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DEVIATIONS AND VARIATIONS IN SOUTH AFRICAN PUBLIC PROCUREMENT [A NOTE ON SCM INSTRUCTION 3 OF 2021/22]

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ABSTRACT

The article discusses the approach to deviations from the norm of an open bidding process and contract expansions and variations, as set out in SCM Instruction 3 of 2021/22 issued by National Treasury, entitled *Enhancing Compliance, Transparency and Accountability in Supply Chain Management.* The author contends that the instruction grants public institutions a wide discretion to determine their own policies in relation to deviations and variations, without providing sufficient guidelines for the exercise of the discretion. Unguided and unguarded discretion is an anathema in a constitutional state and cannot be justified based on National Treasury's newly found deference to the "PFMA functions" of accounting officers and accounting authorities. The degree of discretion vested in public entities ought to be in proportion to the maturity of their control environments. The stronger the internal control environment within institutions and the greater their capacity for self-governance, the greater the degree of discretion and vice versa. The author further contends that in the face of the gross abuses of deviations and variations which have occurred in the recent past, it is inappropriate to vest high levels of discretion in public bodies at this stage. The public interest in fair and ethical procurement processes is compromised by the absence of appropriate "safety rails".

DEVIATIONS AND VARIATIONS IN SOUTH AFRICAN PUBLIC PROCUREMENT
[A NOTE ON SCM INSTRUCTION 3 OF 2021/22]

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1 Introduction

South African public procurement is in a state of "procurement purgatory".[1] New rules appear and disappear with alarming frequency. Uncertainty abounds. Over a period of a year or so preceding the writing of this article a number of key developments have taken place:

- The Judicial Commission of Inquiry into State Capture published sweeping recommendations on procurement reform;[2]
- In *Minister of Finance v Afribusiness NPC*, the Constitutional Court upheld a ruling from the Supreme Court of Appeal (SCA) which struck down an entire edifice of procurement regulations;[3]

[1] Moroeng & McConnachie: 2022.
[2] Judicial Commission of Inquiry into State Capture Report: Part 6 Volume 4 15-27 ("*the State Capture report*").
[3] *Minister of Finance v Afribusiness NPC* 2022 (4) SA 362 (CC) ("*Afribusiness*"). See also the subsequent ruling of the Constitutional Court in *Minister of Finance v Sakeliga NPC (previously known as Afribusiness NPC)* 2022 (4) SA 401 (CC).

- National Treasury ("NT") took the unprecedented step of advising organs of state to suspend all procurement transactions pending clarity from the Constitutional Court on its decision *Afribusiness*;[4]

- The Minister of Finance published draft PPPFA regulations for public comment,[5] and subsequently published the final version of the regulations;[6]

- The Minister of Cooperative Governance and Traditional Affairs issued regulations in terms of the Disaster Management Act, 2002, which permit institutions to follow emergency procurement to address the severe load shedding crisis facing the country.[7]

Additionally, NT issued a slew of Supply Chain Management (SCM) Instructions and Circulars, including:[8]

- SCM Instruction 3 of 2021/22 "Enhancing Compliance, Transparency and Accountability in Supply Chain Management" (This instruction is referred to below as "the new instruction");[9]

- Circular 1 of 2022/23 "Communication on Constitutional Court Judgment regarding Preferential Procurement Regulations, 2017";

- Circular 2 of 2022/23 "Confirmation of the Status of the Approved Government Tender Bulletin Departure";

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[4] In a letter addressed to organs of state, dated 25 February 2022, the Director-General of National Treasury advised organs of state not to issue any new tenders, pending clarification from the Constitutional Court. https://www.timeslive.co.za/news/south-africa/2022-02-26-treasury-boss-halts-all-new-state-tenders-amid-confusion-on-concourt-ruling/ (accessed on 30 February 2022).
[5] Draft Preferential Procurement Regulations, 2022 published in GN 681 *GG 11403* of 10 March 2022.
[6] Preferential Procurement Policy Framework Act, 2000: Preferential Procurement Regulations, 2022 published in GN 2721 *GG 47452* of 4 November 2022.
[7] Disaster Management Act, 2002: Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002 published in GN 11547 *GG* 48145 of 27 February 2023. [Editor's note: Government has since terminated the National State of Disaster on electricity supply constraints.]
[8] These instructions and circulars were issued in terms of the Public Finance Management Act, 1999. The list does not include additional SCM related prescripts pertaining to local authorities, issued in terms of the Municipal Finance Management Act, 2003.
[9] An *erratum* to this Instruction was issued on 28 October 2022.

- SCM Instruction 4 of 2022/23 "Reporting on Procurement in Response to National State of Disaster as Result of Severe Weather Events";
- PFMA SCM Instruction No. 05 of 2022/2023 which repealed Instruction 11 of 2020/21 relating to procurement in response to the Covid-19 pandemic;
- SCM Instruction 6 of 2022/23, the National Travel Framework;
- SCM Instruction 7 of 2022/23 "Cost Containment Related to Travel and Subsistence";
- SCM Instruction 8 of 2022/23 "Cession and Assignment"; and
- SCM Instruction 9 of 2022/23 "Mandatory Utilisation of E-Tender Portal for Publication of Bid Opportunities, Bid Awards, and any Bid Related Notifications".

This formidable list is likely to be replaced by an entirely new set of rules when the long-awaited Procurement Bill is finally enacted.[10] Given the ever-changing regulatory landscape, it would be prudent to heed the caution in the State Capture Report that:

> "[T]he sheer number of Acts and Regulations which addresses procurement issues makes it very difficult for conscientious officials to get a clear understanding of what is required of them".[11]

Although fraud and corruption remain key challenges, more often than not procurement failure is the result of unintentional, non-fraudulent breaches of "one of the myriad rules and regulations that apply to tenders".[12] The volatility, fragmentation, and unpredictability of the current system militate against the building of a strong compliance culture within the SCM environment.

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[10] The Minister of Finance announced in the 2022 budget speech, that the Public Procurement Bill would be tabled before Parliament during 2022/23.
[11] Judicial Commission of Inquiry into State Capture Report Part 1 Vol 1 795.
[12] *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) SA 359 (SCA) para 1.

This article discusses the approach taken in the new instruction to the practices of deviation from the norm of competitive bidding and contract variation. The key principle that runs throughout the new instruction is that accounting officers and accounting authorities (AOs and AAs) must take primary responsibility for the management of their respective institutions' procurement systems. Public institutions are given a wide discretion to regulate their processes of deviation and variation, with NT performing a diminished role. The argument put forward in this article is that the sudden change in policy direction does little to advance the public interest in fair, ethical tendering processes. It also does little to promote the predictability and stability of the SCM system.

2 Analysis

The following aspects of the new instruction are discussed below:

- The underlying reason for the instruction;
- Its efficacy as an anti-corruption measure;
- The breadth of the discretion bestowed on public officials;
- The manner in which the new instruction was published; and
- The content of the new instruction.

2.1 The reason for the instruction

The underlying reason for the change of approach is not readily discernible *ex facie* the new instruction. The instruction explains that although NT must enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities, it must do so with due regard to the "PFMA functions" of the AO/AAs.[13] It further explains that AO/AAs are ultimately responsible for the identification of risks and internal control weaknesses and to ensure that mitigation measures are in place.[14] But this does not fully explain the need for a new approach. After all, the "PFMA functions" of AO/AAs have been in existence for as long as the PFMA has been on

[13] Para 3.3 of the new instruction.
[14] Para 3.5 of the new instruction. In terms of ss 38 and 51 of the PFMA, AO/AAs must ensure that effective, efficient and transparent financial management and procurement systems are put in place.

the statute books, yet their existence have not inhibited NT in the past from exercising control over the discretionary power of public bodies. Why a different approach is needed *now*, has not been explained. It is possible (even probable) that this newfound sense of inhibition is attributable to the recent Constitutional Court ruling in the *Afribusiness* matter. But it is worth remembering that the primary issue decided in *Afribusiness* was that public bodies are responsible to determine their preferential procurement policies, and not the Minister of Finance. *Afribusiness* was not concerned with, nor did it seek to place constraints on the exercise of NT's "framework" powers in terms of section 76 of the PFMA. NT's powers to make regulations or issue instructions in terms of the PFMA are fundamentally different from the "PFMA functions" of the AO/AAs. The latter ought not to place constraints on the exercise of the former. In terms of the PFMA, NT's powers include the following:

- To promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions (s 6(1)(*g*));
- To prescribe uniform treasury norms and standards (s 6(2)(*a*));
- To enforce the Act and any prescribed norms and standards (s 6(2)(*b*));
- To issue instructions to determine a framework for an *appropriate* procurement system.

The role of AO/AAs, on the other hand, is to "have and maintain" an appropriate procurement system in keeping with the framework established by NT.[15] NT thus sets the parameters within which the general responsibilities of AOs/AAs must be exercised. In determining what is "appropriate", NT ought to gauge the capacity of public bodies for self-governance, and the strength of their internal control environments. Nothing contained in the PFMA requires NT to adopt a minimalist approach to the exercise of its framework powers, or to be overly-deferential to the so-called "PFMA functions" of AOs/AAs.

[15] Sections 38(1)(*a*)(*iii*) and 51(1)(*a*)(*iii*) of the PFMA.

2.2 The New Instruction as an Anti-Corruption Measure

This leads to the second issue, namely, the efficacy of the new instruction as an anti-corruption measure. Accounts of the abuse of deviations and variations in South Africa are legendary and need not be repeated here.[16] There are a number of factors which underly these abusive practices, including personal preference for a particular service provider,[17] poor contract management, [18] so-called "business necessity"[19] and other more sinister motivations.[20] But irrespective of the underlying reasons, abusive practices encourage corruption, entrench monopolies, stifle competition, undermine legality and value for money and create barriers to entry for emerging suppliers.[21] Hence, there is a compelling public interest in exercising effective control over these processes.

The previous instruction (repealed SCM Instruction Note 3 of 2016/17)[22] sought to do just that by limiting the discretion of public bodies to approve their own deviations and variations. All deviations, except for sole-source procurement and emergencies,[23] and all variations in excess of 20% of contract value or R20m in respect of construction-related contracts (15% or R15m in respect of all other contracts), were subject to treasury approval.[24] These restrictions were considered necessary to curb widespread abuse of deviations and variations, Yet, despite these controls, abuses have continued apace. Indeed, the public might have expected *more* rather than less protective measures against abusive practices. The new instruction still uses the benchmark of 20% or R20m/15% or R15m, but for an entirely different reason – it is used only as a threshold for reporting purposes. Expansions and variations above these thresholds must be reported to the relevant treasury and the Auditor-General (AGSA) and

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[16] For vivid examples of abuse of deviations and variations, see State Capture report Part 1 Vol 1 726 ff.
[17] *Wesley Pretorius & Associates Inc v Amathole District Municipality* [2020] ZAECGHC 41 (12 May 2020).
[18] *TEB Properties CC v MEC for Department of Health & Social Development, North-West* [2012] 1 All SA 479 (SCA).
[19] *Ngaka Modiri Molema District Municipality v Naphtronics Pty (Ltd) NO* [2018] ZANWHC 3 ("*Naphtronics*").
[20] See for example *Eskom v McKinsey & Co Africa (Pty) Ltd* [2019] ZAGPPHC 185 (18 June 2019).
[21] State Capture Report Part 1 Vol 1 733.
[22] National Treasury SCM Instruction 3 of 2016/17 "Preventing and Combatting Abuse in the Supply Chain Management System", referred to hereafter as the "repealed instruction".
[23] Para 8.5 of the repealed instruction.
[24] Para 9.2 of the repealed instruction.

recorded in the institution's annual report.[25] Save for the right to request additional information,[26] the relevant treasuries have no powers of intervention when reports indicate abusive or questionable practices. In any event, by the time the reports are submitted, the horse has bolted and there is very little that could be done to *prevent* unjustified expansions or variations. NT could of course refer such matters to the AGSA for auditing purposes, but such *ex post facto* interventions are not effective as preventative tools.

There can be no doubt that the underlying purpose of the empowering provisions (s76(4)(*b*),(*c*) and (*g*) of the PFMA) is to *strengthen* the control environment. The stated aims of the new instruction are to "*improve* compliance, accountability and transparency" in the procurement of goods and services, "*reduce* abuse of the SCM system" (emphasis added) and ensure value for money. [27] But, arguably, the new instruction is likely to have the opposite effect. Not only does the instruction open the door for public bodies to approve all deviations and variations, they also have sole authority to decide when it would be considered "impractical" to procure by means other than competitive bidding and to deviate on other grounds not specifically listed in the instruction. The internal SCM policies of public bodies now serve as the main instrument of control. It is doubtful whether these measures will be able to strengthen the control environment, improve compliance or reduce abusive practices. It could thus be argued that the instruction amounts to an unlawful abdication of responsibility not rationally connected to the purpose for which the power was given.[28]

2.3 The nature of the discretionary power

The third aspect relates to the degree of discretionary power vested in public bodies. This article is not an argument in support of a rigid, rules-bound procurement system, stripped of all discretionary power. Rather, it is intended to highlight the risks inherent in making sudden policy shifts in favour of wide discretionary power, without sufficient

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[25] Paras 5.4 and 5.5 of the new instruction. In terms of para 5.6, the relevant treasury and the AGSA may request additional information pertaining to the expansions and variations.
[26] Para 5.6 of the new instruction.
[27] Para 1 of the new instruction.
[28] Section 6(2)(*f*)(*ii*)(*aa*) and (*bb*) of the Promotion of Administrative Justice Act, 3 of 2000 ("*PAJA*").

justification or without putting adequate "safety rails" in place. Dworkin explains the nature of discretionary power in the following terms:

"Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction".[29]

The "belt of restriction" could take on many different forms, such as rules, standards, guidelines, checks and balances and so forth, but they must be in place in order for the exercise of discretion to function properly.

Procurement regimes, both at home and abroad, have a certain proclivity for a rules-based approach. There are multiple reasons for this: Rules set out rights and duties of individuals in advance;[30] rules facilitate judicial review by providing clear criteria by which administrative action may be judged;[31] they minimize the risk of error or corruption;[32] wide discretionary powers are likely to tempt public bodies to confer powers on themselves that they do not possess,[33] or worse, use their powers for nefarious ends; and it is believed that public bodies are more likely to exercise wide discretionary powers in furtherance of their immediate operational interests in obtaining the goods and services needed, rather than in support of the fairest outcome.[34]

Whilst there is merit in these arguments, there are also clear disadvantages associated with rules-based systems. Not only do they tend to be mechanical and inflexible, they also carry significant opportunity and efficiency costs. In a rules-based system, process gets elevated over outcomes, and minor infractions are often viewed as fatal. In a rules-based environment, procurement officials tend to become fixated with policies, procedures, rules and regulations, rather than looking for better or smarter ways of achieving key procurement objectives. The key driver of behaviour in a rules-based system is the avoidance of punitive sanctions associated with "irregular

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[29] Ronald Dworkin *Taking Rights Seriously* 31, as quoted in Baxter: 1984 88 – 89.
[30] Baxter: 1984 90.
[31] Baxter: 1984 91.
[32] *Sanyathi Civil Engineering & Construction (Pty) Ltd v Ethekwini Municipality* 2012 (1) BCLR 45 (KZP) para 35.
[33] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) para 70.
[34] Dekel: 2008 262.

expenditure", as opposed to value extraction and innovation. Rules often serve as "shelters" behind which officials take refuge in order to justify a ritualistic adherence to fixed standards.[35] Perhaps the greatest limitation of rules-based systems is that they tend to place a lopsided emphasis on controlling and constraining discretion, rather than empowering administrators to use their discretionary powers wisely, ethically and efficiently.[36]

Discretion is not a bad thing. In fact, it plays an important role in administrative decision making.[37] In the context of public procurement, decisions regarding what, how, and when to procure, and with what degree of urgency, all involve the exercise of discretion.[38] The problem with the new instruction is not that it bestows "unfettered" discretion on officials, for discretion can never be "unfettered". It is always subject to constitutional constraint.[39] Rather, the problem is that it gives public bodies wide discretion, without putting adequate "decisional referents" in place for its lawful exercise.[40] Instead, it has been left to AO/AAs to determine for themselves the grounds for deviation based on "other means" and the extent to which contracts may be expanded or varied. The broad injunctions governing deviations and variations provide an inadequate guide and consequently, public institutions are left uncertain as to what precisely is required of them.[41] There is also the accompanying problem of "splintering" or fragmentation, for there could potentially be as many differences in approach to deviations and variations in SCM policies as there are institutions.

There is no single formula for how discretion ought to be bestowed on officials, but as Baxter explains, the manner in which discretion is regulated must at least serve the three purposes of confining, structuring and checking discretion.[42] He further explains that the right degree of discretion must be established, the manner in which it is

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[35] Baxter: 1984 91.
[36] Hoexter & Penfold: 2021 64.
[37] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) ("*Dawood*") para 53; Baxter: 1984 82 – 84.
[38] Guide to Enactment of the UNCITRAL Model Law on Public Procurement, 128.
[39] Hoexter & Penfold 2021: 65; Baxter: 1984 88.
[40] Baxter 1984: 89. For comparison, see subpart 6.3 and Part 18 of the US Federal Acquisition Regulations ("FAR") for detailed guidance on the process of deviation, accessed on https://www.acquisition.gov/browse/index/far on 22 April 2022.
[41] Paras 4 and 5 of the new instruction.
[42] Baxter: 1984 90; *Dawood* (note 38 above) para 53.

exercised must be regulated and controls should be in place for preventing or correcting abuse. [43]

This is the essence of the concern raised here, for unguided discretion is hopelessly at odds with constitutional values. [44] As the Constitutional Court explained in *Dawood*:

> "If broad discretionary powers contain no express constraints, those who are affected by the exercise of broad discretionary powers will not know what is relevant to the exercise of these powers".[45]

As already discussed, the degree of discretion afforded to officials must be informed by environmental factors, such as the capacity of public bodies for self-regulation. The weaker the internal control environment or the appetite for self-regulation, the lower the degree of discretion, and vice versa. Corruption thrives in the absence of clear guidelines. A strong culture of self-governance ought thus to be a *sine qua non* for vesting wide discretionary power in the hands of procurement officials.

The *dictum* by the minority in *Afribusiness* to the effect that guidelines are not always required must be understood in context. [46] In this instance, the minority was critical of the view expressed by the SCA that the PPPFA regulations, 2017 did not provide officials with sufficient guidelines on the application of prequalification criteria. The minority disagreed and held that the guidelines provided in the regulations were sufficiently clear and that no further guidelines were necessary.[47] But the minority did not negate the importance of ensuring that proper guidelines were put in place in appropriate instances.

2.4 The manner in which the instruction was issued

The fourth aspect relates to the manner in which the new instruction was issued. The time that was afforded to institutions to implement the new instruction was woefully inadequate. The new instruction was signed on 31 March 2022 and took effect the

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[43] Baxter 1984: 90.
[44] Hoexter & Penfold: 2021 65.
[45] *Dawood* para 47; Hoexter & Penfold: 2021 64.
[46] In *Afribusiness* para 72, the minority stated that "our law does not require that guidelines be formulated in every case where discretion is allowed".
[47] *Afribusiness* paras 72 – 74.

following day, 1 April 2022, leaving organs of state with no time to make adjustments to their internal controls, let alone develop new SCM policies as envisaged in the new instruction.[48] The better approach would surely have been to afford public bodies a sufficient period of time to adjust their policies and systems to the new instruction.[49] It is most unlikely that new tenders advertised on or shortly after 1 April 2022 would have been issued in compliance with the new instruction, which in turn raises the spectre of further irregular expenditure and legal challenges. The practice of issuing treasury instructions with little or no time for implementation, without a clear explanation or an opportunity for public comment does not conduce to good governance. It simply increases the sense of confusion and anxiety among public bodies and bidders alike. Arguably, this practice is legally challengeable as a breach of the rights to administrative justice and participatory democracy.

2.5 The new rules on deviations and variations

I now deal with the fifth aspect, which relates to the contents of the rules on deviations and variations in the new instruction.

2.5.1 Impracticality

The instruction states that whenever it is "impractical" to invite competitive bids, the AO/AA may procure the goods and services by "other means". The term "other means" is not exhaustively defined but *includes* (a) limited bidding[50] (b) written quotations (c) procurement in emergency situations and urgent cases.[51] Clearly, the instruction contemplates that additional methods of restricted bidding may be utilised

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[48] Para 14.1 of the new instruction. However, para 14.2 states that procurement transactions that commenced prior to the coming into effect of the instruction must be concluded in accordance with the prescripts applicable at the time of invitation or advertisement.

[49] By way of contrast, SCM Instruction 2 of 2020/21, dealing with threshold values for procurement events, was amended to allow for a period of adjustment in excess of a month.

[50] "Limited bidding" means "a bidding process reserved for a specific group or a category of possible suppliers by (a) sole source where there is no competition in the market and only one supplier is able to provide the goods or services; (b) single source where a thorough analysis of the market and a transparent and equitable pre-selection process is used to decide on one supplier among a few prospective bidders to make a proposal; (c) multiple source where a thorough analysis of the market indicates that there is limited competition and only a few prospective bidders are requested to make a proposal".

[51] Para 4.2 of the new instruction.

as well.[52] It is left to public bodies to spell out in their SCM policies, the circumstances under which procurement by "other means" may be used.[53]

The standard of "impracticality" as justification for deviation is a long-standing feature of both domestic[54] and international[55]public-procurement regulation. But the obvious problem with the standard is its vagueness and ambiguity, hence its vulnerability to abuse.[56] The repealed instruction sought to curtail this abuse, by limiting self-approved deviations to cases involving emergency and sole-supplier procurement.[57] The new instruction is much more permissive – emergency and sole source procurement are listed among a range of permissible forms of deviation which may be approved internally.

The precise contours of what is "impractical" are difficult, if not impossible, to define in the abstract, but officials would do well to keep in mind that "basic good practice in not 'impractical'".[58] Deviations on grounds of limited bidding, price quotations, emergency, urgency or any other means should not be there for the asking, for they are exceptions to the rule of open bidding.[59] Recently, in *RAiN Inc v SASSA,* the Constitutional Court discerned that the concept of impracticality covered a range of possibilities, from an "absolute impossibility" to engage in competitive bidding, to something less.[60] But "impractical" does not simply mean "inconvenient" – it involves a contextual evaluation whether a competitive bidding process "is well and sensibly suited for the circumstances".[61]

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[52] Paras 4.3 and 4.4 of the new instruction states that all permissible forms of deviation must be dealt with in the SCM policy documents.
[53] Paras 4.1 and 4.5 of the new instruction.
[54] Treasury regulation 16A6.4; Municipal Finance Management Act reg 36(1)(*vi*).
[55] Paras 30(4)(*a*) and (*b*) and 30(5)(*b*) of the UNCITRAL Model Law, 2011.
[56] Bolton: 2007 164-165; Bolton: 2006 7.
[57] Para 8.1 of the repealed instruction. All other deviations were subject to treasury approval. In Practice Note SCM 2 of 2005, sole source and emergency procurement are cited as examples of when it would be considered impractical to procure by means of on open tender.
[58] State Capture Report 734.
[59] Para 8.5 of the repealed instruction 3 of 2016/17 made it clear that the relevant treasuries would approve deviations other than emergency and sole-source procurement on an exceptional basis only.
[60] *RAiN Chartered Accountants Inc v South African Social Security Agency* 2021 (11) BCLR 1225 (CC) ('*RAiN*').
[61] *RAiN* para 30. The Court had regard to the dictionary definition of "impractical" which means "not adapted for use or actionable; not sensible".

RAiN dealt with the concept of impracticality at a broad, conceptual level without further expatiation. Bolton, on the other hand, offers a few concrete examples of when open tendering might be regarded as "impractical".[62] However, some of the examples which she cites may be harder to justify than others, such as the receipt of "unacceptable" tenders. It is debatable whether a deviation could be justified on the grounds that an open invitation to tender failed to yield any acceptable tenders, as Bolton suggests, or that it would be too costly to call for tenders a second time.[63] It is also debatable whether deviations could be justified in order to procure consulting services.[64] However, other examples cited by Bolton might be easier to justify, such as when intellectual property rights have to be protected or where additional goods or services are required from the same supplier for reasons of standardization or to avoid the disruption of services.[65] Ultimately, the determination of impracticality involves a judgment call to be made by the public body itself.[66]

A decision to deviate on grounds of impracticality is subject to judicial review and must therefore be made judiciously. The mere say-so of officials that a competitive process is impractical will not suffice.[67] In *CEO, South African Social Security Agency v SASSA*, the SCA emphasized that the reasons for deviation must be rational and objectively verifiable, and not based on what the officials subjectively regarded as impractical.[68] As a general rule, approvals must be obtained in advance, and not *ex-post facto*.[69] *Ex post facto* approval is often abused in order to justify contract awards that have already been made.[70] Exceptions may be allowed (such as instances involving extreme urgency or emergency), but even in such cases, it is recommended that upfront approval must first be sought, failing which *ex post facto* ratification could be obtained. Moreover, approval for deviation should be given by a person or body of

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[62] Bolton: 2007 165-174.
[63] Bolton: 2007 166.
[64] Bolton: 2007 167.
[65] Bolton: 2007 171-172.
[66] *RAiN* para 30.
[67] *Walele v City of Cape Town* 2008 (6) SA 129 (CC) para 60.
[68] *RAiN* paras 31 and 35; *Chief Executive Officer, South African Social Security Agency v Cash Paymaster Services (Pty) Ltd* 2012 (1) SA 216 (SCA) para 21; *Naphtronics* para 37.
[69] The State Capture Report Part 1 Vol 1 737 cites examples of where *ex post facto* approval for deviations were granted to justify awards of contract which had already occurred.
[70] *Department of Agriculture, Forestry and Fisheries v B Xulu & Partners Inc* [2020] ZAWCHC 3 (30 January 2020) para 26; *Naphtronics* para 41 – 42.

appropriate seniority. The new instruction grants such powers of approval to the AO/AA, but this power is probably delegable.

2.5.2 Sole source

The new instruction permits sole source procurement in cases where there is no competition in the market and only one supplier can provide the goods and services. [71] Sole-source procurement has received much criticism in the State Capture Report wherein the practice was described as "poorly conceived", "particularly troubling" and open to abuse.[72] The report states that deviation based on sole source procurement cannot be justified, even if only one bidder is able to respond to the invitation to bid. [73] It is contended that "[t]he time and incidental expense involved in going out to tender, [even if only one bidder responds], is necessary in the interests of good governance".

The Report finds that sole source deviation cannot be defended on the basis that it would be "impractical" to go out to tender, [74] and recommends the cessation of all sole-source deviations.[75]

But the sagacity of this recommendation is questionable. Undeniably, the practice of sole source procurement has been sorely abused, but the solution does not lie in its wholesale prohibition. Rather, adequate control measures and guidelines must be put in place to ensure that sole-source procurement is used as a measure of last resort, when no other alternatives are available.[76] Sole-source procurement is universally recognised as an exception to the rule of open bidding,[77] because genuine cases do arise in which only one bidder is able to meet an institution's needs. In such instances it would be misleading to follow a competitive process, as the Commission seems to suggest. Bidders are bound to question the wisdom (if not the fairness) of approaching the market under the guise of a competitive tender process if only one competitor is

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[71] Para 2 of the new instruction.
[72] State Capture Report Part 1 Vol 1 734
[73]State Capture Report Part 1 Vol 1 855.
[74]State Capture Report Part 1 Vol 1 855.
[75] State Capture Report Part 1 Vol 1 855.
[76] Guide to Enactment of the UNCITRAL Model Law on Public Procurement 2011, 220.
[77] See for example articles 30(5), 34(4) and (5) and 52 of the UNCITRAL Model Law on Public Procurement, 2011.

able to meet the requirements of the procuring institution. Such a tender process would appear contrived and rigged to achieve a pre-determined outcome.

In contrast to sole-source procurement, "single-source" procurement is available to select one supplier among a few prospective bidders to make a proposal.[78] Although the term "single-source" procurement appeared for the first time in the new instruction, it has been used as a term-of-art for some time now to describe situations where the preferred supplier was not the only available supplier with unique ability to meet the needs of the procuring institution. Under the new instruction, however, the concept of single-source procurement has a narrower, more defined meaning. The term is used to refer to instances where a supplier is selected among a few bidders to make a proposal following "a transparent and equitable pre-selection process".[79] Pre-selection has thus become a prerequisite for the use of single-source procurement. Whereas previously, single-source procurement could be used to acquire additional goods or services from a particular supplier for reasons of standardization or compatibility with existing technology, under the new instruction this option is seemingly not available without following a pre-selection process. But, as indicated above, institutions have a wide discretion to procure by "other means" [80] and could, presumably, devise alternative means to procure for reasons of standardization or compatibility without pre-selection. Of course, such alternative means would not be called single-source procurement but something else.

2.5.3 Market analysis

A thorough market analysis is vital in establishing the rationality and reasonableness of the decision to deviate. Curiously, the new instruction makes no mention of the need for a thorough analysis of the market in relation to the justification of "sole-source" procurement, but only in relation to "single-source" and "multiple-source" procurement.[81] This was probably due to an oversight which occurred during the drafting process, for it would be incongruous to require market-analysis justification only in respect of single-source and multiple-source procurement but not in respect of

[78] Para 2 of the new instruction.
[79] Para 2 of the new instruction.
[80] Para 4.4 of the new instruction.
[81] Para 1 of the new instruction.

sole-source procurement, the most exclusionary form of deviation. A market analysis requirement should thus be read in for purposes of sole-source procurement as well.

The extent of the market analysis must be informed by the nature and complexity of each transaction. The operative word is "thorough", for a decision to deviate on any of the recognised grounds cannot be justified on the basis of a superficial analysis alone. The more robust the analysis, the easier it would be to justify a decision not to follow an open bidding process. For instance, the UNCITRAL Model Law recommends advance public notice to test the assumption that only one supplier exists. If additional suppliers then emerge who meet the stated criteria, the need for exclusivity falls away.[82] The US Federal Acquisition Regulations (FAR) stipulate that the extent of market research may vary depending on factors such as urgency, value, complexity and past experience. [83] The FAR also outline the various types of research methodology that could be used, such as formal requests for information, supplier databases, and interactive on-line communication sessions with industry.[84] Research methodologies employed remain subject to the *caveat* that procuring agencies cannot ask potential suppliers to submit more than the minimum information required.[85]

2.5.4 Emergency and urgency

By their very nature, emergency situations require swift action in order to deal with life-threatening, or other dangerous situations that have arisen. Three aspects require emphasis: The first aspect is that the risk presented should be "immediate". Depending on the circumstances, a technical assessment might be called for to validate the immediacy of the risk, but generally speaking an emergency cannot be based on speculative harm that may occur at some undetermined point in the future. Secondly, an emergency contract ought not to be in place for longer than what is required to deal with the immediate risk to life, health, property or the environment.[86] This principle is clearly illustrated in *Naphtronics*. In this instance, the administrator of

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[82] Article 34(5) of the UNCITRAL Model Law 2011, read with the Guide to Enactment, 221. Please note that the Model Law employs the term "single source" and not "sole source" with reference to instances where only one supplier is available.
[83] Para 10.002 (1) of FAR.
[84] Para 10.002(2) of FAR.
[85] Para 10.001(b) of FAR.
[86] *Naphtronics* paras 32 and 48.

a municipal entity appointed a security company on an emergency basis for a period of 3 years, in response to violent protests in the area. His motivation for doing so appeared valid – he did so in order to provide security of tenure for the large number of security personnel that the company had to appoint. However, the court ruled that the contract had to address the emergency situation at hand and could not extend into the distant future.[87] It is therefore important to distinguish between situations which require an immediate response (in order to address the emergency at hand) and post-emergency situations which require reconstruction or rehabilitation. The latter ought to follow normal, or possibly urgent procurement procedures, but not emergency procedures.[88]

The third aspect pertains to the processes that should be followed to trigger an emergency response. Emergencies require quick action with minimal time-consuming procedures and controls. For this very reason they are notoriously susceptible to corrupt practices.[89] But no matter how dire the situation, officials act cannot unilaterally. They must follow prescribed processes, minimal though they may be.[90] This should at least involve obtaining approval from a person or body with delegated authority to trigger an emergency procurement event. In *Naphtronics*, the court acknowledged that an emergency situation existed, but was critical of the administrator for acting unlawfully by not engaging the relevant procurement structures and instead appointing the company himself. [91]

The emergency procurement provisions contained in the recently promulgated Disaster Management Regulations to address the load shedding crisis must be read with these principles in mind.[92] The regulations do not create any special powers to trigger emergency procurement mechanisms, outside of the existing regulatory

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[87] *Naphtronics* para 48.
[88] See New Zealand Government publication "Quick Guide to Emergency Procurement" accessed 27 May 2022 on https://www.procurement.govt.nz/assets/procurement-property/documents/guide-emergency-procurement.pdf.
[89] This is vividly illustrated by the scandals which have engulfed the procurement of personal protection equipment during the Covid-19 pandemic.
[90] *Naphtronics* paras 40-43, 47.
[91] *Naphtronics* para 40. See also *Ngaka Modiri Molema District Municipality v Moto-Tech (Pty) Ltd* [2017] ZANWHC 54 (17 July 2017) paras 43-44 and 48.
[92] Note 7 above. [Editor's note: Government has since terminated the National State of Disaster on electricity supply constraints.]

framework. They are to be exercised "subject to" the provision of the PFMA, NT instructions and other applicable legislation, including NT's new instruction 3 of 2021/22.[93]

But this creates a conundrum – for the new instruction makes it clear that an emergency involves a serious and *unexpected* situation.[94] Arguably, a crisis which has been years in the making, such as load shedding, was not unexpected or unforeseen and therefore falls outside the concept of an "emergency situation", as defined in the new instruction. But assuming it does meet the requirements of the definition, emergency procurement procedures should nonetheless be invoked circumspectly, and only when the energy crisis poses an "immediate" risk to health, life, property or the environment. The regulations are not an open invitation to depart from the norm of an open bidding process in order to mitigate the load shedding crisis. Furthermore, as indicated above, an emergency contract should not be put in place for longer than what is required to deal with the immediate risk to health, life, property or the environment.

The requirements of urgency, though less exacting than those of an emergency, are nevertheless also quite stringent.[95] Whilst the concept of urgency does not necessarily involve a threat to life, health etc, it involves an element of immediate or dire need. The important qualification is that the urgency should not have arisen as a result of improper planning.[96] *TEB Properties CC v v MEC for the Department of Health & Social Development, North-West* provides an example of improper planning which gave rise to a false urgency.[97] In this instance, a government department started looking for new office space about 3 months before its existing lease was due to expire. The department erroneously decided that it was not practical to follow a competitive

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[93] Regulation 6(1) of the Disaster Management regulations. The regs also require real time audits by the Auditor General of all emergency procurement transactions, anti-corruption measures and monthly reports to Parliament.
[94] See the definition of "emergency situation" in para 2 of the new instruction.
[95] In para 2 of the new instruction, "urgent case" means cases where "early delivery is critical and the invitation of competitive bid is either impossible or impractical, not due to improper planning".
[96] *Joubert Galpin Searle Inc v Road Accident Fund* 2014 (4) SA 148 (ECP) para 79.
[97] *TEB Properties CC v MEC for the Department of Health & Social Development, North-West* [2012] 1 All SA 479 (SCA).

bidding process, as the matter had become urgent. Clearly, had there been forward planning, the need for a deviation on grounds of urgency would have been obviated.

In RAiN the Constitutional Court itself recommended the use of a deviation on the grounds of urgency. In this instance certain services were required from a firm of accountants in relation to the unending *AllPay* saga, but a dispute had arisen as to who was responsible for payment.[98] The Court noted that: "i[I]t does not require rocket science to realise that – on its own – a competitive bidding process will take much longer than a deviation".[99]

The Court also expressed the view that another firm of accountants coming in from the cold would require more time than RAiN to complete the work. The Court thus ordered SASSA to "consider" a deviation from an open bidding process in terms of reg 16A.6.4. But *RAiN* does not justify deviations on grounds of urgency simply because it would be less time consuming or more convenient to appoint an existing contractor to implement a new phase of a project as opposed to a new contractor. Nor does *RAiN* justify deviations on the grounds that a competitive process would take longer to complete than a deviation. It must be shown that early delivery is *critical* and that the need did not arise due to improper planning.

2.5.5 Contract expansions and variations[100]

As discussed above, the new instruction permits institutions to expand or vary their contracts without treasury approval, subject only to a reporting requirement in respect of expansions and variations above the stipulated threshold.[101] Expansions and variations are a rich source of litigation, in fact, some of the leading procurement-law cases have their origin in unlawful variations. For instance in *Minister of Transport v Prodiba*, a 5 year contract was extended for a period of some 20 years;[102] in

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[98] *Allpay Consolidated Investments Holdings (Pty) Ltd v CEO of SASSA* 2014 (1) SA 604 (CC). RAiN, a firm of accountants was required to determine the profit which Cash Paymasters made from an irregular contract.
[99] *RAiN* para 33.
[100] Para 5.1 draws a distinction between expansion and variation of contracts. The former refers to increasing the scope of work and the latter refers to changing the scope of work.
[101] In terms of para 5.3, institutions may not expand or vary transversal contracts but must request the relevant treasury to do so.
[102] *Minister of Transport N.O v Prodiba (Pty) Ltd* [2015] 2 All SA 387 (SCA) ("*Prodiba*").

Department of Transport v Tasima a contract which carried an initial price tag of R355 million was extended for a further 5 years, at more than double the initial amount;[103] and in *Buffalo City v Asla Construction*, a turnkey contract for between 3000 and 5000 housing units was extended to include another 953 units.[104] Organs of state and contractors are not at liberty to amend public contracts at will.[105] It is a fundamental principle of procurement law that contract variations should not create contracts which are materially different from the ones which were put out to tender, for that would be unfair to other bidders who participated in the tender process. [106]

Expansions and variations involve changes to the original scope of work, usually coupled with price increases, and should therefore be approached with due care and consideration.[107] The default position is to proceed by way of an open tender whenever material contract changes are required.[108] In *Prodiba*, the SCA struck down a contract expansion because the contractor was asked to provide "a new service dealing with new technology in respect of which potential competitors were not engaged". [109] The new instruction does not place an outer limit on the extent to which contracts may be altered, but in the absence of any other guidelines, institutions may well consider applying the 20% or R20m/15% or R15m threshold as an internal benchmark. Expansions and variations beyond this benchmark could be subjected to ever increasing levels of internal approval and control.

3 Conclusion

The new instruction is not without its advantages. Organs of state have long complained about bottlenecks in Treasury's approval process as a consequence of the centralized approval process created by SCM instruction 3 of 2016/17. The immediate benefit of the new instruction is that the approval process for deviations and variations are dealt with internally by institutions, and thus (hopefully) more

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[103] *Department of Transport v Tasima (Pty) Ltd* 2017 (1) BCLR 1 (CC).
[104] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC).
[105] Bolton: 2006: 281.
[106] Bolton: 2006: 281.
[107] Para 5.1 of the new instruction.
[108] Material changes include significant increases to the scope of work (expansions) or significant changes to the scope of work (variations).
[109] *Prodiba* para 33.

expeditiously. Furthermore, by freeing itself of the burden to approve deviations and variations, NT has also freed itself from being placed in the awkward situation of having to justify its decisions in front of sceptical parliamentary committees or the general public. However, in my view, these "advantages" do not outweigh the concerns mentioned above.

Treasury's new-found reticence to exercise its statutory powers is not mandated by s 76(4) of the PFMA or judicial authority. Nor can it be justified, given the chronic abuses of deviations and variations in the recent past. The sudden and unexplained shift in emphasis, coupled with the lack of guidelines, is likely to exacerbate the problem of fragmentation and uncertainty. More importantly, the new instruction is unlikely to be effective as an anti-corruption tool. In fact, it is likely to weaken, rather than strengthen safeguards against abusive practices.

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