process would be compliant with the objectives enshrined in section 217(1) of the Constitution.

### 2.3 *Corruption*

Accountability is one of the cornerstone principles of the public procurement law regime in South Africa as it is in many procurement regimes around the world. Without a procurement system which is both transparent and accountable, the vast resources which the state channels and develops through public procurement systems is at risk of being abused through corruption and misuse of funds.<sup>160</sup> It is without doubt that since the advent of democracy in 1994, South Africa has seen an exponential increase in social and infrastructural programmes aimed at improving the quality of the lives of its citizens. Yet there is increasing sentiment that there is a lack of good governance and poor service delivery which, to a large extent, is a result of increased fraud and corruption.<sup>161</sup> This sentiment is not misplaced and is supported by statistics. Estimates gleaned from a report to Parliament by South Africa's Special Investigating Unit show that up to twenty percent of the South African government's procurement budget – which amounts to approximately R25 billion – may be lost to corruption every year.<sup>162</sup> This staggering figure is the consequence of a host of systemic problems. The list of these problems is extensive and includes broad issues such as inadequate accountability measures, ineffective Broad-based Black Economic Empowerment measures and poor transparency measures. It also contains more niche issues such as incompetent officials, as discussed above, as well as bid rigging, conflicts of interest, urgent tenders which lead to seeking justification to bend the rules and multijurisdictional corruption (deals between parties in two different countries, for example, arms deals).<sup>163</sup> What follows is an examination of corruption within public procurement in South Africa and some of the measures that are used to address it. In particular, the definitions and types of corruption will be considered with reference to international instruments to which South Africa is a party and domestic legislation such as the Prevention and Combating of Corrupt Activities Act (the 'Corruption Act').<sup>164</sup>

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<sup>160</sup> I.M Ambe & J.A Badenhorst-Weiss op cit (n 82) at 456

<sup>161</sup> Ibid at 457.

<sup>162</sup> Parliamentary Committee on Justice and Correctional Services, *Special Investigating Unit: Annual Report 2010/11* (11 October 2011) available at <https://pmg.org.za/committee-meeting/13474/>

<sup>163</sup> E. Mantzaris, 'Public Procurement, Tendering and Corruption: Realities, Challenges and Tangible Solutions' (2014) 7(2) *African Journal of Public Affairs* 67 at 71.

<sup>164</sup> Act 12 of 2004.

### 2.3.1 A definition of 'corruption'

Finding an all-encompassing definition of the concept of corruption can be difficult. The term is infused with moral and ethical elements and in almost any society it is a particularly sensitive subject. When broadly defined 'corruption' undoubtedly offends inherent and possibly universal values but even so it has been suggested that corruption may be culture-specific: It could certainly be argued that there is a dichotomy between conceptualisations of corruption when viewed from the perspective of western and non-western interpretations of the term.<sup>165</sup> However, despite these challenges, there are no shortage of serviceable definitions which capture the essence of the concept.

One of the more widely used definitions defines the terms as follows:

*'Corruption is behaviour which deviates from the formal duties of a public role because of private regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence.'*<sup>166</sup>

In distilling the quintessence of this definition we may turn to the comparatively simpler definition used by the World Bank, namely that corruption is the abuse of public office for private gain.<sup>167</sup> In the South African context we may refer to two international instruments which the country is a party to, namely the African Union Convention on Preventing and Combating Corruption<sup>168</sup> and the United Nations Convention Against Corruption.<sup>169</sup> Both international instruments recognise that corruption has become a transnational phenomenon that affects all societies and economies making international cooperation to prevent and control it essential. The instruments aim to promote and strengthen measures in signatory-countries that prevent, detect, combat and punish corruption and further promote integrity, accountability and proper management of public affairs and public property.<sup>170</sup> The important role of these instruments cannot be understated - it is globally recognised that public procurement as a

<sup>165</sup> S. Williams & G. Quinot, 'Public Procurement and Corruption: The South African Response' (2007) 124(2) *South African Law Journal* 339 at 340.

<sup>166</sup> J. Nye 'Corruption and political development: A cost-benefit analysis' (1967) 61 *American Political Science Review* 417 at 419.

<sup>167</sup> The World Bank, 'Corruption and Economic Development' in *Helping Countries Combat Corruption: The Role of the World Bank* (1997) at 8.

<sup>168</sup> African Union, *The African Union Convention on Preventing and Combating Corruption* (1 July 2003) available at <http://goo.gl/iYHpNe> (accessed 23 July 2016).

<sup>169</sup> United Nations General Assembly Resolution A/58/422 of 31 October 2003, *United Nations Convention Against Corruption*, available at: <http://www.refworld.org/docid/4374b9524.html> (accessed 25 July 2016).

<sup>170</sup> See Article 2 of the AU Convention on Preventing and Combating Corruption; Article 1 of the United Nations Convention Against Corruption.

sphere of government activity is a major area in which corruption takes place and South Africa is no exception. This is so because public procurement, particularly in the case of large infrastructure projects, tends to involve large sums of money; the contracting entities involved are frequently non-commercial nature; the unique nature of the relationship between the decision-maker and the public body, which is such that deviating from the public interest will not normally affect the decision-maker's personal finances; the broad and often unsupervised level of discretion afforded to decision-makers; bureaucratic rules which provide insufficient regulation and guidance to governments and private parties.<sup>171</sup>

With regard to the domestic regulation and penalisation of corruption, in South Africa the Corruption Act is the primary piece of legislation giving effect to the country's international obligations on the issue. It is instructive to recant its definition of corruption in section 3:

*“Any person who. directly or indirectly-*

- a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or*
- b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,*

*in order to act, personally or by influencing another person so to act, in a manner-*

- i) that amounts to the-*
  - aa) illegal, dishonest, unauthorised, incomplete, or biased; or*
  - bb) misuse or selling of information or material acquired in the course of the,*

*exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;*

- ii) that amounts to-*
  - aa) the abuse of a position of authority;*
  - bb) a breach of trust; or*
  - cc) the violation of a legal duty or a set of rules;*
  - iii) designed to achieve an unjustified result; or*
  - iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,*

*is guilty of the offence of corruption.”*

This comprehensive definition of corruption in the Corruption Act is part of the move to develop a coherent and integrated approach to combating public sector corruption in South Africa. In addition to defining the term, the Corruption Act also creates certain offences that may be committed by defined categories of persons, such as public officials, judicial and

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<sup>171</sup> S. Williams & G. Quinot op cit (n 165) at 341.

legislative officers. Moreover, it creates two offences that are peculiar to the procurement context and further prohibits a public official from acquiring a private interest in a contract connected with the public body in which he or she is employed.<sup>172</sup> These mechanisms will be discussed in greater detail further below.

### 2.3.2 *The types of corrupt activity in public procurement*

Corruption in public procurement can take the form of private or public corruption. The private corruption usually takes the form of collusion, price fixing, maintenance of cartels or other uncompetitive practices which bidders may engage in to the detriment of the procuring entity. These practices can be as pervasive as public corruption and they are similarly prohibited in South Africa.<sup>173</sup> While this form of corruption does occur in public procurement in South Africa, for present purposes it will not be discussed in detail save to mention that these practices are predominantly defined, regulated and penalised by the competition or anti-trust laws in the country. Public corruption, on the other hand, refers to situations where a supplier engages in outlawed activity in order to influence the public official responsible for making procurement decisions. This generally takes the form of bribes or other non-monetary inducements which are offered in order to impact the decision-making process.

There are numerous examples of the form that public corruption may take. It may be as simple as a public official improperly exercising his or her discretion by deciding to which firm to award the tender, or in deciding which firms to invite for tender, or by formulating contract evaluation criteria which may favour a particular bidder.<sup>174</sup> However, it can be more elaborate, such as instances where a procurement official may improperly exercise his or her discretion by deciding to split a large tender into several smaller ones in order to avoid the thresholds set out in the MFMA, PFMA or PPPFA and the related regulations in order to avoid the procedural requirements they impose for certain thresholds.<sup>175</sup> Other improper benefits that a bidder may seek from a procurement official include the avoidance of a government-imposed cost such as fees or taxes in relation to the tender. A bidder may also request that a condition of tender be waived such as an obligation to provide certain documentation or that a contractual requirement not be applied stringently, for example, to allow the supply of sub-standard products.<sup>176</sup>

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<sup>172</sup> Ibid at 346.

<sup>173</sup> Ibid at 342.

<sup>174</sup> Ibid at 341.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid at 342.

One form of public corruption which has gained a significant amount of media attention in South Africa over the course of the last year is the issue of ‘state capture’<sup>177</sup> and it is apposite to deliberate on its effect on public procurement. Defining ‘state capture’ as a concept is as challenging as defining corruption given the wide array of definitions however the following definition has been used by a number of European academics:

*‘[S]tate capture is a group phenomenon where by some members of the business and/or political elite appropriate some parts or functions of the state and use its resources to benefit the group while harming the public good.’*<sup>178</sup>

This broad definition of state capture does not distinguish between whether it is private businesses capturing the state, whether it is the state capturing private business interests or whether both is happening at simultaneously. In the context of public procurement, state capture tends to involve targeting organs of state or state-owned enterprises that control the distribution and performance of contracts for state functions as these are the primary sources from which funds can be extracted through improper conduct. When an organ of state or state-owned enterprise is ‘captured’ by private interests it loses its autonomy to act in furtherance of public goals, thus losing its ability to enter into tender contracts which are competitive, cost-effective or of a high quality.<sup>179</sup> In other words, it prevents the procuring entity from being able to contract in accordance with the requirements set out in section 217(1) of the Constitution. State capture in public procurement may therefore be defined as institutionalised large-scale corruption centred on certain state organs or state-owned enterprises that cease to serve public goals and instead are used for the captor group’s own objectives.<sup>180</sup>

What the many examples of corruption in the context of public procurement discussed above illustrate is that public corruption is arguably the most pervasive type of corruption which occurs in public procurement in South Africa. They cost the South African economy millions

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<sup>177</sup> See, for example, the following media reports: H. Winkler, ‘How the state capture controversy has influenced South Africa’s nuclear build’, *The Sunday Times* (27 May 2016) available at <http://www.timeslive.co.za/sundaytimes/opinion/2016/05/27/How-the-state-capture-controversy-has-influenced-South-Africa%E2%80%99s-nuclear-build>; J. Brown, ‘Guptas deny state capture’, *City Press* (26 June 2016) available at <http://citypress.news24.com/Business/guptas-deny-state-capture-20160624>; F. Shivambu ‘State Capture: It’s criminal and its nothing new’ *Daily Maverick* (24 March 2016) available at <http://www.dailymaverick.co.za/opinionista/2016-03-24-state-capture-its-criminal-and-it-is-nothing-new/#.V5dKwPmLTcc> (accessed on 26 July 2016).

<sup>178</sup> M. Fazekas & I.J. Toth ‘From corruption to state capture with empirical applications from Hungary’ (2016) 69(2) *Political Research Quarterly* 320 at 322.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid.

and deprive citizens of access to infrastructure which will improve their quality of life and prevent the state from realising constitutional goals. These forms of corruption demonstrate why concerted steps have been taken to criminalise corruption in both international instruments and in South Africa's legislation. What will follow is an analysis of the legislated regulatory mechanisms which aim to prevent corruption and improve transparency and accountability.

### *2.3.3 Measures addressing corruption in public procurement*

There is a range of methods which the South African government can employ to combat corruption and these may be classified into administrative, social and regulatory measures. Administrative measures are ones which are not necessarily required by legislation but are permitted under the exercise of discretion which may be afforded to decision-makers procuring entities. Regulatory measures to prevent corruption are legislated and are therefore binding and obligatory – these are imposed where corruption is discovered and may include penal sanctions. Social measures refer to societal pressures such as shame and infamy which may be used to deter persons from engaging in corruption when it is exposed.<sup>181</sup>

Administrative measures vary and may include mechanisms which allow organs of state or state-owned enterprises to restrict bidding entities' ability to obtain certain licenses, permits or approvals if they are found to be engaging in corrupt activities. On a broad level this may be as simple as refusing to register a bidder's company where the bidder's members have a history of bankruptcies, criminal or fraud convictions. Specifically, in public procurement, a procuring entity may take an administrative decision to deny a company the opportunity to bid for government tenders by forbidding registration on qualifying lists for public contracts.<sup>182</sup> Pivotal to the administrative mechanisms is increased public sector financial management; this is evident in legislation such as the PFMA and the MFMA. The focus of these statutes is accountability. These pieces of legislation curtail corruption by legislating financial controls such as conflict of interest checks, specific auditing requirements and a multi-stage approval process during a competitive bidding process (as was discussed in detail above).

Social measures against corruption refer to the strong feelings of contempt which society shows towards corruption. Social sanctions are by no means primary tools against corruption however their value cannot be understated. Where the media sensationalises corruption scandals and

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<sup>181</sup> S. Williams & G. Quinot op cit (n 165) at 342.

<sup>182</sup> Ibid.

publishes the names of those involved they are often subjected to shame, ridicule and disgrace. The negative publicity that results from such a conviction where it becomes public knowledge will frequently lead to a loss of business and, at worst, may even force the company to end business.<sup>183</sup>

The regulatory measures include the legislation and any accompanying regulations which a government may adopt to prevent and punish corruption. A legal prohibition on corruption, bribery or other inducements means that those found guilty may face civil and criminal penalties and forfeitures. This may take the form of a fine or prison sentence which may be imposed during a criminal trial and a corrupt public official may lose his employment and forfeit related benefits of his or her job.<sup>184</sup> Many jurisdictions around the world have criminalised corruption and South Africa is no exception. In what follows, the penal measures in the Corruption Act will be discussed.

### 2.3.3.1 *The Corruption Act*

South Africa has implemented a robust and comprehensive policy to combat corruption as part of the broader effort to reduce crime in the country.<sup>185</sup> One of these policies is the Public Service Anti-Corruption Strategy, which was developed to combat corruption in the public sector through a number of integrated methods which includes preventative, investigatory and persecutory measures.<sup>186</sup> In so far as these polices deal with corruption in procurement, the proposals which they put forward were implemented through the enactment of the Corruption Act.<sup>187</sup>

The Corruption Act defines the general offence of corruption,<sup>188</sup> which was set out fully above, and creates offences which may be committed by defined categories of persons.<sup>189</sup> With regard to the procurement context, the Corruption Act creates two unique offences<sup>190</sup> and further forbids public officials from acquiring a private interest in a contract connected with a public

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<sup>183</sup> Ibid at 346.

<sup>184</sup> Ibid at 344.

<sup>185</sup> South African National Crime Prevention Strategy: Summary (1996) available at <http://www.gov.za/documents/national-CRIME-prevention-strategy-summary> (accessed 20 July 2016).

<sup>186</sup> The National Department of Public Works: Republic of South Africa, *Anti-Fraud and Corruption Strategy, 8<sup>th</sup> Revision* (2013) available at <http://goo.gl/baVF0O> (accessed 20 July 2016).

<sup>187</sup> S. Williams & G. Quinot op cit (n 165) at 347 – 348.

<sup>188</sup> The Corruption Act op cit (n 164) at section 3.

<sup>189</sup> Ibid at sections 4 – 9.

<sup>190</sup> Ibid at sections 12 – 13.

body in which he or she is employed.<sup>191</sup> There are also penalties for violations: those found guilty of corruption relating to procurement may be excluded from government contracts.<sup>192</sup> In addition, they may also be convicted and sentenced to life imprisonment or a fine if convicted by the High Court or up to 18 years or a fine if convicted by a regional court.<sup>193</sup> The exclusionary measures created by the Corruption Act will be discussed in greater detail in what follows.

Section 28 of the Corruption Act deals with exclusion from public contracts. Section 28(1) provides that where a court finds a person found guilty of a procurement-related offence it may hand down an order that the particulars of the convicted person, the conviction as well as details of the offence may be publicised in the Register for Tender Defaulters (the ‘Register’).<sup>194</sup> The Register is managed by National Treasury, is available online and contains information on companies and people excluded from government contracts. There are two offences that could lead to a person being placed on the Register. The first offence is ‘corrupt activities in relation to contracts’ and is directed at bribery which may occur during the procurement process.<sup>195</sup> It is defined to include situations where:

*‘...a person accepts or agrees to accept, offers or agrees to offer, or gives, any gratification, for his benefit or the benefit of another person, in order to influence in any way the promotion, execution or procurement of a contract with a public entity.’<sup>196</sup>*

The second offence is ‘corrupt activities in the procuring and withdrawal of tenders’ and it is related to situations where:

*‘...a person offers, agrees to offer or to accept, or accepts, any gratification as an inducement to or in order to influence another person to award a tender, make a tender or withdraw a tender for a contract.’<sup>197</sup>*

It is important to note that the two offences detailed above concern violations of the public procurement process – they exclude corrupt activity that may occur outside of this context, such as fraudulently obtaining licences or other documents, inducements intended to secure

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<sup>191</sup> Ibid at section 17.

<sup>192</sup> Ibid at sections 28, 30 and 31.

<sup>193</sup> Ibid at section 56.

<sup>194</sup> Ibid at sections 28(1)(a) and 29.

<sup>195</sup> Ibid at section 12.

<sup>196</sup> S. Williams & G. Quinot op cit (n 165) at 348.

<sup>197</sup> Ibid.

waivers of fees or tax avoidance violations. It has been argued that the narrow range of offences in the Corruption Act may not be effective in ending public corruption as it only targets persons convicted of procurement-related corruption and government contractors. It also raises a further potential issue that the Corruption Act unfairly targets government contractors convicted of procurement corruption by imposing harsher sanctions than government contractors and other persons convicted of non-procurement related corruption.<sup>198</sup>

The above criticism brings into focus the importance of the range of persons who may be subject to being placed on the Register and excluded from government contracts in terms of the Corruption Act. This has an important impact on the effectiveness of the provisions and in this regard the interpretation and application of section 28 of the Corruption Act are crucial. It has been argued that ensuring the efficacy of the provisions is to interpret section 28(1)(a) as a general provision which makes it mandatory to list all convicted persons on the Register. Section 28(1)(b) should then be interpreted to require (where the convicted person is an enterprise) listing of the particulars of any partner, manager, director or other person who wholly or partly exercises or may exercise control over that enterprise and who was involved in the offence concerned, or who knew or ought reasonably to have known or suspected that the enterprise committed the offence.<sup>199</sup> Furthermore section 28(1)(c) must be read to require, in addition to the endorsement of the 'primary convict' under s 28(1)(a), listing on the Register the particulars of any other enterprise owned or controlled by the primary convict or the particulars of any partner, manager, director or other person, who wholly or partly exercises or may exercise control over such an enterprise, where that enterprise, partner, manager, director or other person was involved in the offence concerned or ought reasonably to have known or suspected that such other enterprise was involved in the offence concerned.<sup>200</sup>

It is clear from the wide range of persons that may be listed on the Register in terms of the Corruption Act that government is cognisant of the fact that in practice companies do not necessarily stop bidding for government contracts because they have been barred. These persons generally circumvent the exclusion by bidding by using different corporate identities, different company officers or by using sub-contractors. The South African government's robust response to these possibilities has been lauded as preferable because, in other jurisdictions,

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<sup>198</sup> Ibid at 349.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

while related persons may be excluded from bidding, such exclusion does not usually depend on the complicity, participation or knowledge of the related person.

There are two further important considerations which relates to the efficacy of the Register as a mechanism to prevent convicted persons from bidding for government contracts. The first is the time period for which those persons are expected to be listed on the Register. Under the Corruption Act the National Treasury determines the period of time that a person will be listed on the Register and not the court who made the conviction. It has been argued that separating the court's power to convict and order that the bidder be listed on the Register from the National Treasury's power to impose a time period for enlistment may lead to delays between the conviction and when the bidder is made aware of the time period.<sup>201</sup> The National Treasury will accordingly have to make a concerted effort to put mechanisms in place to prevent any delays. Where they do occur, the National Treasury should adjust the period of enlistment accordingly or alternatively the period of enlistment should be determined by the courts at the time that the order is handed down to minimize the risk of administrative delays.<sup>202</sup>

The second consideration concerns the cancellation of ongoing contracts. Where a person has been listed on the Register, the National Treasury, after consultation with the relevant procuring entity and consideration of a range of factors listed in the Corruption Act, may terminate any agreement with the person subject to the enlistment.<sup>203</sup> The power to terminate on-going contracts may have extensive consequences including whether or not the contractor will be paid for work completed or other benefits that the public body may have received under the contract. In addition, the question of whether the public body will be entitled to recover amounts paid in terms of the contract and who will bear the costs of the wasted procurement procedure and a possibly new procedure also arise.<sup>204</sup>

Should a contract be terminated by a procuring entity on the grounds that a person has been convicted and enlisted on the Register, this may open government to a legal challenge by the affected bidder. Where the bidder was convicted on the basis that it was engaged in fraudulent conduct then the South African common law treats the contract as voidable on the ground of improperly obtained consent.<sup>205</sup> However, should a court order that a person or enterprise other than the primary convict be enlisted on the Register, the termination of an active contract

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<sup>201</sup> Ibid at 356.

<sup>202</sup> Ibid at 356.

<sup>203</sup> The Corruption Act op cit (n 164) at section 28(3) and (7).

<sup>204</sup> S. Williams & G. Quinot op cit (n 165)

<sup>205</sup> Ibid.

following enlistment may not be justifiable.<sup>206</sup> Should the corrupt conduct of a third party on an unrelated transaction lead to the enlistment of a party to an active tender, the validity of the termination of the contract would be doubtful under the common law. Notwithstanding this, it should however be noted that the Corruption Act circumscribes the termination powers of the National Treasury<sup>207</sup> – only allowing termination where the enlistment applies to a convicted natural person, company or person in control of a company.<sup>208</sup> A contract may not therefore be terminated where a person was listed on the Register because of a relationship with a convicted natural person or persons in charge of such a firm.

With regard to the question of whether the public body will be entitled to recover amounts paid in terms of the contract; a contract that the procuring entity has been induced to enter on the basis of corruption is tainted with illegality of the underlying corrupt transaction between the official representing the procuring entity and the bidder. Consequently, outstanding payments may not be recovered on the basis of the rule denying payment under an illegal transaction.<sup>209</sup> In fact, it may also be possible for the procuring entity claim on the basis of the unjust enrichment of the contractor should it be able to prove that it has suffered loss and that the contractor has been enriched at its expense.<sup>210</sup>

It is clear that the Corruption Act establishes a strong framework of exclusionary measures to ensure that in addition to any criminal sanctions which persons convicted of corruption may face, these persons will also be barred from benefiting from government contracts. This form of regulatory measure is pivotal in public procurement particularly given the large sums of money involved when government procures infrastructure. The deterrent effect that these measures should also not be understated as publicised lists of persons barred from bidding for government contracts and those convicted of corruption, fraud or other improper tender-related offences are available from the National Treasury.

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<sup>206</sup> See *Plaaslike Boeredienste (Edms) Bpk. v Chemfos Bpk.* (1985) 2 All SA 155 (A) and *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* (1999) 2 SA 719 (SCA).

<sup>207</sup> The Corruption Act op cit (n 164) at section 28(3)(a)(i).

<sup>208</sup> S. Williams & G. Quinot op cit (n 165) at 358.

<sup>209</sup> See *Chipunza v Muzangaza* (2004) JOL 12880 (ZH).

<sup>210</sup> S. Williams & G. Quinot op cit (n 165) at 359.

### Chapter 3 - Accountability in PPPs

Outside of the exclusionary penal measures there are other regulatory measures which seek to create an environment where corruption cannot thrive by requiring transparency and accountability as a preventative step. It will be recalled from early on in this paper that in South Africa the elements of accountability and transparency have been afforded constitutional status in section 217(1). These elements are fundamental to public procurement in the country particularly given commitment to infrastructure development through PPPs.<sup>211</sup> Legislated accountability and transparency measures such as maintaining proper financial records, developing clear performance outcomes and ensuring an efficient tender process are all central components to ensuring that PPP processes remain constitutionally compliant. However, despite the fact that PPPs should manifest mutual commitment and trust between government and the private sector, and whereby risk, rewards, resources, skills, expertise and finances are shared, it has been argued that PPPs can reduce accountability and undermine public control.<sup>212</sup> Below, some of the issues that pervade PPPs in South Africa will be discussed. This will include a discussion on the complexity of the legislation and policies governing PPPs, criticisms regarding the transparency of the system as well those concerning the monitoring and evaluation of PPPs. Naturally, commentary will include a discussion on enhancing accountability and transparency in PPPs and public procurement more broadly. Thereafter the paper will also provide a brief international comparison to demonstrate how India, a fellow commonwealth country facing similar developmental challenges, has addressed these issues.

#### ***3.1. Challenges in accountability and transparency***

The overarching requirement for accountability and transparency in PPPs has already been discussed above in the context of the Constitution, as well as the different laws and policies in the PFMA, MFMA, PAJA as well as Regulation 16. This legal regime, in so far as it relates to accountability and transparency, has been subject to criticism on a number of levels. One of the criticisms is that the regime creates a cumbersome and complex procurement system which fosters a culture of rule-bending and the tendency to use corrupt means to avoid these rules.<sup>213</sup> In addition, because of the complexity of the system legislation and policies create, the roll-out of PPPs has been particularly slow. This can be demonstrated with reference to the

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<sup>211</sup> Ibid at 350.

<sup>212</sup> M.C Fombad op cit (n 52) at 69.

<sup>213</sup> Ibid.

requirements set by the MFMA and the Municipal Systems Act which require feasibility studies to be undertaken before a municipality conducts PPPs. While feasibility studies undertaken in terms of Section 78 of the MSA take approximately two years, in the MFMA it takes an average of six months. The result is that a municipality faced with the challenge of having to satisfy the requirements of both Acts might instead resort to creating partnerships with the private sector in ways that are not consistent with the conventional structure of PPPs.<sup>214</sup> The result of the slow roll out is that on average, only two PPPs have been rolled out per year at national and provincial level since 2004, and the average period taken to complete a PPP ranges between 24 and 36 months.<sup>215</sup>

Perhaps most central to ensuring accountability and transparency is the protection of the legitimate interests of all stakeholders and the duty to engage with these stakeholders at various stages of the procurement process. It has been argued that the legal regime does not adequately protect the legitimate interests of stakeholders during PPPs and that there is scant provision for input from citizens from inception to completion of a project.<sup>216</sup> This may seem to be at odds with the criticism that the PPP process is not efficient as it could then be argued that the involvement of an affected community might further slowdown the PPP process because communities often do not speak with a unified voice and tend to be passive receivers of services rather than voluntary participants.<sup>217</sup> However, excluding affected communities and even private companies who have legitimate interests in the procurement process only stands to undermine the accountability and transparency principles set out in the Constitution.

Notwithstanding these constitutional requirements, several concerns have been raised which bolster the argument that there is a need for more robust procurement policies and legislative provisions on the matter. It was mentioned early on in this paper (and it is worth reiterating) that if the 'transparency' principle is to be realised during state procurement the process, PPPs must be guided by clear and codified criteria upon which decisions will be made and that decisions such as the one awarding the contract should be verifiable and publicised with reasons where appropriate. However, there are a number of stages in the PPP process where transparency may be compromised.

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<sup>214</sup> Ibid at 70.

<sup>215</sup> Ibid.

<sup>216</sup> Ibid.

<sup>217</sup> Ibid.

National Treasury Regulation 16.5.4 which was referred to above and which contains the requirements for obtaining Treasury Approval IIB provides one such example. It stipulates that after bids are evaluated but before the preferred bidder is appointed, the procuring entity must submit a report for approval by the relevant treasury which demonstrates how the criteria of affordability, value for money, and substantial technical, operational and financial transfer were applied in the evaluation of the bids in general and which demonstrates how the criteria were applied with respect to the preferred bid specifically. However, there is no mention of an evaluation committee for bid selection; neither is there any mention of the criteria for scoring the bids.<sup>218</sup>

### *3.1.1. Transparency and accountability versus commercial confidentiality*

One aspect of the lack of transparency in PPPs which has received a substantial amount of media attention recently, is the non-disclosure of PPP arrangements between the public and private partners on the grounds of ‘commercial confidence’ protection of ‘property rights’ or on grounds of data protection.<sup>219</sup> This naturally implicates transparency and for present purposes one of the most instructive recent examples of how a procuring entity tried to evade compliance with this constitutional principle during a tender process is in the case involving the South African National Roads Agency (‘SANRAL’) and the City of Cape Town (the ‘City’).

The case commenced in the Western Cape High Court<sup>220</sup> and the salient facts are as follows: The City launched a judicial review in which it sought to set aside the declaration of parts of the N1 and N2 national roads as toll roads in terms of certain legislation. The City contended that the Minister of Transport’s decision to declare the roads as toll roads was irrational because the Minister approved the declaration of the roads without knowing what the cost of the project or the toll fees would be, and without considering whether the toll fees would be affordable, or whether tolling would be a financially sustainable or socio-economically appropriate.<sup>221</sup> The City was granted an interdict prohibiting SANRAL from negotiating and concluding a contract

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<sup>218</sup> Ibid at 71.

<sup>219</sup> See, for example, R. Essop, ‘N1/N2 Toll Project Documents No Longer Secret’ *Eyewitness News* (30 March 2015) available at <http://ewn.co.za/2015/03/30/Sanrals-proposed-toll-project-now-available-for-the-public>; and A. Lewis, ‘Cape Town Targets SANRAL papers’, *IOL News* (18 March 2015) available at <http://www.iol.co.za/news/south-africa/western-cape/cape-town-targets-sanral-papers-1833569>

<sup>220</sup> *South African National Roads Agency Limited v City of Cape Town and Others; In Re: Protea Parkway Consortium City of Cape Town and Others* (2014) 4 All SA 497 (WCC).

<sup>221</sup> Ibid at para 9.

with the preferred bidder.<sup>222</sup> SANRAL then launched an interlocutory application during the review proceedings seeking an order which would require the supplementary founding papers of the City of Cape Town in the pending review proceedings to be redacted so as to keep secret certain information which SANRAL contends should not be released in the public domain as negotiations with the preferred bidder had not yet been concluded. The information is derived from or is part of the relevant administrative record of decision in the review proceedings and publicising such information would not only compromise negotiations but also reveal commercially sensitive or proprietary trade information that the bidders might have included in their proposals.<sup>223</sup>

The final ruling of Judge Binns-Ward in the High Court judgment concluded that SANRAL did not definitively make out a case to have its information kept secret.<sup>224</sup> However, Judge Binns-Ward did rule that SANRAL was to be afforded confidentiality in terms of the “implied undertaking” rule. The application of this rule meant that the administrative record (as well as any quotes from it which may appear in the parties’ affidavits) could not be publicised or accessed via the court Registrar until such time as the review application was called and heard in court unless SANRAL gave its consent for prior disclosure.<sup>225</sup> The City took the matter on appeal to the SCA where Justice Ponnan authored the unanimous decision of the court.<sup>226</sup> the SCA made short shrift of the ‘implied undertaking’ rule which the High Court relied on and held that the rule is not part of our law.<sup>227</sup> Justice Ponnan meticulously discussed the principle of open justice in South African law in light of the rich constitution jurisprudence on the subject and he further drew on the jurisprudence from a number of foreign jurisdictions. He held that courts are open to protect both those who use the judiciary and in order to secure the legitimacy of the judiciary and not to ‘satisfy the prurient interests of those who wish to examine the private details of others.’<sup>228</sup> Accordingly, he held that the public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness. He then stated that

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<sup>222</sup> Ibid at para 10.

<sup>223</sup> Ibid at para 2.

<sup>224</sup> Ibid at para 59.

<sup>225</sup> Ibid at paras 57 – 58 and 88.

<sup>226</sup> *City of Cape Town v South African National Roads Authority Limited and Others* (2015) 3 SA 386 (SCA).

<sup>227</sup> Ibid at 27.

<sup>228</sup> Ibid at 19.

*‘...the right of open justice must include the right to have access to papers and written arguments which are an integral part of court proceedings... That must follow axiomatically, it seems to me, because the public would hardly be in a position to properly assess the legitimacy or fairness of the proceedings if they could observe the proceedings in open court but were denied access to the documents that provide the basis for the court’s decision.’<sup>229</sup>*

The core of the SCA judgment was that court records, including those of review applications brought during public procurement processes are, by default, public documents which must be open to public scrutiny at all times.<sup>230</sup> While there may be situations which justify a departure from the default position such as legitimate commercial confidentiality, should it be proved, any departure from the default position must be viewed as an exception which must be justified. The High Court’s judgment was ruled to be inconsistent with this principle – it limited the ability of litigants to ensure publicity when they challenge the actions of the state or state-owned entities. Thus where openness is most sorely needed – the consideration of government conduct – the High Court judgment was found to limit transparency the most.<sup>231</sup>

The above exposition of the confidentiality dispute between SANRAL and the City serves to demonstrate how transparency and accountability is a frequently disputed and often highly publicised issue. Even before a tender is finally awarded, judicial review challenges throughout the process may occur. The manner in which commercially sensitive documents and proprietary information of both bidders and the procuring entity is handled bring the issue of transparency and accountability during the procurement process into focus. Accountability evidently remains a complex, elusive, abstract, multifaceted and contested issue.<sup>232</sup> Fombad notes that understanding the different accountability relations and ensuring that all stakeholders are working towards reinforcing accountability and transparency throughout the procurement process is vital.<sup>233</sup> In the context of public procurement, and specifically PPPs, the state or state-owned entity, private partners, elected officials and public officials understand each other’s needs and objectives and work together in an atmosphere of trust, mutual collaboration, shared responsibility, transparency and open communication responsible for accountability

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<sup>229</sup> Ibid.

<sup>230</sup> Ibid at 47.

<sup>231</sup> Ibid.

<sup>232</sup> MC Fombad op cit (n 52) at 73.

<sup>233</sup> Ibid at 75.

during the procurement process.<sup>234</sup> Of course there are situations where confidentiality must be maintained however the constitutional principles in section 217(1) must permeate the entire process. It must be borne in mind that citizens, government officials, Parliament, the electorate, the courts, tax payers, shareholders and the local community are the principal stakeholders. As a result, elected officials, politicians and administrators must be alive to their legal obligation to remain accountable throughout the process.<sup>235</sup>

### ***3.2 Improving accountability and transparency during the procurement process***

One of the fundamental steps that the South African government must take to improve accountability during the procurement process is to ensure that the responsibility for PPPs and other forms of tendering for infrastructure does not end once the contract is awarded. Steps should be taken to implement checks and balances throughout the lifespan of the agreement.<sup>236</sup> The transparency and accountability mechanisms promulgated by National Treasury's PPP Unit are currently heavily centred on the pre-contractual stages of the procurement process and neglects post-project evaluation mechanisms.<sup>237</sup> This creates a lacuna at the operational stage of the project, which is arguably where procuring entities require equally strong regulation to ensure that projects avoid issues like unjustifiable overspending, escalating costs and corruption. There are several key mechanisms which government could adopt to improve accountability during PPPs specifically and other forms of procurement more generally. Parliamentary oversight, administrative institutions, community monitoring as well as accountability structures may strengthen the procurement process and further the realisation of the objectives set out in section 217 of the Constitution.

Parliamentary oversight could take the form of a dedicated PPP parliamentary committee. Through this committee Parliament would be vested with the power to scrutinise contracts between the public and private sector from inception to development stage and beyond to ensure that these contracts are legally compliant and that deliverables are realised efficiently and effectively. Any notable findings of this committee should be tabled in parliament and made available to the public, furthermore the committee should regularly disclose revenue figures from any of the concessions it awards. In this way, citizens will be able to engage with projects that government embarks upon and better understand reasons for price fluctuations of

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<sup>234</sup> Ibid at 76.

<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

goods and services and better appreciate their rights and obligations in relation to the projects.<sup>238</sup> Transparency and accountability measures could be made even more robust as a dedicated committee would ensure that any adverse findings by National Treasury, a legal challenge or the Auditor-General are not dismissed but that they remain in the public discourse and the desired effect of correcting aberrations and improving operations.<sup>239</sup>

Establishing administrative institutions to monitor the procurement process may also improve accountability. Apart from a procuring entity's designated accounting officer, the primary monitoring agents for PPPs stipulated in the PPP Manual<sup>240</sup> are the Auditor General and the National Treasury's dedicated PPP Unit. It has however been argued that accounting officers do not have direct authority over the private party contracting in the PPP, powers of the Auditor-General are vaguely defined and National Treasury may be considered a bureaucratic government department and should avoid becoming mired in the business of power and politics.<sup>241</sup> Therefore to improve accountability, expanding the scope of the powers of the Auditor-General and creating other administrative institutions may be a solution. Expanding the powers of the Auditor-General must be guided by the principles drawn from the International Organisation of Supreme Audit Institutions ('INTOSAI') and tailored for the South African context. India provides an instructive example of how to adopt INTOSAI guidelines and customise them accordingly to foster transparency and accountability.<sup>242</sup> In this regard, the South African government expand the powers of the Auditor-General as follows: In addition to the Auditor-General's current role of exercising financial supervision and control over the delivery of PPPs, he or she should also be able to investigate post-contractual operational matters such as environmental issues and administrative and managerial problems. Moreover, the office of the Auditor-General could also serve as a point of contact between government agencies and the public by allowing the public to submit complaints or problems requiring the investigation of accountability.<sup>243</sup>

With regard to creating a dedicated administrative institution, these should ideally first be created within the management structures of each PPP and they should be tasked with monitoring the proper implementation of the PPP, conducting operational review meetings,

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<sup>238</sup> Ibid at 77.

<sup>239</sup> Ibid.

<sup>240</sup> National Treasury op cit (n59).

<sup>241</sup> MC Fombad op cit (n 52) at 77.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid at 78.

and presenting quarterly reports on the project.<sup>244</sup> These internal structures could report broadly to the PPP Unit and, to increase its capacity, a further independent division of the PPP Unit which could be created to oversee, monitor, evaluate and audit the procurement, implementation and development of projects. This could also take the form of an entirely independent monitoring institution comprised of members of the public and private sector who have considerable expertise in the area of infrastructure development but no vested interest.<sup>245</sup>

Community monitoring should play a central role in any procurement process and robust engagement and participation by the community in the policy would add to increasing transparency and accountability. Communities must be informed through awareness campaigns and clear channels of communication must be established and maintained throughout the procurement process. The role of the media in this regard cannot be understated. In addition, elected officials, administrators and project managers must remain alive to their responsibility to give reasons, explain publicly, fully and fairly to the citizens how they are carrying out responsibilities that affect the public. Community feedback mechanisms such as independent reviews and social surveys should become legislated and institutionalised to serve as a check and balance during the procurement process.<sup>246</sup>

Improving accountability and transparency mechanisms will go a long way in curtailing the challenges discussed earlier on in this paper. Several measures could be adopted in order to ensure that service delivery is improved and that issues such as corruption and the abuse of public authority is eliminated. In addition, it is worth reiterating that improving accountability is a primary step to ensuring that the objectives set out in section 217(1) of the Constitution are realised. Bolstering monitoring mechanisms through any of the aforementioned means improves compliance with the requirement for procurement which is fair, equitable, transparent, competitive and cost-effective.

## Conclusion

This paper has endeavoured to provide an analysis of the regulatory regime governing public procurement in South Africa with particular reference to the procurement of infrastructure and

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<sup>244</sup> Ibid.

<sup>245</sup> Ibid.

<sup>246</sup> Ibid at 79.

the delivery of other basic services to citizens. Since the advent of democracy the South African government and state-owned enterprises have sought to partner with the private sector through specialised contractual procurement mechanisms such as PPPs to aid in the delivery of infrastructure and amenities. Given that the delivery of infrastructure and basic services necessarily implicates constitutional rights such as access to housing, water and sanitation, amongst many others, it is therefore unsurprising that the overarching principles governing public procurement have also been afforded constitutional status in section 217. These principles have formed the basis of a body of laws and policies which regulate public procurement at national, provincial and local levels. The courts have similarly emerged as key role players as this relatively new body of law frequently requires them to interpret and rule on contentious issues.

The tensions within the public procurement regulatory regime formed the basis of this paper, which commenced with an overview of the constitutional principles which permeate the regime. The objectives of fairness, efficiency, cost-effectiveness, competitiveness, equity, transparency and accountability were all discussed in detail. Following which, the legislative framework which encompasses the PPPFA, PFMA, MFMA were also discussed as these statutes form the basis of a typical infrastructure procurement process. The paper then turned to discuss a typical PPP procurement process from the pre-contractual phase to the conclusion of the PPP agreement with the preferred bidder – this process is predominantly governed by the National Treasury's regulations and guidelines. Understanding this process is fundamental to understanding the challenges which are inherent in public procurement and it is these challenges which formed the basis of the next portion of the paper.

Three issues which impact the delivery of infrastructure through public procurement processes were highlighted. Firstly, the lack of knowledge, skills and capacity prevalent in many state organs and state-owned enterprises was discussed. Finding skilled professionals with appropriate knowledge was acknowledged as a key driver in preventing poor governance. Secondly, non-compliance with laws, regulations and tender conditions was discussed. It was demonstrated that given the extensive regime of laws, regulations and policies that governs public procurement and specifically PPPs in South Africa, it is therefore unsurprising that the issue of non-compliance with the various processes remained a challenge. In this regard, the paper examined how increasing the level of discretion afforded to procuring entities along the lines envisaged in the UNCITRAL Model Law on Public Procurement as well as World Bank

Guidelines would mitigate issues around non-compliance with tender conditions. In addition, the paper provided an overview of how courts have attempted to mitigate the stringent wording of the definition of ‘acceptable tender’ used in the PPPFA. The third challenge discussed was the ever-present issue of corruption in public procurement. The paper highlighted the various forms of corruption which frequently occur in South Africa, including the impact of state-capture on public procurement, and then went on to discuss the penal and preventative mechanisms employed in the Corruption Act. An overview of the administrative, social and regulatory mechanisms was provided and the paper then turned to focus on the mechanism of excluding those convicted of corruption from contracting with government and the efficacy of the Register kept by National Treasury which lists offenders.

Finally, the paper turned more broadly to improving accountability in PPPs in South Africa. It is certainly arguable that this singular aspect is the most essential mechanism to ensuring that public procurement challenges are prevented. Argument was put forward that there is a need for more robust procurement policies and legislative provisions. This brings into focus one of the key tensions in accountability and transparency – the issue of commercial confidentiality during the tender process amidst legal challenges – and the example set by the SANRAL case is instructive. As a final point, attention must be drawn to the mechanisms which were proposed which government could adopt to improve accountability during PPPs specifically and other forms of procurement more generally. Namely, parliamentary oversight, the creation of administrative institutions, community monitoring as well as accountability structures could all be implemented to strengthen the procurement process and further the realisation of the objectives for public procurement set out in the Constitution.

## Bibliography

### Primary Sources

#### *Legislation, government policies & guidelines*

Amendment of Treasury Regulations in terms of Section 76, GNR 225 of 15 March 2005  
(Government Gazette No. 27388)

*Anti-Fraud and Corruption Strategy: 8th Revision* (2013), The National Department of Public Works

Accelerated and Shared Growth Initiative for South Africa (2014), *The Department of the Presidency*

Constitution of the Republic of South Africa, 1996

Guideline for Accounting Officers – Public Finance Management Act, *The South African National Treasury*

The Income Tax Act 58 of 1962

The Medium Term Strategic Framework (2009), *The Department of the Presidency*

The Municipal Finance Management Act 56 of 2003

The Municipal System Act 32 of 2000

The National Development Plan (2013), *The South African National Planning Commission*

Parliamentary Committee on Justice and Correctional Services, *Special Investigating Unit: Annual Report 2010/11* (11 October 2011)

Preferential Procurement Policy Framework Act 65 of 2000

Preferential Procurement Regulations, GNR 502 of 8 June 2011 (Government Gazette No. 34350)

Prevention and Combating of Corrupt Activities Act 12 of 2004

Prohibition of Set-Asides and the Use of Cost-Estimates as Benchmarks, National Treasury Practice Note 2 of 2006

Promotion of Administrative Justice Act 3 of 2000

Public Finance Management Act 1 of 1999

Public-Private Partnership Unit, 'Introducing Public Private Partnerships in South Africa' (2007), *The South African National Treasury*

Public Private Partnership Manual, PPP Unit Practice Notes (2004), *The South African National Treasury*

Public Sector Supply Chain Management Review (2015), *The South African National Treasury*

Regulations in terms of the Northern Transvaal Tender Board Act, Provincial Notice 4 of 1997  
(14 February 1997)

South African National Crime Prevention Strategy: Summary (1996)

South African National Planning Commission, The National Development Plan (2013)

### **Case Law**

*AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC)

*Basadi JV & Others v MEC of Education, Province of the Free State & Others* 2004 ZAFSHC 74 (29 July 2004)

*Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* (2005) 4 All SA 487 (SCA)

*Chipunza v Muzangaza* (2004) JOL 12880 (ZH)

*City of Cape Town v South African National Roads Authority Limited and Others* (2015) 3 SA 386 (SCA).

*Dr JS Moroka Municipality and Others v Betram (Pty) Limited* (2014) 1 All SA 545 (SCA)

*Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* (1999) 2 SA 719 (SCA)

*Logbro Properties CC v Bedderson NO and Others* (2003) 1 All SA 424 (SCA)

*Metro Projects CC and Another v Klerksdorp Local Municipality and Others* (2004) 1 All SA 504 (SCA)

*Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others* (2008) 2 All SA 145 (SCA)

*Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs v Smith* 2004 (1) SA 308 (SCA)

*Minister of Social Development and Others v Phoenix Cash & Carry PMB CC* (2007) 3 All SA 115 (SCA).

*Plaaslike Boeredienste (Edms) Bpk. v Chemfos Bpk.* (1985) 2 All SA 155 (A)

*South African National Roads Agency Limited v City of Cape Town and Others; In Re: Protea Parkway Consortium City of Cape Town and Others* (2014) 4 All SA 497 (WCC).

*VE Reticulation (Pty) Ltd and Others v Mossel Bay Municipality and Others* 2013 (2) SA 489 (WCC)

### ***International law instruments & sources***

The African Union Convention on Preventing and Combating Corruption (1 July 2003), *The African Union*

Public Private Partnerships: Global Credit Survey (2005), *Standard and Poor's New York*

United Nations Commission on International Trade Law: Model Law on Public Procurement, General Assembly Resolution 66/95 of 9 December 2011

United Nations Convention Against Corruption, General Assembly Resolution A/58/422 of 31 October 2003

United Nations' Millennium Development Goals United Nations General Assembly Res 55/2 (18 September 2000)

The World Bank Procurement Guidelines: Procurement of Goods, Works and Non-Consulting Services Under IBRD Loans and IDA Credits & Grants by World Bank Borrowers (Washington, 2011), *The World Bank*

'Corruption and Economic Development' in *Helping Countries Combat Corruption: The Role of the World Bank* (1997), *The World Bank*

### **Secondary Sources**

#### ***Books***

P Bolton, *The Law of Government Procurement in South Africa* (2007)

SJ Evenett & BM Hoekman, 'Transparency in Government Procurement: What can we expect from International Trade Agreements?' in S Arrowsmith & M Trybus (eds), *Public Procurement: The Continuing Revolution* (2003)

Turpin, *Government Procurement and Contracts* (1989)

***Journal Articles***

- I.M Ambe & J.A Badenhorst-Weiss, 'A Review of Procurement Practices in the South African Public Sector' (2012) 6 *Journal of Transport and Supply Chain Management* 437
- P. Bolton 'Disqualification for Non-compliance with Public Tender Conditions' (2014) 17(6) PER/PELJ 2314
- P Bolton, 'The Regulation of Preferential Procurement in State-Owned Enterprises' (2010) 1 TSAR 101
- J Conradie, 'The Municipal Finance Management Act' (2004), 5(1) *Official Journal of the Institute of Municipal Finance Officers* 12
- LM Du Plessis, 'Just Legal Institutions in an Optimally Just South Africa under the 1996 Constitution' (1998) 3 *Stell LR* 239
- M. Fazekas & I.J. Toth 'From corruption to state capture with empirical applications from Hungary' (2016) 69(2) *Political Research Quarterly* 320
- MC Fombad, 'Enhancing Accountability in Public-Private Partnerships in South Africa' (2014) 18(3) *South African Business Review* 66
- E. Mantzaris, 'Public Procurement, Tendering and Corruption: Realities, Challenges and Tangible Solutions' (2014) 7(2) *African Journal of Public Affairs* 67
- S.O Migro & I.M Ambe, 'Evaluation of the Implementation of Public Sector Supply Chain Management and Challenges: A case study of the Central District Municipality, North West Province, South Africa' (2008) 2 *African Journal of Business Management* 230
- J. Nye 'Corruption and political development: A cost-benefit analysis' (1967) 61 *American Political Science Review* 417
- P. Volmink, 'Legal consequences of non-compliance with bid requirements' (2014) 1 *APPLJ* 41
- S. Williams & G. Quinot, 'Public Procurement and Corruption: The South African Response' (2007) 124(2) *South African Law Journal* 339

***Media Articles***

J. Brown, 'Guptas deny state capture', *City Press* (26 June 2016)

R. Essop, 'N1/N2 Toll Project Documents No Longer Secret' *Eyewitness News* (30 March 2015)

A. Lewis, 'Cape Town Targets SANRAL papers', *IOL News* (18 March 2015)

F. Shivambu 'State Capture: It's criminal and its nothing new' *Daily Maverick* (24 March 2016)

H. Winkler, 'How the state capture controversy has influenced South Africa's nuclear build', *The Sunday Times* (27 May 2016)