APPLJ
AFRICAN PUBLIC PROCUREMENT LAW JOURNAL
A PUBLICATION OF THE AFRICAN PROCUREMENT LAW UNIT APLU

# THE REFORM OF PUBLIC PROCUREMENT REMEDIES: A DOMESTIC AND COMPARATIVE ANALYSIS

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**(2020) 7 APPLJ 63**

**ABSTRACT**

The current remedy regime of the public procurement system of South Africa has left much to be desired as compared to what the UNCITRAL Model Law on Public Procurement suggests as an international standard. With the world-wide COVID-19 pandemic shining a spotlight on government procurement systems and their failures, and extensive allegations of extreme malfeasance in public procurement of various emergency requirements in South Africa in response to the pandemic, an effective remedy regime has never been more important. This article explores some of the major failures of the current South African remedies regime against the backdrop of the UNCITRAL Model Law and the recently published draft Public Procurement Bill, 2020. It argues that although the draft Bill provides some solutions, there are several issues that must still be addressed before the draft Bill can be enacted. The draft Bill shows promise by attempting to clarify the hierarchy of remedies available internally and externally, by introducing the Public Procurement Tribunal and Regulator and creating new compensation claims available to bidders. However, the independence of these new institutions, the continued fragmentation of the available remedies, the lack of review or reconsideration procedures for local government, the problems faced by courts in choosing the appropriate remedy out of the numerous available to them, and more, remains to be addressed. It is argued that the Bill should be closer aligned to the Model Law, especially with regards to a stand-still period between contract award and conclusion.

# THE REFORM OF PUBLIC PROCUREMENT REMEDIES: A DOMESTIC AND COMPARATIVE ANALYSIS

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## 1 Introduction

Until recently, there was no attempt in South Africa to regulate public procurement law in a codified and coherent manner.[1] Consequently, there has been great confusion regarding the appropriate remedies to apply where disputes arise.[2] The UNCITRAL Public Procurement Model Law ("Model Law") has become an essential standard for the legal profession against which procurement law reform should be compared to.[3] This is because the Model Law has spearheaded "a set of universal standards and norms" by covering any vital principles and procedures procuring entities could require in numerous circumstances.[4] The recently published draft Public Procurement Bill ("Bill") aims to create a unified set of rules to prevent domestic confusion from persisting in South Africa.[5] In order to judge the adequacy of the remedies introduced by the Bill, I will conduct a domestic analysis by comparing the Bill to the current position in South Africa with reference to legislation, case law and literature. Additionally, I will engage in a comparative legal study by comparing the Bill to the Model Law on Public Procurement to determine whether the Bill meets the international standards dictated by UNCITRAL. My purpose, therefore, will be to investigate whether the Bill has brought our procurement legislation closer to the goals

* I would like to express my gratitude and thanks to Professor Geo Quinot for his encouragement to publish this contribution, and his commentary which assisted my writing greatly.
1 Quinot 2011:193.
2 193.
3 UNCITRAL (United Nations Commission on International Trade Law) Model Law on Public Procurement (2011).
4 UNCITRAL 2011; Wallace 2006:485; Arrowsmith 2004:19.
5 See s 2*(e)* of the Bill, as published under GN 94 in *GG* 43030 of 19-02-2020.

and prescripts of the Model Law as an international standard, whilst ensuring that the South African context is taken into consideration.[6]

The article will start by providing a brief background to public procurement law in South Africa and set out the legislative framework and the challenges experienced. It will then continue by measuring the current position of our procurement law remedies against the international standard that the Model law represents. The article will then investigate how the Bill proposes to address the shortcomings of the current procurement law remedies, and whether this will bring our law more in line with the Model law or not. Lastly, this contribution will take note of the shortcomings the Bill fails to address, and explain why these failures should be rectified before the Bill can be enacted.

## 2 Background and context: South Africa

Public procurement can be seen as the backbone of economic development in developing nations.[7] South Africa specifically has the largest expenditure on public procurement of the Southern African Development Community countries, historically amounting to 20% of the national GDP at R626 billion in 2018.[8]Comparatively, only 12% of the worldwide GDP is dedicated to public procurement.[9]

The importance of a reliable public procurement system has never been so clear as with the current global crisis of COVID-19.[10] Public procurement worldwide has had to increase substantially so countries are equipped to fight the pandemic and keep their citizens alive. Therefore, reliable and incorruptible public procurement systems have become a necessity for saving millions of people's lives and livelihoods. Countries worldwide have faced the enormous challenge of procuring large quantities of desperately needed equipment required to combat the effects of the virus as a result of the supply of such equipment not being able to meet the skyrocketing demand so

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[6] Quinot 2011:15.
[7] De La Harpe 2015:1572.
[8] De La Harpe 2015:1586; Brunette & Klaaren 2020.
[9] Bosio & Djankov 2020.
[10] Quinot 2020:12.

suddenly.[11] Developing countries specifically are already at a disadvantage when it comes to procuring necessary medical supplies.[12] These countries often do not produce this type of equipment themselves, and thus must battle other major developed countries in the markets to procure scarce, life-saving equipment for themselves.[13] Consequently if a country has a weak procurement system, as South Africa does, it will likely fail to fulfil its essential public function.

This sudden surge of emergency procurement has also left many government procurements systems vulnerable to exploitation and corruption.[14] It is already a common occurrence that personal protective equipment ordered simply does not arrive, or is unusable.[15] According to the Special Investigating Unit ('SIU') an alleged R13billion of the funds meant to go towards combatting the pandemic has already been looted by corrupt government officials.[16] The SIU is already investigating 2 556 personal protective equipment contracts awarded by the government, along with 1 774 service providers and 189 State institutions for alleged corruption, and the unit is still receiving complaints to investigate.[17] One such case instituted in the SIU Special Tribunal, namely *Department of Health: SIU v Fabkomp (Pty) (Ltd) and Others*[18], related to a contract valued over R10million, where the tribunal found the procurement of motorcycles with sidecars "resulted in a process that was not fair, competitive or cost-effective."[19] A further case[20] relates to a contract awarded by the Gauteng Department of Health for an astounding R139million, where it was found the PPE unit prices were artificially inflated between 211% and 542% by the supplier.[21]

Having an effective remedy regime ensures corrupt activities can be identified, righted and deterred in the future.[22] Unless there is enforcement of procurement laws, the

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[11] Arrowsmith & Butler 2020:159.
[12] Moss 2020:180.
[13] 180.
[14] Arrowsmith & Butler 2020:159.
[15] 159.
[16] SIU (Special Investigating Unit) 2020:18.
[17] 18.
[18] EC04/2020.
[19] SIU 2020:19.
[20] *The SIU v Ledla Structural Development (Pty) Ltd and 43 Others* (GP07/2020).
[21] SIU 2020:21.
[22] Udeh 2018:22.

public would not have faith in public procurement systems and competition over tenders would decrease.[23] Thus, if the system is badly designed and open to misuse and corruption, much-needed economic development, or even the procurement of essential protective equipment, will not occur.[24]

The Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution) states that:

> "When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."[25]

The Constitution further states that that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair" and that National legislation must be promulgated to ensure this is done.[26] Therefore, remedies have developed for bidders on government contracts to contest decisions made by procuring entities, within the framework provided for by the Constitution, where procurement laws were not followed.[27]

The current public procurement law remedy scheme can be difficult to navigate as it is regulated by "a plethora of statutory enactments that do not always clearly align."[28] Remedies arise from numerous areas of the law including administrative and contract common law, and from case law. .[29] This, means many of the remedies used in public procurement matters have arisen out of areas of law not necessarily geared towards resolving public procurement issues.[30] As public procurement is a field of law that straddles so many other areas of law, but yet has its own very specific intricacies and requirements, these remedies developed for other areas of law often do not provide satisfactory relief.

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[23] Quinot 2020:22.
[24] De La Harpe 2015:1572.
[25] Section 217(1)-(3).
[26] Section 33(1).
[27] Udeh 2018:23-24.
[28] Quinot 2011:1-2.
[29] Volmink 2014:8.
[30] Quinot 2011:3.

# 3 Shortcomings in the current procurement law remedies in providing effective relief to complainants

## *3 1 Legislative remedies*

The enforcement of procurement law is achieved through a highly dispersed system of remedies divided between different areas of law.[31] Amongst others, public procurement is regulated by the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), the Preferential Procurement Policy Framework Act 5 of 2000 ("PPPFA"), the Public Finance Management Act 1 of 1999 ("PFMA"), the Local Government: Municipal Finance Management Act 56 of 2000 ("MFMA"), the Local Government: Municipal Systems Act 32 of 2000 ("Systems Act"), the Broad-Based Black Economic Empowerment Act 53 of 2003, the Prevention and Combating of Corrupt Activities Act 12 of 2004, the National Supplies Procurement Act 89 of 1970 ("National Supplies Act"), the State Tender Board Act 86 of 1968, and the Disaster Management Act 57 of 2002 and all their respective regulations. It is clear to see this is a great deal of legislation to regulate one area of law, and as a result "overlap, duplication and even tension between all these various instruments" occurs frequently.[32]

### 3 1 1 *Internal legislative remedies*

These pieces of legislature contain both internal and external remedies. Internal remedies refer to the procuring entity reviewing their conduct when such a review is requested and where legislation allows for a review.[33] According to administrative law, unless exceptional circumstances arise, these internal remedies must be exhausted before approaching the court.[34] The PFMA and MFMA encourage the use of internal remedies, including negotiation or mediation, prior to judicial intervention and the PPPFA provides additional grounds of review upon which procurement law decisions may be reconsidered.[35] The Model Law also suggests the use of "reconsideration" as

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[31] Quinot 2020:3.
[32] 4.
[33] Udeh 2018:123.
[34] Section 7(2) of PAJA; Quinot 2011:3.
[35] Preferential Procurement Policy Framework Regulations, 2017: GN 501 in *GG* 40553 of 20-1-2017; Bolton 2008:797-799.

a remedy, which is its form of an internal remedy.[36] This category of remedies has its shortcomings.

In South Africa internal remedies mainly apply within specific municipal areas.[37] Further, review of a procurement process is not mandatory, and if a review does occur, the results are not binding on the parties to the review.[38] One such internal remedy is Regulation 49 of the MFMA which "vests on 'aggrieved persons' a general right to administrative review against the procurement decisions or actions of a municipality or municipal entity".[39] Furthermore, section 62 the Systems Act creates an unsuccessful bidder's right to appeal where an award decision was made by a delegated authority and is often used against Municipal decisions. Whether this right to appeal does exist or not, whether contracting out such a right is possible, and what the correct interpretation of the section is, has still not been clearly established.[40] Section 62 and Regulation 49 overlap greatly, but also contradict each other on issues such as time limits, scope of use, categories of complainants and availability of subsequent actions.[41] This is only one of many examples that can be mentioned to illustrate the perplexing nature of the current legislative framework.

Some internal remedies even perturb the effective functioning of public procurement. An example of this is where an individual procurement official is held personally responsible for failed procurement attempts where losses follow, often leading to over-caution of these officials. [42] Although this remedy may have the laudable purpose of ensuring tax payers do not end up paying for government officials' mistakes, and ensuring better adherence to procurement rules, the concern remains that this remedy places the standard of care of public officials at too high a benchmark and leads to considerable uncertainty.[43] Arguably, this remedy would result in over-caution of

[36] UNCITRAL Model Law on Public Procurement, Arts 64(2) and 66.
[37] Udeh 2018:124.
[38] 124.
[39] 109-112.
[40] Udeh 2016:72.
[41] Quinot 2011:4.
[42] Quinot 2020:6.
[43] Anthony 2019:147-148.

government officials in a tender process, unnecessarily wasting precious time and money.

3 1 2 *External legislative remedies*

Conversely, external remedies are challenges, appeals or reviews before an external and independent administrative authority.[44] Examples of these remedies can be found in the Municipal Supply Chain Management Regulations[45] and the Treasury Regulations,[46] providing for the review of decisions made by municipalities, provincial and national government through external remedies. The external remedies provided for in the current regime have been largely ineffective.[47]

### *3 2 Court-ordered remedies*

The Constitution additionally states "a court must declare that any law or conduct that is inconsistent with the Constitution is invalid… and may make any order that is just and equitable".[48] To give effect to this PAJA gives the court the power to review administrative actions, which procurement procedures have been accepted as, based on their lawfulness, reasonableness, and their procedural fairness.[49] Resulting court orders may include directions to give reasons, "remitting the matter for reconsideration by the administrator," setting aside an award or contract, costs orders, "substituting or varying the administrative action or correcting a defect resulting from the administrative action", and declaratory orders.[50]

Court-ordered remedies, however, also contain a myriad of problems including difficulties such as proving harm or a lack of alternative remedies in the context of an interdict. [51] Additional issues include lack of clarity on pre-contractual and post-award remedies and deciding which area of law to apply.[52] Courts have also been hesitant

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[44] Udeh 2018:149.
[45] See GN 868 in *GG* 27636 of 30-05-2005.
[46] See GN R225 in *GG* 27388 of 15-03-2015; discussed in Udeh 2018:150.
[47] Udeh 2018:169.
[48] Section 172(1) of the Constitution.
[49] Section 6(1) of PAJA; De la Harpe 2009:85.
[50] Section 8 of PAJA; Bolton 2008:798.
[51] Quinot 2011:7-9.
[52] 9.

to judge procurement matters because of the doctrine of separation of powers, the polycentricity of tender issues and the reduction in cost-efficiency that judicial intervention creates.[53] Further, as stated by Nugent JA in *South African Post Office v De Lacy and Another,*[54] courts need relief from the "disturbing frequency" with which public procurement issues are brought to them, which also often unnecessarily interrupt procurement processes.[55]

A review of the procurement process can also often lead to a contract that was awarded being declared void as a result of a fault in the process leading up to the award.[56] This could lead to "catastrophic consequences for an innocent tenderer" resulting from the contract being void *ab initio* as:

> "a decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract."[57]

These actions could additionally negatively impact the public at large, especially those who were involved with the contract, or those in whose favour the procurement was contracted.[58] This issue must therefore be carefully considered when reforming the remedies available.

Regarding compensation claims, receiving delictual damages in all cases apart from fraud is unlikely because of limited government resources.[59] For the same reason, it is also doubtful that compensation claims in terms of PAJA would succeed.[60]

The current position therefore clearly presents difficulties for parties to gain access to remedies and it will be determined if the Model Law and the draft Bill could perhaps provide the solution.

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[53] Quinot 2009:439-441.
[54] *South African Post Office v De Lacy and Another* [2009] ZASCA 45.
[55] See para 1; Quinot 2011:6; Udeh 2016:33.
[56] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* [2007] ZASCA 165 para 23.
[57] See para 23.
[58] See para 23.
[59] *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16 ("*Steenkamp*"); *Minister of Finance and Others v Gore NO* [2006] ZASCA 98 ("*Gore*").
[60] Quinot 2011:12.

## 4 Background and context: Model Law

The procurement methods, procedures and basic remedies of the Model Law are favoured by many jurisdictions.[61] South Africa does however not apply the Model Law on Public Procurement directly, but does mirror some of the same ideals.[62] Amongst others, the Model Law lists "maximising economy and efficiency" as part of its primary objectives.[63] These are similar to the requirements set out in our Constitution, such as cost-effectiveness. [64] Consequently, the mere fact our system of law is so fragmented arguably shows we are already not in line with the Model Law or the Constitution.

The Model Law provides numerous remedy options including administrative or judicial remedies as well as additional internal review possibilities.[65] The UNCITRAL Guide to Enactment of Model Law encourages a procurement law remedy system to be largely "self-policing and self-enforcing".[66] This type of system allows any party with an interest in procurement to ensure compliance with procurement laws simply by protecting their own rights and requesting remedial action where laws are not complied with.[67]

Some remedies include the right of any contractor or supplier with an interest in obtaining the contract to seek review "by the procuring entity, an administrative body, or a judicial form," to protest where loss or injury occurred due to breach of procuring entity duties, to seek orders correcting unlawful actions and costs orders for costs and lost profits.[68] The Model Law also provides the opportunity for specific actions of procuring entities to be excluded from the possibility of review, such as the decision

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[61] De la Harpe 2015:1587.
[62] 1587.
[63] Preamble of the UNCITRAL Model Law on Public Procurement (2011).
[64] Section 217(1) of the Constitution.
[65] De la Harpe 2015:1587; Arts 64(2) and 66 of the UNCITRAL Model Law on Public Procurement (2011); Arrowsmith 2004:22.
[66] UNCITRAL 2014:122.
[67] Udeh 2018:33.
[68] Myers 1993:182.

regarding the method of procurement to be used, a procuring entity rejecting all offered tenders or choosing specific groups to exclusively open tenders to.[69]

An interesting aspect in the Model Law which is seldom seen in domestic legislation is the inclusion of "a mandatory standstill period to forestall the hasty signing of a contract with intention to circumvent review" between contract award and conclusion.[70] This means that as soon as a procurement entity receives an application for reconsideration of a decision, it may not take any further steps to bring the procurement contract.[71] If the contract is already concluded, the procuring entity may not perform on this contract.[72] This standstill period will lapse after a designated number of days have passed since the review was concluded by the entity, or upon consent from the court where it is an urgent public interest matter.[73] The standstill period may also be extended upon application of the unsatisfied bidder.[74]

## 5 How the Bill seeks to address current shortcomings and how this compares to the Model law

### *5 1 Addressing the fragmentation of the current regulatory framework*

The draft Bill aims to "create a single regulatory framework for public procurement to eliminate fragmented procurement prescripts".[75] This along with the other objects of the Bill, such as maximising economy and efficiency, show the legislature is attempting to bring the regime more in line with the Model Law objectives.[76]

The entire National Supplies Act and the PPPFA accompanied by the additional grounds of review it added in the past would be repealed.[77] However the Bill seems to provide a wide basis upon which reconsideration or review of procurement decisions

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[69] 182.
[70] Article 65(1) of the UNCITRAL Model Law on Public Procurement (2011).
[71] Article 65(1).
[72] Myers 1993:182.
[73] Article 65(2)-(3).
[74] Myers 1993:182.
[75] Section 2*(e)* of the Bill.
[76] Section 2*(b)*(iv) of the Bill.
[77] Section 123.

can be made, stating from sections 96 to 100 that a bidder may apply for reconsideration or review of a procurement decision where they are "dissatisfied".

The Bill has attempted to codify the procurement remedies, stating "a bidder may … seek a reconsideration or review of a decision or a failure to take a decision by an institution in terms of this Act" and thereafter explaining the numerous forums which may hear these reviews and the relevant timeframes.[78] This could be an attempt to resolve the contentious position on post-contract-conclusion remedies, as any "decision" may be reviewed or reconsidered.

### *5 2 Establishing a hierarchy for the available remedial routes*

The Bill tries to clarify the hierarchy of review regarding tender awards.[79] In terms of the institutional review, both bidders and the institution itself may apply.[80] Further, with institutional internal review the institution now "*must* immediately institute an investigations and issue a written decision within 10 days after the submission of the application" making the review mandatory.[81] Further, institutional review is not limited to merely municipal institutions, and thus could be applied more widely. On interpretation these decisions are arguably also binding unless the applicant applies for a further reconsideration by the required treasury or Regulator.[82] This could therefore be an avenue through which the previous ineffectiveness of internal remedies could be resolved.

It is hopeful that the Bill's proposed form of external remedies will prove more effective than the current regime. As per the provincial reconsideration procedure the provincial treasury may reconsider provincial government decisions upon application by a bidder who participated in the disputed bid within that province.[83] On a national level, the Regulator, discussed below, may hear such applications.[84]

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[78] Section 94; Chapter 9.
[79] Chapter 9.
[80] Sections 94-96.
[81] Section 96(4) (own emphasis).
[82] Section 96(6).
[83] Section 97.
[84] Section 98.

The Bill repeals the entire State Tender Board Act and establishes the Public Procurement Regulator within the National Treasury which, in part, will replace the State Tender Board.[85] However, Quinot argues this Regulator "is not a return to the erstwhile State Tender Board" and will perform somewhat different functions.[86] The duties of the Regulator include addressing serious material breaches of the Bill, reconsidering decisions of institutions and dispute resolution.[87] There have been concerns raised about the independence of this regulator as there is no indication in the Bill on how the institution must be compiled or ran, and will thus continue as a sub-institution of the National Treasury, which is hardly independent from the National Government.[88] If the aim of the Regulator is to reduce court proceedings on procurement issues, its independence will be of the utmost importance to ensure applicants trust the entity and their conclusions.[89]

The highest level of review will be done by the Public Procurement Tribunal which is an independent institution that can review decisions taken by the provincial treasury and the Regulator.[90] In contrast to the Regulator, there are numerous mechanisms put in place for the Tribunal to ensure its independence.[91] Section 104 lists scenarios where a member of the tribunal would have to disclose an interest they might have in a matter before them, and subsequently leave the proceedings to ensure the Tribunal's objectivity. A Tribunal order may also be taken to a court to file the order as a civil judgement, having the full effect of such judgement.[92] This can only occur if no other judicial review proceedings have been instituted on the decision, or any existing proceedings have already been concluded.[93]

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[85] Section 123 and section 4.
[86] Quinot 2020:12.
[87] Section 5 of the Bill.
[88] Quinot 2020:7.
[89] 8.
[90] Section 99 of the Bill.
[91] Sections 101-110.
[92] Section 113(3).
[93] Section 113(2).

Where the Bill is stricter than the Model Law is where it requires application for reconsideration/review by either the relevant institution, provincial or national government to occur within 10 days after the bidder:

> "became aware of the circumstances giving rise to the application for reconsideration or of the date when that bidder should have become aware of those circumstances, whichever is earlier".[94]

On the other hand, the Model Law suggests that 20 days is more appropriate.[95] Understandably, the Bill does not want to unduly delay awarded contracts from being implemented if it aims to create more efficiency and a successful bidder having to experience uncertainty on whether they will be appealed against for 20 days could be considered unreasonable.

### *5 3 Addressing the problems faced in the court-rooms*

Arguably, the Bill does strive to make procurement law more "self-policing and self-enforcing" as the Model Law tries to do.[96] With the number of new forums to which the dissatisfied bidder can now apply for review or reconsideration, the courts will surely enjoy a decreased caseload resulting from public procurement decisions.

However, section 113 states that Tribunal decisions may still be reviewed by a civil court in terms of PAJA. Although this application would be limited to review of the decision and not allow for appeal if such application is done in terms of the Act, the possibility of approaching a court does still exist. Therefore, a dissatisfied party will still be able to go to court once the tribunal has reviewed the decision, but this can only happen if the provincial treasury or the Regulator has also already reconsidered the decision before the Tribunal can review it.[97]

It is furthermore important to note that the PAJA rule that all internal remedies must be exhausted before judicial review can occur, also still stands. Creating these

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[94] Sections 96-100.
[95] Myers 1993:182.
[96] Udeh 2018:33.
[97] Section 100 of the Bill.

additional internal levels that must be exhausted thus runs the risk of creating a bottle-neck scenario where the entities meant to conduct these procedures are not adequately capacitated to handle them. Consequently this could result in procurement transactions getting trapped with little way of securing progress until the internal remedies are eventually exhausted. These additional levels of review that need to occur before a court may be approached could thus be very cumbersome, time consuming and costly.

### *5 4 The Bill's approach to compensation claims*

The Bill has also introduced new compensation claims available to bidders. Section 112 states that the Tribunal may order damages to be paid to the bidder for:

> "any reasonable costs incurred by the bidder submitting an application as a result of an act or decision of, or procedure followed by, the institution in the procurement proceedings that is not in compliance with the provisions of this Act, and for any loss or damages suffered" and that this "must be limited to the costs relating to the application".

As seen above, this may also be confirmed as a court order.[98] This is in line with the Model Law, which recommends costs orders in favour of contractors or suppliers specific to procurement law regimes.[99] This could also resolve the issue of a contract being overturned after the successful bidder had already incurred costs in the implementation of the contract.

However, since PAJA and delictual damages were unlikely to be awarded prior to the Bill as a result of limited government resources, it is unlikely this section will find much application in the future. Currently, with the Bill merely being in draft form, the guiding precedent on this matter is *Steenkamp*.[100] With delictual claims, all the elements of a delict must be proven to allow damages and the elements of negligence and wrongfulness often prove difficult to establish.[101] However, the Bill seems to stretch even wider and lessen the burden of proof on the wronged bidder as they merely need to prove loss or damage suffered that relates to the review or reconsideration

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[98] Section 113(3) of the Bill.
[99] Myers 1993:182.
[100] [2006] ZACC 16.
[101] See para 39.

application. If the court was hesitant in allowing a claim for damages where the wronged party had a high burden of proof to succeed with their claim, why would the court be less hesitant now where the burden of proof is lighter and claims are thus more likely to succeed? Furthermore, if the court was already concerned about limited government resources in *Steenkamp*, why would they be less hesitant now after the government has had to undergo enormous expenditure, as a result of the COVID-19 virus, whilst already struggling with a strained budget before the pandemic arose? Consequently, especially if an alternative remedy is available, the court would avoid the "chilling effect" a compensation claim may have on effective state administration and rather make use of the alternative.[102]

## 6 What the Bill fails to address

### *6 1 Fragmentation and proliferation of regulation: internal and external remedies*

Although the Bill does attempt to remedy some of the issues in our procurement law system, there are some significant issues it has failed to address. The Bill claims to intend to create a more unified regime but still fails to address the fragmentation of the current system properly.[103] Quinot raises concerns about the instrument-creating power given to the Regulator and the Minister in this regard.[104] These powers entail the ability to create binding directives, instructions and regulations on procurement practices.[105] The fear is that instead of creating cohesion, this power could lead to the creation of yet further remedies to add to the existing melting pot, causing more extensive fragmentation and resulting in our procurement regime straying even further from the Model Law and the Constitution.

Chapter 11 of the MFMA will be repealed along with its Regulation 49, which provides for internal dispute resolution regarding municipal supply chain management

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[102] See para 42.
[103] Preamble of the Bill.
[104] Quinot 2020:10.
[105] See ss 5(2)*(d)-(g)*, 9(2)*(a)* and 121 of the Bill.

decisions.[106] This would mean that instead of local government procurement being regulated independently from provincial and national procurement systems, as it always has been, procurement by all three spheres of government would now be regulated under the same Act. [107] Although normally this would be of no interest where an alternative is promulgated through the Draft Bill, in this instance it seems the legislature has largely ignored the position of municipal procurement procedures.[108] This is plainly evidenced by the void left in Chapter 9 of the Bill, where all other spheres of government are given due attention and detail regarding their procurement review procedures, and local government is left unmentioned.[109] One interpretation is that the Bill seems to suggest all municipal public procurement reconsiderations must be done according to the institutional reconsideration provisions, which is the first port of call for all spheres of government.[110] However, unlike the provincial and national spheres which have specific provisions detailing which forums to apply to up until judicial review, there is no mention of what route the local government decisions must follow.[111] This becomes even more concerning considering the Tribunal can only be accessed once the provincial treasury or the national Regulator has been approached.[112] Local government decisions cannot be reconsidered by the provincial treasury or the Regulator, which only reconsiders national government decisions. As Quinot poses the question: "Does this imply that the Tribunal will have no jurisdiction over local government procurement?"[113] This is clearly, and hopefully, an unintended gap in the proposed legislation that should be addressed in subsequent versions. The repeal of Chapter 11 of the MFMA may resolve its conflict with the contentious s 62 of the Systems Act. However, s 62, along with the problems it presents, remains intact – which means the current tension it has with the MFMA remedies may simply be reproduced when trying to apply the s 96 remedy from the Bill.[114] Trying to distinguish between 'reconsideration' in the Bill, and the 'challenge' provided for under s 62 of the

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[106] Section 123 of the Bill; Municipal Supply Chain Management Regulations, 2005 (see GN 868 in *GG* 27636 of 30-5-2005).
[107] Quinot 2020:11.
[108] 11.
[109] 11.
[110] See s 96 of the Bill; Quinot 2020:11.
[111] See ss 97-98 of the Bill; Quinot 2020:11.
[112] Quinot 2020:11.
[113] 11.
[114] See s 123 of the Bill.

Systems Act, may become an academic debate that rages on for years and that has no tangible effect on everyday practice.

### *6 2 Timing requirements for notice of award of a tender*

Arguably, what the Bill fails to address is when notice of award of a tender must be given by. Section 42 states that an institution must notify the successful and other bidders of the results of the procurement process, but does not state any sort of time frame within which this should occur.[115] The Bill does go on to say that the results must also be published promptly, but this is notably vague and open to abuse by procuring entities.[116] The only time frame instituted in this regard is that a contract must be *awarded* within 10 days of notice of award being given, but not by when *notice* of award must be given.[117] This lack of clarity could mean that the contract could be concluded between the procuring entity and the successful bidder before notice of award is made to unsuccessful bidders, thereby precluding unsuccessful bidders from pre-contractual remedies aimed at challenging the award.[118] This could perhaps be resolved through a particular interpretation of the Bill: since the Bill states that the award must be made within ten days of the notice of award, it follows by implication that the award and subsequent conclusion of the contract may not occur before notice of the award has been provided to the successful bidder as well as the unsuccessful bidders. However, this uncertainty can easily be remedied by including a reasonable time frame in the Bill – for procuring authorities to provide notice of the results to all bidders – before its final enactment.

### *6 3 Unaddressed issues faced by the courts*

The Bill also fails to recognise the problems courts face with the sheer amount of judicial remedies before them when considering procurement cases, and merely states that PAJA can be used for judicial review.[119] Further, since PAJA is still

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[115] Section 42(2).
[116] Section 42(5).
[117] Section 42(1).
[118] Section 42.
[119] Section 113.

applicable for judicial review, this means an unsatisfied party has 180 days within which judicial review can be applied for.[120] However, this is arguably too long a period as public procurement proceedings are normally time-sensitive, and if a decision is overturned more than 180 days after the initial award there could be a significant amount of expenses already incurred and consequent damages needing to be paid by the government, which is already considerably burdened and accordingly low on resources.

### *6 4 Continued absence of the Model Law stand-still period*

The South African procurement system could also benefit from the proposed standstill period mentioned above, which the Model Law suggests. In a previous version of the Bill, s 46 stated:

> "procuring entities may provide for a standstill period after an award decision has been made and prior to a contract entering into force, in order to allow sufficient opportunity for challenging the award decision".[121]

However, in the final version that was published for public comment, this section has been completely removed. All the Bill states is that the contract cannot be awarded if a review proceeding has been instituted before the contract has been awarded unless it is urgent and in the public interest, whereas the suggested standstill period is between contract award and conclusion.[122] This standstill period could be an efficient way of preventing a successful bidder from prematurely incurring expenses relating to the contract only for the decision to be reviewed, suspended and overturned at a later stage. (You could perhaps provide another footnote here, citing Moseneke's cautionary remarks (leaping without looking, or something to that effect) in *Steenkamp*.)

The standstill period could also be a way of circumventing the application of s 62(3) of the Municipal Systems Act which states that "no variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision". This

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[120] Section 7 of PAJA.
[121] Laing 2018:251.
[122] See ss 95(1)*(a)-(b)* and s 95(2) of the Bill.

section has caused great contention and debate in South African courts over the years.[123] If the accrual of these rights is suspended by the standstill period, a *mala fide* successful bidder cannot use this provision to excuse the contract being kept in their possession.

Understandably, this standstill period should not be too long since it is important for procurement processes to be efficient so that necessary services can be provided timeously, and so that costs may be kept at a minimum, but a reasonable period could greatly benefit the procurement regime and should be considered.

Additionally, as Laing argues, the standstill period should work in tandem with a stipulated time frame within which review applications must be made by the interested party and that such a time frame may be:

> "reduced or extended by agreement between the parties or by a court or tribunal, on application, where the interests of justice require".[124]

This time frame will ensure the standstill period is not abused, and that procurement procedures are not unnecessarily interrupted for long periods of time, or after a period of time which unnecessarily disadvantages the successful bidder.

The standstill period, if ultimately included in the Bill, would have to be accompanied by carefully thought-out regulations.[125] Otherwise, as seen in the European Union which uses a similar mechanism, applications for judicial review relating to the standstill period will increase significantly.[126] This standstill period nonetheless "creates opportunities for improvement and refinement over time".[127]

## 7 Conclusion

The current public procurement remedy system clearly leaves much to be desired. Although the Bill does present many new opportunities to create a better functioning

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[123] Udeh 2018:129.
[124] Laing 2018:247.
[125] 254.
[126] 254.
[127] 254.

system, there are many aspects the legislature needs to delve deeper into to determine their adequacy. The independence of the Regulator will have to be improved upon. This can easily be done by making some adjustments to the existing independence mechanisms in place for the Tribunal and adapting them to suit the Regulator's functions or, alternatively, separating it from the National Treasury. The various levels applicants must go through before a civil court may be approached also requires more in-depth analysis to determine the efficiency of the proposed system. Furthermore, the provision of compensation claims needs to be re-examined taking the current hesitation of the courts into consideration to determine the feasibility of such a provision. Additionally, if cohesion is the objective of the legislature, the instrument-creating powers given to the Regulator and Minister would have to be revised to determine whether they would not rather create more dysfunction than unity. The lacuna left by the legislature regarding the review or reconsideration procedures of local government must also urgently be addressed to avoid great uncertainty. In addition to this, the concept of 'reconsideration' must also be addressed in more depth in the Bill to distinguish it from, or relate it to, review or appeal. The time frames allotted in the Bill to respective sections must also be closely analysed, and a balancing of interests needs to be done to see whether the suggested time frames do not overly favour one party to the detriment of another. In addressing these concerns, the Model Law could also provide more avenues of development to guide the legislature in implementing measures that the Bill does not yet address. The reinstatement of the standstill period could prove to be only one of many helpful mechanisms that the Model Law suggests. Therefore, the investigation has proven fruitful in the prospective development of the South African public procurement system; and, hopefully, with the necessary changes the Bill will create a regime better suited to the South African context.

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