

Law Reform in the Contract State: Directions in Public Procurement Regulation in South Africa

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Abstract: As South Africa contemplates another episode of public procurement legal reform, we identify gaps in political will and organisational capacity to accomplish such an objective and argue for covering such gaps by creating greater opportunities for public support. Legislative reform provides the possibility for root and branch rationalisation of public procurement rules and procedures in a manner that identifies inefficiency and ineffectiveness and advances social justice in South Africa. Specific issues for consideration include interrogating the call for establishment of a centralized procurement regulatory authority, specifying the kind of formal instruments effective for purposes of public procurement reform, and considering the degree of autonomy to be afforded to the constitutionally separate spheres of government at provincial and local levels. Further, transparency and public participation are crucial strategies for the effective implementation of public procurement regulation. Since the current regime of procurement regulation can best be described as in a state of incomplete movement toward a centrally steered but decentralised procurement system, we advocate pulling that regime through to a state of completion, then continuing to network and embed that regulation in society, recognizing and working with public procurement as a social process. [End Abstract]

Introducing the topic of public procurement law reform in South Africa, this article surveys a number of significant issues, with particular focus on the incomplete implementation of South Africa's previous such effort in the 1990s, the negotiation of the constitutional landscape in order to achieve such law reform, and the importance of public participation and transparency in order to effectively implement such a law. The focus of this paper is thus not on the frequent concerns regarding state capture and corruption which occupy pages in the papers and the academic journals especially the law journals (Venter, 2015) but rather on reform which aims to improve the functioning and capacity of the public procurement regime. This paper also does not intend to deal with all things relevant to this procurement regime, or its legal reform. Instead, we discuss some of what are likely to be the

most contentious issues in the process of law reform, offering arguments for taking certain positions on those issues. We do so with attention to legal questions but from the converging perspectives of the sociology of organizations, politics, and public administration.

The first section of this paper provides background on the regulatory history of South Africa's current public procurement regime. The current regime is significantly influenced by an incomplete episode of law-making beginning soon after South Africa's transition to constitutional democracy. The second section of the paper provides an overview of the current law reform effort, paying particular attention to its intentions regarding some of the key institutions of the regime – the regulatory authority over public procurement currently largely residing with National Treasury and with the character of the regime demonstrated in its detailed rules. The third section notes the importance of transparency and makes the argument for public participation as two crucial strategies for effective implementation of reformed public procurement regulation.

Part One: Prefiguring Contemporary Public Procurement Law Reform in South Africa

The shape of contemporary public procurement law reform in South Africa is prefigured by the omissions and incoherencies of an earlier episode. In 1995 this earlier episode of law reform began with the establishment of a Procurement Forum, a public body tasked with designing South Africa's post-apartheid procurement policy. Jointly led by the Ministries of Finance and of Public Works, supported financially by the World Bank and technically by a Public Sector Procurement Reform Task Team, the Procurement Forum would be influenced by a convergence of prevalent international trends with domestic conditions and goals. A full discussion of this episode is beyond our current scope and we will focus on changes proposed in national and provincial governments.

In the 1990s, South Africa was swept into the international wave of administrative reforms occurring under the rubric of the private sector inspired paradigm of new public management. (Cameron, 2009; Chipkin and Lipietz, 2012) Elaborated by the Department of Public Service and Administration in conjunction with the National Treasury, the new public management agenda in South Africa stressed the twin objectives of giving state managers the freedom to manage and holding them accountable for results. What this meant in practice was that a broad range of managerial powers and functions were to be decentralised and responsibility for their discharge aligned in the offices of departmental and agency heads. As the Procurement Forum began work, existing tender boards centralised the procurement function at national level and in each province, something inconsistent with the new public management approach. By removing important powers from the control of

administrative heads within departments and other organisational units of the state, these tender boards restricted managerial freedom and thereby complicated lines of accountability.

The 1990s were also a period of large-scale reform of public procurement systems internationally, influenced by an efflorescence of private sector procurement thought in the 1980s, (Ellram and Carr, 1994) which converged principally with a donor-driven 'good governance' agenda that highlighted the corruption of and inefficiencies in developing country procurement systems. (Mariz et al., 2014) South Africa's existing central tender boards were evaluated in this context and, typically, viewed as out-dated, cumbersome and unwieldy, both bad procurers and a bottleneck placed across the effective discharge of government functions. Crucially, specifically reflecting South African realities, the central tender boards were also framed as an inhibition upon the inclusion of previously disadvantaged, black-owned small and medium businesses in government contracting. In this view, centralisation biased procurement towards large purchases from established companies. Distanced from localities and local conditions, it ran up against an increasing emphasis upon localised procurement from small, emerging suppliers. (Ministry of Finance and Ministry of Public Works, 1997) This impetus toward redistribution, the key political driver of the reform process, would through the efforts of the Public Sector Procurement Reform Task Team find its way into the 1996 Constitution of the Republic of South Africa as section 217 (2), providing for the application of categories of preference in the allocation of government contracts. (*Constitution of the Republic of South Africa, 1996, n.d., sec. 217*)

An interim strategy for reform, articulated in a Ten-Point Plan released by the Department of Public Works in 1996, largely sought to include black-owned small and medium business in government contracting, through such measures as preferences, unbundling large contracts, improving access to information and advice, simplifying tender submissions and promoting early payment cycles. (Bolton, 2006, p. 204) This was followed by a more substantial document, the 1997 Green Paper on Public Sector Procurement Reform, prepared by the Procurement Forum and released jointly by the Ministries of Finance and of Public Works. The Green Paper, in addition to such measures, proposed a broader approach to decentralisation, to be coupled with extensive central regulation, the latter to be undertaken by a Procurement Compliance Office, likely a stand-alone entity close to what became National Treasury. Much of this 117 page Green Paper was dedicated to elaborating the regulatory functions of this Procurement Compliance Office. (Ministry of Finance and Ministry of Public Works, 1997) At least in institutional imagination, this Office is the direct forerunner of the current Office of the Chief Procurement Officer, officially established within National Treasury in 2013.

In the then-standard approach of the reform paradigm, one would see a robust central regulatory agency steering a procurement system decentralised to align initiative and accountability with public managers. This, however, was not the approach consistently and fully implemented after the Procurement Forum. In the years that followed the release of the 1997 Green Paper, a difference of opinion arose between National Treasury and the Department of Public Works as to who should drive the process. Released for public discussion, the Green Paper never graduated into an authoritative White Paper. In the absence of an over-arching and authoritative guiding policy document and with only the general and capacious provisions of section 217 of the Constitution for constraint, various parts of the South African state began to move in different directions.(The World Bank, 2003)

In 1999 the Minister of Finance drove the Public Finance Management Act (PFMA) through Parliament, on the back of 18 months of extensive consultation, and with overwhelming multi-party support.(*Public Finance Management Act 1999*, n.d.) The PFMA provided the legal basis for decentralising responsibility for establishing constitutionally compliant procurement functions to accounting officers and authorities in national and provincial spheres of government. The PFMA was followed by consequent amendments to existing State Tender Board Act regulations in 2003. Procurement was one, but only one, of the functions of public finance management. Organisational decentralisation occurred thereafter, deemed complete by 2009 with the disbanding of the State Tender Board and provincial tender boards.(Chipkin, 2016) In 2000 National Treasury pushed through the Preferential Procurement Policy Framework Act (PPPFA) which established preferences for a range of business categories through a points-based system for the adjudication of tenders. National Treasury would be responsible for administering this legislation. In the case of public procurement, however - from 2003 reconceptualised more broadly as supply chain management - it would do so through an exceedingly complex dispersal of regulatory functions across a number of its divisions, centrally the residual Specialist Functions, including also the Office of the Accountant-General, Intergovernmental Relations and Assets and Liabilities Management. The effect, arguably, was for public procurement regulation to be subsumed under the organisationally dominant logic of broader financial management, inhibiting the development of a systematic and tailored approach toward public procurement.

Dispersal of regulatory functions within National Treasury was matched by the elaboration of regulatory functions beyond it. National Treasury, operating under advice from the World Bank(The World Bank, 2003), noted the degree of regulatory fragmentation consequent upon the failure to develop a South African white paper. Treasury thus, from 2003, sought to guide greater uniformity

in the system, partly through subordinate legislation in terms of the PFMA. However, to a significant extent the decentralization process without robust steering had already unfolded. Already in 2000 the Department of Public Works passed legislation establishing the Construction Industry Development Board (CIDB). The CIDB had many of the powers and responsibilities originally envisaged as belonging to the Procurement Compliance Office. These powers and responsibilities, however, only covered procurement of construction and related services, and involved relatively limited legal authority over the now decentralised system. In 1998, as amended in 2002, it was further legislated that information technology was to be procured centrally through the newly established State Information Technology Agency. The statutes establishing these bodies joined, and were later joined by, a range of others, so that by today there are no less than twenty statutes dealing with public procurement in a direct and significant way.

Primary legislative fragmentation established parallel regulatory authorities. Such dispersal of authority proved inadequate to steering the new South African procurement system, which increasingly experienced well-publicised issues of non-compliance, corruption, inefficiency and ineffectiveness. In part, the character of the post-1994 African National Congress (ANC) party-state was an important factor here. The ANC bridged the political-administrative divide, curtailing administratively independent enforcement, thereby placing political constraints upon effective enforcement of public procurement rules. Substituting for effective accountability arrangements, and in the context of existing regulatory fragmentation, there occurred an elaboration of rules in subordinate legislation, with some 85 distinct legal instruments at the time of writing. An authoritative analysis of the resulting situation, commissioned by National Treasury, noted *inter alia* the excessive difficulty in defining the complete set of legal instruments to govern any particular case. It also noted overlap and duplication, involving conflicts between legal instruments, significant uncertainty as to which instruments to follow, and a range of capacity development issues produced by a proliferation of different procurement approaches in diverse contexts and institutions. (Quinot, 2014)

Contemporary public procurement law reform is responsive to this history. Since around 2010, there have been indications of increasing concerns in the ANC (Cronin, 2012) and National Treasury in relation to public procurement. This increasing concern has occurred in the context of several factors including notably an emergent fiscal crisis of the state, following global recession from 2007, and heightened public concerns around corruption and poor service delivery, which by this point fundamentally implicates public procurement. A further factor has been the increasing assertiveness and political heft of black-owned enterprise, now organised into the Black Business Council, a

constituency grown in part through preferential public procurement practices. Public procurement, in the result, was flagged as a priority in the National Development Plan of 2011.(National Planning Commission, 2011) The use of public procurement as a tool for industrial development was given a boost by the signing of a Local Procurement Accord between government, business and labour in the same year.(Department of Economic Development, 2011) In his 2012 Budget Speech, Finance Minister Pravin Gordhan announced an intention to appoint a Chief Procurement Officer (O-CPO) in the National Treasury.(Gordhan, 2012) The Chief Procurement Officer being appointed in 2013, the Office of the Chief Procurement Officer began accruing to itself the powers and functions previously dispersed across National Treasury, a process that is currently incomplete. It then signalled the intention to proceed with legislative reform, the overview and to some extent critique of which is the topic of the second part of this paper.

Part 2: An Overview of Contemporary Public Procurement Law Reform in South Africa

With the historical context of the first part of this paper in mind, the current legal reform effort driven by the National Treasury might be characterized as a series of movements along the following five lines.(Malunga, 2014; National Treasury, 2015a, 2015b; Pearson et al., 2016; Public Affairs Research Institute, 2015; Quinot, 2014; van der Westhuizen, 2015; World Bank, 2016) First, the effort aims for locating overarching regulatory authority for public procurement in South Africa in the OCPO in the National Treasury, mandating procedures that support systematic engagement with emerging issues. Second, it aims towards adopting a strategic approach to centre-led procurement, through compulsory transversal contracting after consultation, along with various efforts to centralise elements of the public procurement process, for instance including central supplier management through such information technology tools as a central supplier database. Third, linked to the second, it intends to formulate and elevate in stature the concept of strategic procurement, which will incrementally allow for more flexibility in procurement methodology, while shifting the burden of regulation and value-creation from the purchasing stage to planning and contract management. Fourth, it attends to mainstreaming a more flexible preferential procurement system, eliding tensions with considerations of cost-effectiveness and functionality, while moving the details of the preference from statute to subordinate legislation . Fifth and finally, it shifts the burden of regulation from rigid, inefficient and ineffective rules to more robust mechanisms of discipline.

There is much to be said in favour of this effort. The centre-led procurement concept, the second movement above, offers an intelligent way out of a history of disruptive cycling between centralised and decentralised institutional arrangements. New information technologies, especially, enable centralisation of key stages in the procurement process in a way that does not undermine, but rather produces efficiency and effectiveness even while enabling central control and constraining malfeasance. Strategic procurement, the third movement above, risks creating institutional opportunities for unethical conduct. The fourth movement, involving a more flexible approach to preferential procurement, arguably enables difficult to measure and monitor off-budget redistributions to emerging business, often from service delivery to the country's poorest. These potentially negative consequences, however, are already prominent within the current system. Further, strategic and preferential procurement, if pursued appropriately, can facilitate the formalisation of existing informal arrangements, allowing for a measure of regulation in the public interest.

Finding ourselves in broad agreement with these thrusts, we focus here on the first and the last movements. As in our approach to prospective elaborations of strategic and preferential procurement, it is our contention that these movements should be approached in the manner of 'working with the grain', an approach, suitable for widely informal public administrations, which concerns itself amongst other things with the identification of 'good fit' solutions and incremental elaborations, as opposed to international best practice solutions that pay little regard to the difficulties of integration into domestic administrative systems.(Levy, 2014)

With respect to the first of the movements above, questions of institutional location were raised initially by a commissioned study into the feasibility of public procurement legislative reform. (Quinot, 2014) From the outset, we would contend, broaching that issue had a particular effect. Reform efforts that run-up against clandestine resistance, as is often the case in informal public administrations affected by corruption, tend to be stymied by continuous debates on peripheral issues that involve intractable dilemmas. The issue of institutional location is often of just such a nature. Those attempting to delay public procurement reform internationally often raise issues of organisational redesign principles and projected benefits and costs. These are difficult to adjudicate, involving a variety of values which are often incommensurable on any single scale, therefore quintessentially open to seeding doubt and debate as a delaying tactic. (Hood, 1998; Simon, 1946) The intractable nature of organisational redesign dilemmas is part of the reason why efforts in this direction should be predicated on the identification of compelling organisational structural problems. In the South African case, this has not been so. There is limited evidence to suggest that

the institutional location of the OCPO has provided serious impediments to the effective discharge of its functions. Indeed, the abstract argument made for relocating the OCPO, centred on the matter of regulatory independence, arguably tends in the opposite direction, to maintaining the OCPO in its current location.

To elaborate on the latter point, current international best practice in public procurement reform would tend to favour establishment of the OCPO as a national public entity, outside of the public service, unattached to any particular department, preferably accountable directly to Parliament and subject to special rules of appointment and dismissal. The attendant arguments is that independence from politics and from the procurement operations of any department is necessary in order to ensure effective, objective and impartial discharge of regulatory functions. It is the case that the OCPO commissioned study into the feasibility of legislative reform favoured such a position. In conjunction with various constitutional and administrative concerns, on the whole, the weight of the public procurement policy process in South Africa tends to prefer the creation of a national public entity accountable to the Minister of Finance and working more closely with the National Treasury.

In arguing against this tendency towards removing public procurement regulatory authority from the National Treasury into an independent public entity, it is important to draw a distinction between formal independence and de facto independence. (Maggetti, 2012) Formal independence consists in legal and formal organisational arrangements that limit control by elected politicians. De facto independence concerns the extent to which organisations exercise actual autonomy in their day to day regulatory activities. Quantitative and qualitative research indicates that formal independence is relevant to, but not necessary or sufficient for, de facto independence.(Maggetti, 2007)

The best explanations for de facto independence are sociological, emerging from the extensive literature on bureaucratic autonomy.(Bendix, 1945; Carpenter, 2001) This literature notes the importance of organisational design, but routinely asserts that such autonomy is more powerfully a function of political and organizational sociology. Public sector organisations behave autonomously for a number of reasons. Public servants with scarce skills can leverage scarcity to obtain more power over organisational decision-making. Their power is augmented where these skills are necessary to, in a formally rational and effective manner, ensuring the provision of goods in which powerful social actors have an urgent and intense interest. Such external political supports are strengthened where these public servants and other actors are networked into a “constituency for bureaucratic autonomy”(Shefter, 1977, p. 413) which can make it immediately politically costly to interfere in the formally rational provision of these goods. These basic criteria have been variously

elaborated, including in literature on regulatory agencies. (Gilardi and Maggetti, 2011; Maggetti, 2012) National Treasury can be argued to fit these criteria fairly well.

National Treasury is a node in the global network state that regulates the South African economy and its interaction with the international economy, in the process becoming a fundamental factor in the livelihoods of millions of South Africans. Indeed, recent history, involving various attempts to politically interfere in the autonomous operation of National Treasury, shows that this does in fact bring immediate and considerable political costs. The latest reshuffle of the Minister of Finance has led to ratings agency downgrades, announcements of investment strikes and calls for a general strike of labour, to the largest marches against the government in post-apartheid history, to serious splits in the ruling African National Congress, and its South African Communist Party (SACP) and Congress of South African Trade Unions (COSATU) allies, with calls across society for the removal of South Africa's President. These political dynamics, which continue to exert pressures towards the rational and rule-bound operation of the National Treasury, cannot be effectively replicated through the legislation of formal independence for a public procurement regulatory authority.

Our analysis advocates against such an approach. However, if such an approach is chosen, this analysis does imply a clear strategy for the law reform effort. Following in the shadow of its Treasury institutional context, an increasingly formally independent OCPO might wish to build its autonomy through tying the office into a constituency through public collaboration in efforts at oversight and enforcement. We discuss this further in Part Three below.

As noted above, we perceive a movement in current law reform strategy to shift the burden of regulation from inefficient and ineffective rules to more robust mechanisms of discipline. With respect to this last movement, we see several research needs. One is identifying the legal instruments necessary and the legal instruments appropriate for various functions in a public procurement regime. A legal regime consists of instruments from constitutional provisions to statutes to regulations and may also include other forms of norms and standards such as instructions and guidance. The law reform effort must specify what type and form of instruments need to be in place in order to rationally uplift public procurement reform to an effective statute level. In terms of established Constitutional Court jurisprudence, in *Pharmaceutical Manufacturers*, where regulations are necessary to the operation of a statutory framework it is irrational and illegal to bring that statutory framework into operation without already having essential regulations and schedules in operation. (*Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000)*, n.d.) In that case, the necessary schedules were not part of

the Act but were essential for the Act's operation. (*Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000), n.d., para. 65) A similar substantive question might thus usefully be posed in order to identify with some precision those rules actually essential for public procurement legislation. In order to be most effective, the rules should be simpler than the current complex regime. (Fombad, 2015)

Further, we should be asking what kind of legal instruments are appropriate for which legal functions in the implementation and operation of a public procurement regime. (Cohn, 2013) Procurement is best understood as a special species of regulation as it aims in large part not at industry but at other government units. For instance, a statute resulting from this law reform effort replacing the existing Preferential Procurement Policy Framework Act might be assumed to be co-equal with the Public Finance Management Act. (*Public Finance Management Act 1999*, n.d.) The Public Finance Management Act itself authorizes further legal instruments, in the forms of regulations and instructions. The statute, the regulations, and the instructions may all purport to be generally applicable and binding. Instructions however may well be argued to differ from regulations in that regulations have gone through a transparent process of law-making. Should instructions be understood as binding? To the extent that they serve to provide an official interpretation of the Act and the Act's regulations, are guidelines better legal instruments than instructions in order to achieve the purposes of the Act? Research on the bureaucratic impact of such legal instruments may be required to answer such questions.

A standard and effective approach to the kind of corruption experienced in the public procurement system can be effectively addressed by routinely and effectively imposing discipline over the system. This recognition may underlie the movement from rules to mechanisms of discipline. What this approach requires however is 'political will' and organisational capacity. The South African government in its current dilemma of allegations of 'state capture' through political patronage and corruption of its public procurement system can be understood to lack both the necessary political will and the organisational capacity to coordinate public procurement reform effectively. Still, National Treasury is best positioned to navigate this politicized terrain through developing clear and effective regulatory powers that are tailored to the demands of a modernized public procurement reform programme. To do so, it will require public support for upholding the country's constitutional rights system.

In our view, the approach of public procurement law reform should be to cover the gaps in political will and organisational capacity by creating greater opportunities for public support. These include

the provision of tailored regulatory powers, which include remedies such as the suspension and termination of procurement processes, the cancellation of contracts, and the possibility of central debarment of suppliers. Many of these provisions are best considered together with the movements towards centre-led strategic yet flexible procurement. Of particular interest here is opening regulation up to public involvement, through transparency and participation provisions. We would also point to the benefits of reinforcing public involvement by incentivising whistleblowing and private investigation through a *qui tam* provision.

Qui tam lawsuits provide a reward (a bounty) for private action enforcing a public claim. The remedy unites those with inside information and those with the legal power and incentive to use that information. First developed in England in the 1200s, the *qui tam* lawsuit was for centuries a principal enforcement tool for various English laws. It was then put on a statutory basis in the United States during the Civil War under the federal False Claims Act. As one scholar explains, “the initiative for False Claims Act cases normally comes from whistle-blowers within a wealthy corporation alleged to have perpetrated fraud against the government. The whistle-blower goes to a law firm that specializes in *qui tam* suits. It is important to note that whistle-blowers, NGOs and others who launch *qui tam* suits are not required to have been harmed by the defendant’s conduct in any way. This is not private law to recover personal losses as in tort; it is a private right to enforce public law encouraged with reward for doing so. Whistle-blowers and other plaintiffs file lawsuits ‘under seal’, so that they are concealed from the public and the defendant until the government has time to decide if it wants to join the lawsuit. If the state then runs the case successfully on the basis of information in the initial filing, the whistle-blower gets, say, 15 per cent of what the state recovers in the suit, with the court having discretion to award up to 25 per cent. If the government decides not to join the lawsuit, the plaintiff who wins on their own gets a guaranteed 25 per cent and up to 30 per cent.” (Braithwaite, 2008, p. 67) While there are nuanced issues to be covered in introducing such a remedy into South African law, such a mechanism deserves careful consideration and may prove to be a powerful tool.

One final important and distinct issue in this overview concerns the scope of this law reform effort – in particular whether it intends to extend to the local governmental level of the state. Here, the issue is the interrelationship of executive autonomy and the working of public procurement law. In particular, there is a need to explore the strength and character of executive autonomy in this field in the municipal and (to a lesser extent) the provincial sphere in the South African constitutional scheme. (*City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* (CCT89/09) [2010] ZACC 11; 2010 (6) SA 182 (CC) ; 2010 (9) BCLR 859 (CC) (18 June 2010),

n.d., *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature and Others (CCT 94/10) [2011] ZACC 25; 2011 (11) BCLR 1181 (CC); 2011 (6) SA 396 (CC) (11 August 2011)*, 2011, *Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature and Others (CCT 94/10) [2012] ZACC 3; 2012 (4) SA 58 (CC); 2012 (6) BCLR 583 (CC) (22 March 2012)*, n.d.) It is no accident that South Africa has two public finance management statutes. One covers the national and the provincial spheres. One covers the municipal sphere. The latter arose from the unsuccessful attempt to extend the former into the municipal sphere. In the end of the legislative process around what became the Public Finance Management Act, National Treasury made a judgment to develop and enact the PFMA and the MFMA in sequence.

Understanding as to the strength and character of municipal sphere autonomy can be assisted by contrasting two arguably competing definitions of cooperative governance. One definition encompasses the concept's formal constitutional dimension, rooted in chapters 3, 6 and 7 of the Constitution. These chapters treat the topics of cooperative government, provinces, and local government. In significant ways, these formal provisions stem from a foundational Constitutional Court decision made under the interim Constitution, *In re: The National Education Policy Bill*. (*In re: National Education Policy Bill No 83 of 1995 (CCT46/95) [1996] ZACC 3; 1996 (4) BCLR 518; 1996 (3) SA 289 (3 April 1996)*, n.d.) That case policed the line of control between national departments and provincial departments, allowing the national sphere to require provincial departments to prepare a plan in order to implement a national policy but not allowing the national departments to dictate the content or details of such a plan. Another question within this issue area of executive autonomy is the appropriate understanding and legal characterisation of the procurement function itself. The procurement function does not figure explicitly within the Schedule 4 and 5 competences of the Constitution. Thus the best interpretation is perhaps that it is an administrative function ancillary to other competences and therefore distributed throughout government.

This formal/constitutional doctrine might be contrasted and compared with what has also been termed a system of cooperative governance, fashioned by National Treasury and to some extent rooted in constitutional law, based in chapter 13 entitled "Finance". In a PARI study of the history of National Treasury published earlier this year, Pearson, Pillay, and Chipkin have observed that "The Treasury built its central institutional capacity while fashioning a system of 'cooperative governance'. This involved an attempt to strike the appropriate balance between central control and devolved fiscal autonomy to departments and other spheres of government. Yet the Treasury has always maintained central predominance in setting the scripts of governance." (Pearson et al., 2016, p. 31) In the PARI interpretation, the PFMA occupied a particular place in this institution-building

effort. “The PFMA represented a distinct attempt at balanced decentralisation that sought to imbue far greater autonomy in government institutions to spend according to their own discretion, while at the same time imposing strict reporting requirements to the central government. While this has undoubtedly enhanced aspects of fiscal discipline and made available unprecedented levels of information, its effects on improving service delivery have remained questionable. The expanded autonomy that came with the PFMA’s managerial emphasis combined with a lack of accountability may have emboldened forces that are now attempting to pull away from centralised control.”(Pearson et al., 2016, pp. 31–32) This historical interpretation should be significantly considered in any public procurement legislative reform effort.

Part Three: The Importance of Transparency and Public Participation to the Effective Implementation of the Public Procurement Regime

This section makes the argument for transparency and public participation as crucial strategies for effective implementation of public procurement regulation. These strategies are significant in the use of procurement as part of a broad-based strategy of black economic empowerment.(Iheduru, 2004; Tangri and Southall, 2008) Consideration of episodes of procurement reform elsewhere demonstrates that, while transparency may not be sufficient on its own to reform public procurement practices, together with other strategies including public participation and simplification, it is an important regulatory tool.(Fombad, 2015; Ohashi, 2009; Sunstein, 2010)

Internationally, the case for public participation is rooted in the moral principle that public participation is justified as public procurement is a matter of public interest, both in terms of the use of public funds and the impact that the public procurement system has on service delivery.(Rose-Ackerman, 1999, pp. 59–68) More pragmatically, public engagement is understood to be an effective means to improving relations between the government and its constituency. Public engagement has been demonstrated also to improve accountability and assist in promoting the integrity of the public procurement regime and its processes.

One example of this occurred in the Philippines.(Cadapan-Antonio, 2007; Campos and Syquia, 2005) In the 2000s, members of an earlier task force established by government to provide for procurement reform came to build a civil society organization, Procurement Watch Inc. (PWI). PWI mobilised public support around certain desired reforms and was instrumental in pushing through the Philippines’ first dedicated public procurement statute. This statute provided for civil society monitoring and for their filing of complaints and reports on deviations from the mandated procurement process with procurement Ombuds with enforcement powers. The new procurement

statute also had clear non-discretionary criteria that are to be used during the evaluation of bids to make the procurement process more corruption-resistant and efficient. Further, the statute provided for criminal and administrative sanctions against procurement officials and bidders who are found to be in violation of this statute.

PWI also conducted a variety of capacity-building activities with various groups and individuals. One related to the Differential Expenditure and Efficiency Measurement (DEEM) tool. This was used to measure corruption and inefficiency in public procurement. DEEM was a collaborative effort between the PWI and the government's internal audit agency. The government's internal audit agency agreed to provide PWI with access to procurement documents maintained by the agencies it was auditing. DEEM was thus used as a means to compare and monitor the different stages of the public procurement process by making use of information from documents produced. An additional tool was used to analyze invoices and check if the contract was honoured as per the initial bidding specifications. A third tool, called the observer's diagnostic report was used as a feedback mechanism to verify the legitimacy of the bid. As an exercise, this range of tools could be used to evaluate the Gauteng open tender process.

The successes of the PWI effort are not complete but are real. One realized benefit has been lower pricing due to transparency and an improvement in delivery performance as a result of increased community participation. There are also challenges. The entire reform rests on extensive cooperation between civil society and government departments. This is particularly difficult if a working relationship is not built over a period of time, which points to the importance of institutionalizing relationships. Furthermore, detailed checks are meaningless if the departments are not strict with following procedure and sharing all the necessary documents with the civil society observers. Important documents in this respect were legal memoranda and memoranda of understanding. Market price research was also challenging for the civil society observers as this requires a lot of resources in order to be conducted accurately.

Further techniques used in this field include integrity pacts and social audits.(Fombad, 2015) Integrity pacts are an initiative that was primarily advocated for by Transparency International in the mid-1990s. Each bidder had to disclose all payments made in connection with the bid. The bidders were also advised to have company codes of conduct clearly rejecting the use of bribes and other unethical behavior. The main objectives of the integrity pact are to enable companies to abstain from bribing by providing assurances to them that their competitors will do the same, and that government departments will undertake to prevent any forms of corruption. Social audits are budget-focused monitoring of public expenditure management and oversight. Their use may require

training on public finances to citizen groups. Such training has the result of strengthening the capacity of these groups to exercise oversight over budget process and to demand accountability from government departments. Social audits can help build budget literacy among citizens and facilitate discussions and debates on budgetary issues with the public. They thus strengthen the relationship between the government and its constituencies.

Conclusion

We have set out above some of the issues and the underlying analysis we think should be considered as South Africa contemplates public procurement legal reform. The approach of public procurement law reform should be to identify and cover the gaps in political will and organisational capacity by creating greater opportunities for public support. Specific issues for consideration include the international best practice of establishment of a centralized procurement regulatory authority as well as legal questions around the kind of formal instruments effective for purposes of public procurement reform and the degree of autonomy to be afforded to the constitutionally separate spheres of government at provincial and local levels. Our research and experience shows that transparency and public participation are crucial strategies for the effective implementation of public procurement regulation. With such questions and issues in mind, legislative reform provides the possibility for root and branch rationalisation of public procurement rules and procedures in a manner that identifies inefficiency and ineffectiveness and advances social justice in South Africa. Since the current regime of procurement regulation can best be described as in a state of incomplete movement toward a centrally steered but decentralised procurement system, we advocate pulling that regime through to a state of completion, then continuing to network and embed that regulation in society, recognizing and working with public procurement as a social process.

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