

# THINKING THROUGH THE REGULATION OF DIFFERENT TYPES OF PROCUREMENT PROVIDED FOR IN THE PUBLIC PROCUREMENT ACT

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**(2024) 11 APPLJ 45**

## ABSTRACT

The Public Procurement Act of 2024 was signed into law during July 2024. The regulations necessary to support its implementation are yet to be drafted. This contribution identifies three basic types of procurements and contextualises the concepts of procurement and procurement system (formerly referred to in South Africa as a supply chain management system) which are embedded in the Act. Thereafter the study considers the framework within which procuring institutions are required to implement their procurement system, which the Minister needs to prescribe, with a focus on what is referred to in the Act as strategic procurement and what is understood by this term. The application of strategic procurement in the four areas where this form of procurement needs to be promoted is assessed, namely procurement in other countries, the provision and maintenance of infrastructure and capital assets, the disposal and letting of assets and the stimulation of innovation. Thereafter, the potential for framing the regulations around international standards such as ISO 10845-1 (soft law) to address not only the promotion of strategic procurement but also the methods, procedures and award criteria to be addressed in the prescribed framework, is explored and demonstrated. Finally, the study considers the capabilities within government to develop the necessary regulatory framework for the implementation of the Act and offers three strategic approaches to regulate strategic procurement using a soft law approach.

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## 1 Introduction

The Public Procurement Act<sup>1</sup> ("PPA") defines procurement in terms of different types of procurement. According to section 1 "procurement" means:

- "(a) the acquisition of goods or services for construction, repair or maintenance of infrastructure or capital assets;
- (b) the acquisition of goods or services, other than goods or services referred to in paragraph (a);
- (c) the acquisition of infrastructure or capital assets; and
- (d) the letting or disposal of assets."

"Infrastructure", in turn, is defined as "the physical facilities or structures and systems, including digital or analogue communications systems that are required to provide services to the public directly or indirectly", while

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<sup>1</sup> Act 28 of 2024.

a "capital asset" is defined as "an asset that is tangible or intangible which a procuring institution intends to use for more than 12 months".<sup>2</sup>

For further clarity, guidance is to be sought in the National Treasury Accounting Manual,<sup>3</sup> which describes a tangible asset as "a non-monetary asset having physical substance that are held for use in the production or supply of goods or services, for rental to others, or for administrative purposes or for the development, construction, maintenance or repair of other capital assets". On the other hand, an intangible asset "is an identifiable non-monetary asset without physical substance" such as rights under licensing agreements and databases and database management software created and maintained by government entities.

According to the definition provision, the PPA, therefore, recognises three basic types of procurement: Firstly, goods and services for consumption (hereinafter referred to as "type 1 procurement").<sup>4</sup> Secondly, infrastructure and capital assets and goods or services related to infrastructure and capital assets ("type 2 procurement").<sup>5</sup> Thirdly, the letting and disposal of assets ("type 3 procurement").<sup>6</sup>

Although the PPA was signed into law in South Africa in July 2024, it will only be implemented once the regulations to the Act have been developed and finalised. Furthermore, section 8 of the PPA requires a procuring institution to conduct procurement in accordance with the Act and to develop and implement an effective and efficient procurement system in accordance with the provisions of a prescribed framework. However, the PPA is weak on guiding principles for the procurement framework, leaving much of the shape and nature of the procurement framework to be developed through regulations and instructions, and not through statute.<sup>7</sup>

To make inputs into the lengthy process of developing and issuing regulations which will enable the implementation of the PPA, there is a need to understand the concepts contained in the Act and the implications of the three types of procurement on the establishment and implementation of an institution's procurement system. According to section 63 of the PPA, the process of developing the regulations commences with consultation with the affected ministers and

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<sup>2</sup> S 1 PPA.

<sup>3</sup> National Treasury 2021: Chapter 11 Capital Assets.

<sup>4</sup> Definition of "procurement" s 1 part (b) PPA.

<sup>5</sup> Definition of "procurement" s 1 parts (a) and (c) PPA.

<sup>6</sup> Definition of "procurement" s 1 part (d) PPA.

<sup>7</sup> Klaaren *et al* 2023: 3, 7, 18, 19.

representatives of local government prior to the issuing of draft regulations for public comment and ends with parliamentary scrutiny. While the definitions section of the PPA defines the Act to include the regulations, codes of conduct, instructions and notices made or issued in terms of the Act, this paper only discusses the statutory provisions of the PPA itself.

This paper aims to:

- outline and discuss the concepts associated with procurement and a procurement system as provided for in the PPA in part by reviewing the current supply chain management system that applies in South African law (now referred to as the "procurement system") (part 2 of the contribution);
- unpack aspects of the PPA's framework for a procurement system including strategic procurement, infrastructure, the promotion of innovation, and, finally, elements of a procurement system differentiated by procurement type (part 3 of the contribution);
- demonstrate the potential through international standards (in the form of soft law) to operationalise the methods, procedures and award criteria required by section 24(1)(b), (c), and (d) of the PPA (part 4 of the contribution);
- discuss the capability within government to develop the necessary regulatory frameworks for the implementation of the PPA; and
- outline a proposed strategic approach to provide separate regulations as required by the PPA for the provision and maintenance of infrastructure and capital assets (part 5 of the contribution).

## **2 Central concepts outlined in the PPA**

### **2.1 *The PPA concept of procurement***

Procurement can be defined in different ways. The PPA defines procurement in terms of acquisition, letting and disposal, which is the process of obtaining, renting out or getting rid of something. Other instruments, however, have defined procurement differently, as is indicated in table 1 containing definitions for procurement as they appear in a number of international publications. It appears that procurement is commonly framed in terms of a process (a set of interrelated or interacting activities that transforms inputs into outputs) and activities (tasks that contribute to the completion of deliverables).

**Table 1: Definitions for procurement included in international publications**

Source	Definition
European Union, Public Procurement Directive, 2014	The acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.
OECD Public Procurement Recommendation, 2015	The process of identifying what is needed, determining who the best person or organisation is to supply this need, and ensuring what is needed is delivered to the right place, at the right time, for the best price and that all this is done in a fair and open manner.
ISO 6707-2:2017, Buildings and Civil Engineering Works - vocabulary	A process which creates, manages and fulfils contracts relating to the provision of goods, services and construction works or disposals, or any combination thereof.
ISO 59004:2024, Circular Economy	A process relating to the provision or sourcing of a resource or solution.
ISO 20400:2017, Sustainable Procurement	The activity of acquiring goods or services from suppliers.
UK Parliament, Procurement Act 2023	The award, entry into and management of a contract.
UNCITRAL, 2011 Model Law on Public Procurement	The acquisition of goods, construction or services by a procuring entity.
World Bank, Procurement Regulations for IFS Borrowers, 2023.	The process that starts with the identification of a need and continues through planning, preparation of specifications/requirements, budget considerations, selection, contract award, and contract management. It ends on the last day of the warranty period.

Arrowsmith<sup>8</sup> points out that there are three phases associated with the public procurement process, which ISO 6082:2025 describes as a planning phase, an evaluation and award phase, and a contract administration phase. Arrowsmith observes that, although the concept of public procurement applies to all three phases, regulatory rules on public procurement tend to focus on the evaluation and award phase. This is borne out in the descriptions of procurement in table 1. The PPA definition focusses on the middle phase, which Arrowsmith describes as "the process of placing a contract to acquire goods or services which involves, in particular, choosing who is to be the contracting partner and the terms on which the goods or services are to be provided".<sup>9</sup>

## **2.2 The PPA's concept of a procurement system**

The Constitution of the Republic of South Africa, 1996, ("the Constitution") uses the term procurement in the heading to section 217. Reference is also made to a procurement policy in section 217(2) in relation to categories of preference in the allocation of contracts and the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination. However, section 217(1) includes the phrase, "when an organ of state ... contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective".

National Treasury, when interpreting section 217(1) in a policy document,<sup>10</sup> stated that "supply chain management is an integral part of financial management". Table 2, below, outlines the way in which this policy document conceptualised supply chain management (SCM) and the thrust of requirements for SCM as established in regulations<sup>11</sup> issued in terms of the Local Government: Municipal Finance Management Act<sup>12</sup> ("MFMA"). No specific requirements for the elements identified in table 2 were included in the SCM Regulations issued in terms of the Public Finance Management Act<sup>13</sup> ("PFMA"). Given that SCM was conceptualised as a financial management system, these SCM Regulations require the establishment of a separate SCM unit within the office of the procuring institution's chief financial officer to implement the system.

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<sup>8</sup> Arrowsmith 2010: 1.

<sup>9</sup> Arrowsmith 2010: 1.

<sup>10</sup> National Treasury 2003.

<sup>11</sup> Municipal Supply Chain Management Regulations in GG 27636 of 30-05-2005, as amended.

<sup>12</sup> Act 56 of 2003.

<sup>13</sup> Act 1 of 1999.

Prior to being introduced in the Standing Committee on Finance of the National Assembly, the initial version of the Public Procurement Bill used the term "supply chain management". However, immediately prior to the commencement of the parliamentary process this term was changed to that of "procurement system". The PPA defines a procurement system as that which is envisaged in a prescribed framework prescribed by the Minister as set out in section 24(1). Such a system is required to include the promotion of strategic procurement, types of procurement and associated procedures and requirements, and the criteria for the evaluation of tenders. Section 24(3) requires the procurement system to provide for at least a procurement policy, institutional and governance arrangements, demand management, procurement planning and budgeting, acquisition management, contract management, risk management, logistics management, disposal management, monitoring and assessment of procurement performance and reporting.

Watermeyer<sup>14</sup> suggests that a procurement system comprises rules and guidelines governing procedures and methods, procurement documents which include terms and conditions, governance arrangements to manage and control procurement, and organisational policies. However, the PPA expands on Watermeyer's concept to include interrelated or interacting elements in what ISO 6707-2:2017 refers to as the process which creates, manages and fulfils contracts. Accordingly, the PPA defines procurement around the middle phase of procurement but requires that the procurement system include all three phases of procurement.

**Table 2: Supply chain management elements included in SCM Regulations**

Element	Outline of function associated with the element as per National Treasury 2003 policy	Focus of Municipal SCM Regulations
Demand management	Stage where a needs assessment is performed, dealing with issues such as future needs, critical delivery dates, frequency of need, linking the requirement to the	Ensure that the resources required to support the strategic and operational commitments are delivered at the correct time, at the right price and at the right location, and that the quantity and

<sup>14</sup> Watermeyer 2011: 1, 2.

<b>Element</b>	<b>Outline of function associated with the element as per National Treasury 2003 policy</b>	<b>Focus of Municipal SCM Regulations</b>
	budget, undertaking an expenditure and commodity analysis and determining specifications.	quality satisfy the needs of the municipality or municipal entity.
Acquisitioning management	Stage where preferential procurement policy objectives are identified, the strategy of how the market is to be approached is determined, applicable depreciation rates are determined, the total cost of ownership principle is applied, bid documents are compiled, bid evaluation criteria are determined, bids are evaluated, contract documents are compiled and signed, contract administration is done, and contract information is used to kick-start the logistics management process.	Ensure that goods and services are only procured in accordance with authorised processes, that expenditure on goods and services is incurred in terms of an approved budget, that the threshold values for the different procurement processes are complied with and bid documentation, evaluation and adjudication criteria, and general conditions of a contract are in accordance with any applicable legislation; and that Treasury guidelines on acquisition management are properly taken into account.
Logistics management	For stock or inventory items functions are performed such as coding of items, setting of inventory levels, placing of orders, receiving and distribution of material, stores/warehouse management, expediting orders, transport management and vendor performance.  For fixed capital items functions must be performed such as appropriate classification,	System of logistics management which provides for the setting of inventory levels, placing of orders, receiving and distribution of goods, stores and warehouse management, expediting orders, transport management, vendor performance, maintenance and contract administration.

Element	Outline of function associated with the element as per National Treasury 2003 policy	Focus of Municipal SCM Regulations
	additions to asset and property register, valuation, main use, etcetera.	
Disposal management	<p>Stage involving obsolescence planning or depreciation rates, material is inspected for potential re-use and the formulation and execution of a disposal strategy.</p> <p>For fixed capital stock a similar set of procedures is applied, ie, depreciation and maintenance and replacement planning and costing.</p>	System for the disposal or letting of assets, including unserviceable, redundant or obsolete assets.
Risk management		System for the identification, consideration and avoidance of potential risks in the supply chain management system.
Supply chain performance		Monitoring system to determine, by retrospective analysis, whether the authorised processes are being followed and whether the desired objectives are being achieved.

### 3 Unpacking the PPA framework for a procurement system

#### 3.1 Considerations

Because the PPA requires strategic procurement for four procurement areas — procurement in other countries, type 2 procurements, type 3 procurements, and procurements aiming to stimulate innovation — an understanding of the general approach to strategic procurement is necessary. The next step is to discuss how this approach is to be applied, firstly, to infrastructure procurements and then to innovation procurements provided for in the PPA. Thereafter, the matters which the

PPA requires to be addressed in a procurement system will be examined. Finally, procurement methods and procedures and the criteria for evaluation of tenders for each type of procurement needs to be considered. This can be done by reviewing the provisions of ISO 10845-1:2020.

### **3.2 Approach to a procurement system promoting strategic procurement**

To understand the PPA's approach to procurement and procurement systems, the definition of procurement providing for different types of procurement must be read together with section 24 of the PPA. Section 24(1)(a) provides for different procurement types to be promoted through strategic procurement. This section of the Act further requires the Minister to prescribe a framework within which a procuring institution must develop and implement its procurement system, which must contain, beyond strategic procurement, types of procurement methods, associated requirements and procedures and criteria for the evaluation of tenders. Section 24(3) identifies the minimum matters to be provided for in a procurement system.

The version of the Public Procurement Bill, which was issued for public comment during February 2020, prior to introduction in Parliament, included a chapter on infrastructure procurement and delivery management linked to compliance with standards determined by instruction. However, the version of the Bill tabled with the National Economic Development and Labour Council (NEDLAC) during 2022 removed that chapter. This version of the Bill sought to perpetuate the one-size-fits-all approach to procurement under the control of a supply chain management unit that does not differentiate between infrastructure procurement and other types of procurement. Simply put, it maintained the current procurement paradigm.

The NEDLAC social partners, business and labour, invited several experts in public procurement to attend deliberations. A Joint Strategic Resource ("JSR") comprising the Public Affairs Research Institute ("PARI"), the African Procurement Law Unit ("APLU"), the Wits School of Construction Economics and Management, and Corruption Watch provided technical expertise on the Bill. The JSR developed and argued for what it termed a strategic as opposed to an administrative approach to procurement.<sup>15</sup>

From a public infrastructure point of view, there has over the last few decades been a change in the way that the public sector functions

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<sup>15</sup> Klaaren *et al* 2023: 6, 8, 9, 10.

globally. Three basic paradigms for procurement systems have emerged — administration, management and governance. Procurement practices under the administration paradigm (see table 3) tend to degenerate into a “ticking of boxes” exercise where compliance with rules or the application of mechanistic approaches are more important than project outcomes.<sup>16</sup>

Building on this understanding, the JSR<sup>17</sup> characterised an administrative procurement system as one that is best suited to the buying of well-defined and specified goods or services using standard documents in a simple bidding or purchasing process. It is designed around a supply chain management system within the office of a chief financial officer which functions as a back office performing an administrative, clerical function. The JSR characterised strategic procurement, on the other hand, as a front office or strategic function which needs to be linked to the department or directorate responsible for delivering projects and services. Its distinguishing features include the allocation of risk between the parties to a contract, business needs being satisfied through multiple contracts or different solutions, multiple interfaces and interdependencies between contracts and uncertainties when contracts are concluded. Strategic procurement in this sense requires a strategic and tactical approach with many options to approach the market and a range of delivery models and approaches to mitigate and allocate risk.<sup>18</sup> The JSR concluded that it is not possible to regulate strategic procurements in the same manner as administrative procurements.

As regards the other paradigms, project outcomes can be improved under the management paradigm as it permits managers the discretion to explore and apply different options. The greatest potential to deliver value for money, however, lies within the governance paradigm which focuses on strategic objectives and outcomes. This paradigm requires executives and senior managers to take responsibility and be accountable for outcomes, apply their minds to the best way of doing things, think about doing things differently to achieve better outcomes and take responsibility for finding ways of achieving more with less.<sup>19</sup>

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<sup>16</sup> Watermeyer & Phillips 2020: 57, 58, 59.

<sup>17</sup> JSR 2022a and 2022b.

<sup>18</sup> ISO 22058:2022.

<sup>19</sup> Watermeyer & Phillips 2020: 58.

**Table 3: Characteristics of the different paradigms for procurement systems<sup>20</sup>**

Paradigm	Defining characteristics of the supply chain management system
Administration	<ul style="list-style-type: none"> <li>• System is administrative in nature and rule-driven where compliance with rules and ticking of boxes is more important than project outcomes.</li> <li>• Highly centralised decision-making where management discretion is discouraged.</li> <li>• System is unresponsive, inefficient, slow and incorporates inappropriate bureaucracies.</li> </ul>
Management	<ul style="list-style-type: none"> <li>• System provides a wide range of options enabling a strategic approach to procurement to be taken to improve project outcomes both in terms of strategy and tactics.</li> <li>• Decision-making is decentralised.</li> <li>• Emphasis is on clear accountability, efficiency, effectiveness and project outcomes.</li> </ul>
Governance	<ul style="list-style-type: none"> <li>• Governance enables alignment of choices with organisational strategic objectives and values, stakeholder aspirations and collaborative relationships between "buyers" and "sellers" or "suppliers".</li> </ul>

As enacted, the PPA includes a definition for strategic procurement, namely "a comprehensive approach to procurement that aligns with the strategies and objectives of a procuring institution, thereby enhancing cost-effectiveness".<sup>21</sup> The reference to "strategic procurement" in section 24(1)(a) is its sole deployment in the PPA. Understood against the background given in this paper, the procurement of general goods and services for consumption (type 1 procurement) is not linked to the strategies and objectives of a procurement institution and is therefore best characterised as a type of administrative procurement. Such procurement relates to the running or operation of the institution. Infrastructure, on the other hand, is required to support the service delivery mandate of a procuring institution. Such assets need to be managed to realise value, to be retained in a state in which they can perform their required functions and be disposed of or repurposed when no longer supporting objectives or when they are financially unsustainable. Non-infrastructure related capital assets are generally linked to strategies and objectives of an organisation and can require maintenance and may require disposal. Accordingly, the provision and maintenance of infrastructure and capital assets (type 2 procurement)

<sup>20</sup> Watermeyer & Phillips 2020: 57, 58.

<sup>21</sup> S 1 PPA.

and the letting and disposal of assets (type 3 procurement) can be categorised as strategic procurement.

Strategic procurement requires as a minimum a management paradigm for its effective implementation and preferably a governance paradigm.<sup>22</sup> Governance and management are complementary activities that interact and influence one another. Governance involves setting and being accountable for the institution's fulfilment of its purpose within the parameters set for the institution, whereas management is about fulfilling the associated objectives by making choices within those parameters.<sup>23</sup> It is difficult to exercise management in the absence of governance. Hence the need for the governance paradigm and its significance in strategic procurement.

### **3.3 *Infrastructure procurement as a form of strategic procurement***

The Construction Industry Development Board Act<sup>24</sup> ("CIDBA") defines the construction industry as "the broad conglomeration of industries and sectors which add value in the creation and maintenance of fixed assets within the built environment".<sup>25</sup> This definition is not materially different from the definition for "procurement" in the PPA relating to infrastructure procurement, that is type 2 and type 3 procurements. The Construction Industry Development Board (CIDB) has a mandate in terms of sections 5(1)(a) and 5(3)(c) of their founding Act to promote and implement policies, programmes and projects aimed at, amongst others, procurement reform and standardisation and uniformity in procurement documentation, practices and procedures regarding the construction industry. In its schedule of amendments, the PPA has modified this mandate by making the CIDB's procurement mandate subject to the PPA and to be exercised in consultation with the Public Procurement Office.<sup>26</sup>

In 2004, the CIDB published a Standard for Uniformity in Construction Procurement ("SFU"). The SFU was linked to infrastructure procurement through requirements relating to bidding documents in the SCM Regulations issued in terms of the PFMA and MFMA. This standard formed the basis of the International Organisation for Standardisation ("ISO") 10845 standards for construction procurement which were published in 2010/11.

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<sup>22</sup> Watermeyer & Phillips 2020: 57.

<sup>23</sup> ISO 37000:2021.

<sup>24</sup> Act 38 of 2000.

<sup>25</sup> S 1(h) CIDBA.

<sup>26</sup> S 5(1A) CIDBA inserted by the PPA.

National Treasury issued a Standard for Infrastructure Procurement and Delivery Management ("SIPDM") in 2015, which built upon the provisions of the SFU and linked its requirements to the governance paradigm. However, following a change in leadership within the Office of the Chief Procurement Officer ("OCPO"), this office pursued the notion that there is only one SCM system for all types of procurement, and it accordingly forced the removal of certain evaluation methods from the SFU and narrowed its focus to construction contracts. Furthermore, the Intergovernmental Relations Office within National Treasury took over the development of the Infrastructure Delivery Management System ("IDMS") Toolkit developed by the CIDB in 2010. This toolkit was intended to provide a documented body of knowledge and a set of processes that was at the time considered to represent generally recognised best practices. It was framed primarily around the Project Management Institute's portfolio, programme and project management standards which apply to all industries. In 2019, the SIPDM was withdrawn and replaced with the Framework for Infrastructure Delivery and Procurement Management (FIDPM) which sought to embed the IDMS toolkit principles into National Treasury Instructions.<sup>27</sup> This document reversed much of the thinking in the SIPDM and sought to embrace a paradigm that goes back to a management or administrative paradigm. Standards published post 2022 by the Project Management Institute and the ISO, on the other hand, have changed the focus in project management from tools and techniques to project outcomes while ISO 6082:2025 builds upon the same thinking underlying the SIPDM, which was expanded upon by the Department of Higher Education and Training's University Macro-Infrastructure Framework ("MIF") guidelines.<sup>28</sup> Accordingly, the IDMS needs a major overhaul.

The National Infrastructure Plan ("NIP") 2050 issued in terms of the Infrastructure Development Act<sup>29</sup> calls for a strategic approach to be taken to infrastructure procurement. It requires a regulatory framework to enable infrastructure procurement and delivery that is to be differentiated from that for other goods and services.<sup>30</sup> This policy position is an outcome of the National Planning Commission's ("NPC") findings relating to a dearth of properly prepared and bankable projects, significant underspending, cost and time overruns and delays in implementation, unintended consequences of regulations and

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<sup>27</sup> Watermeyer & Phillips 2020: 23-27, 30-34, 55; Klaaren & Watermeyer 2022: 6.

<sup>28</sup> DHET 2022.

<sup>29</sup> Act 23 of 2014.

<sup>30</sup> GN No 1874, GG 46033 of 11-03-2022: 71, 72.

instructions that were not sufficiently and timeously reigned in, including unpredictable and harmful procurement practices, and poor project outcomes in terms of value for money. Other NPC findings which supported this policy position relate to the SCM practices which misplaced infrastructure procurement within financial processes and treated procurement as a general administrative (or back-office) function requiring a relatively low skills level rather than a professional strategic function linked to those responsible for delivering infrastructure and the exclusion or marginalisation of built-environment professionals in key processes.<sup>31</sup>

During the NEDLAC process the JSR alerted the drafters of the Bill to the policy position in the NPI 2050 Plan.<sup>32</sup> Apparently taking the point, the final version of the Bill produced post NEDLAC separated infrastructure procurement from general goods and services (as is now seen in the differentiation between type 1 and types 2 and 3 procurements outlined in this paper) and required the Minister to make regulations for infrastructure and capital assets or goods and services related to infrastructure and capital assets. Section 63(7)(b) of the PPA entrenches this separation in regulations.

### **3.4 Strategic procurement and stimulation of innovation**

One of the objects of the PPA is to promote innovation. The prescribed framework for a procurement system is required to stimulate innovation linked to strategic procurement practices. The understanding of strategic procurement as intended to stimulate and promote innovation can be given substance through consideration of this topic beyond South Africa's borders. In recent years, innovation has received significant attention around the world. For example, ISO has recently developed and published the ISO 56000 family of seven standards that guide organisations through how they should implement and operate their innovation management system. Recent amendments to the World Bank Procurement Regulations<sup>33</sup> and the recent UK Procurement Act<sup>34</sup> include provisions for innovation.

Innovation is commonly regarded as the practical implementation of ideas that result in the introduction of new goods or services or improvement in offering goods or services. ISO 37000:2014 defines innovation in terms of the "implementation of a new or significantly

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<sup>31</sup> GN No 1874, GG 46033 of 11-03-2022: 68-71.

<sup>32</sup> Klaaren *et al* 2022: Annexure 1.1.

<sup>33</sup> World Bank Procurement Regulations for IPF Borrowers 2023.

<sup>34</sup> Procurement Act (UK) 2023.

improved product (good or service), or process". ISO 22886:2020 defines it in terms of the "search for and the discovery, experimentation, development, implementation and adoption of new products and services".

Edler and Elvira<sup>35</sup> distinguish between the procurement of solutions that do not exist yet and thus need to be developed (triggering demand) and procurement to acquire and adopt a service that exists in the marketplace but is new for the organisation (responsive demand). They point out that innovation can be triggered through intelligent functional specifications and through market intelligence and interaction with the market. Elder and Elvira suggest that there are four types of procurement which are responsive to innovations: experimental (testing-ground for innovative products), technological (creating demand "pull" by guaranteeing a level of production), efficient (encouraging particular standards for products and systems) and adapted procurement (tailoring existing technologies to satisfy unmet user needs).<sup>36</sup>

The World Bank Procurement Regulations<sup>37</sup> requires the formulation of a project procurement strategy for development. Such a strategy is required to address how procurement activities will support the development objectives of the project and deliver the best value for money under a risk-based approach. Furthermore, the strategy needs to outline the borrower's "procurement objectives, proposed evaluation approach and methodology, the various stages of evaluation and, where Rated Criteria are to be used, the specific non-price/qualitative criteria and their proposed prioritization and weightings".<sup>38</sup> Evaluation criteria can include factors such as cost, quality, risk, sustainability and innovation to achieve value for money. Suggested rated criteria linked to innovation include "innovative aspects of design, methodology, technology and/or delivery of the Goods, Works, Non-consulting Services, or Consulting Services".<sup>39</sup> The use of quality-based selections is also permitted where quality is evaluated without using cost as an evaluation criterion, for example, where it is difficult to precisely define requirements and submissions need to demonstrate innovation.

The procuring of more innovative solutions to meet needs was also one of the objectives of the reform embedded in the UK's Procurement Act.<sup>40</sup> This was premised on the use of new and better products and services to

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<sup>35</sup> Edler & Elvira 2014: 230, 231.

<sup>36</sup> Edler & Elvira 2014: 231.

<sup>37</sup> World Bank Procurement Regulations for IFS Borrowers 2023.

<sup>38</sup> World Bank Procurement Regulations for IFS Borrowers 2023.

<sup>39</sup> World Bank Procurement Regulations for IFS Borrowers 2023.

<sup>40</sup> Procurement Act (UK) 2023.

improve the quality and efficiency of services and the directing of public procurement to innovations and innovative companies to drive growth locally and nationally. The strategy underpinning this approach to procurement is twofold. Firstly, to provide procurement professionals with a "wider set of tools, giving them more flexibility to choose newer solutions and to fit the procurement process to specific needs".<sup>41</sup> Secondly through the transparency of procurement data to "make it easier to see what approaches have been successful and encourage use of those approaches more widely across the public sector".<sup>42</sup> The rules in the new UK procurement regime focus on delivering outcomes and allow contracting authorities to design their own processes, tailored to their unique circumstances and to those who are best placed to deliver the best solution. They permit preliminary market engagement in advance of the formal tender process and award criteria to be refined during the procurement process to arrive at a most advantageous tender. Furthermore, phases in the procurement process can be introduced enabling negotiation or dialogue with interim assessments and funding to obtain new and better solutions.

### ***3.5 Operationalising section 24(3) PPA: different requirements for procurement systems***

A system is commonly understood to be a "set of interrelated or interacting elements".<sup>43</sup> The purpose of a system is to combine several elements to achieve one or more stated purposes. Table 2 above outlines the concepts associated with administrative procurement which can be implemented through a unit within the office of a chief financial officer as part of a financial management system. Strategic procurement needs to be delivered through a procurement system linked to those responsible for project delivery.

Table 4 outlines a procurement system for infrastructure delivery and the elements it should contain. Such a system needs to be under the control of those responsible for delivery management which may be described as the critical leadership role played by a knowledgeable procuring institution to plan, specify, procure and oversee the delivery of infrastructure projects including knowledgeable leadership, consistent governance and systematic administration of procurement, contracts and project finances.<sup>44</sup>

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<sup>41</sup> UK Cabinet Office 2023.

<sup>42</sup> UK Cabinet Office 2023.

<sup>43</sup> ISO 9000:2015.

<sup>44</sup> Watermeyer & Phillips, 2020: 43; ISO 6082:2025.

The version of the PPA which was introduced to the National Assembly in May 2023 included a section which required that every procuring institution, as part of its procurement system, establish a procurement unit with minimum specified duties. This section was revised in the version submitted to the Standing Committee on Finance to every procuring institution establishing a procurement function as part of its procurement system with a shorter list of minimum duties. The PPA, in its final form, removed this requirement in its entirety but retained requirements for a committee system which are embedded in the current SCM Regulations.

For a project to progress meaningfully, its objectives and their achievement need to be closely allied to the decision structure. Workflow may be regarded as a series of activities with explicit start and end points necessary to complete a task intended to contribute to the achievement of one or more outcomes of a process. An activity begins and ends with decision points (controls or decision gates) which form the major boundaries to activities. Decisions not only give purpose to activity but also ensure that activities are undertaken in accordance with an institution's system of governance or quality management system as they provide an opportunity to authorise proceeding to the next activity and to take corrective action if necessary.<sup>45</sup>

The National Treasury SCM Guide for Accounting Officers<sup>46</sup> indicates that the principle associated with the committee system is that "no individual official should be in a position to take a decision in isolation regarding the award of a bid". This is reflective of an administrative procurement paradigm. Where projects are delivered under a strategic procurement paradigm, the committee system functions as a quality management system. In strategic procurements, this needs to be extended to all decision-making points within not only procurement processes but also delivery management processes.

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<sup>45</sup> Watermeyer 2018: 39, 40.

<sup>46</sup> National Treasury 2004.

**Table 4: Elements of a procurement system for infrastructure delivery**

Element	Concepts associated with infrastructure delivery
Procurement policy	Intensions and directions and accepted principles or instructions which state expectations on what ought to be done and what is allowed or not allowed
Institutional and governance arrangements	<p>Institutional arrangements: policies, systems, processes and structures used to authorise, plan and manage procurement related activities efficiently and effectively in fulfilling mandates.</p> <p>Governance arrangements: rules, policies, and decision-making processes which govern the procurement system.</p>
Demand management	Co-ordinated activities, based on asset management plans and strategic planning processes, which forecast demand for new and functionality of existing infrastructure, and reduce, increase, delay or switch demand in response to resource constraints with forecasted consequences.
Procurement planning and budgeting	<p>Procurement planning: making of decisions as to what, where and when goods and services are required, how the market is to be approached and what is the number, type, nature and timing of the required contracts.</p> <p>Budgeting: prioritisation of projects based on factors such as risk, benefits and extent of impact and the development of a financial plan to deliver the required projects within the available funding.</p>
Acquisition management	Co-ordinated activities which oversee the development of procurement documents and associated tactics enabling a procurement strategy to be effectively implemented, the soliciting and evaluating of submissions from the market and the finalisation of contracts.
Contract management, including assessment of projects against outcomes	<p>Application of the terms and conditions of a contract, monitoring of compliance with requirements, management of changes in requirements, determining corrective action and assessing adjustments to cost and schedule occasioned by risk events.</p> <p>Comparing of planned outcomes against delivered outcomes and monitoring progress towards the realisation of intended benefits.</p>

Risk management	Coordinated activities to direct and control the process of making management decisions based on an analysis of possible threats, their consequences, and their probability or likelihood of occurrence.
Logistics management	Coordination, movement, and storage of goods through efficient use of resources which includes activities such as sourcing, planning, tracking, warehousing, transportation and inventory control.
Disposal management	Methodology whereby the demolition or dismantling of infrastructure or its parts and the disposal of unwanted, redundant or surplus materials, plant and equipment is undertaken safely.
Monitoring and assessment of procurement performance	The ongoing, systematic collection and analysis of data as a project unfolds enabling project progress to be reported on and the identification of "gaps" between what was planned and what is achieved in terms of deliverables, outputs, outcomes and benefits.
Reporting	Preparation of reliable and credible reports which provide the status, forecast and analysis of projects intended to generate decisions, actions, or awareness of top management within the institution.

Strategic procurement requires a procurement and delivery management system which provides effective governance processes that ensure:

- there is proper management and control of infrastructure delivery including demand management;
- all the various parts of the organisation which play a role in infrastructure delivery work together in a coordinated, efficient and effective manner;
- infrastructure delivery is, wherever possible, managed as a long term and strategic system of individual yet interlinked projects aimed at meeting the organisation's objectives;
- there is timeous decision-making and individual and organisational accountability for infrastructure delivery;
- single point accountability is assigned to a suitably qualified and experienced practitioner (client delivery manager) to provide executive level leadership in the planning, specifying, procuring and overseeing of infrastructure delivery;

- control frameworks are established which include decision gates to enable risks to be appropriately and proactively managed and render the system capable of being audited;
- there is a range of procedures and methods in place enabling appropriate strategies and tactics to be formulated on a project by project basis; and
- procurement is recognised as a central competency of those responsible for delivering infrastructure.<sup>47</sup>

ISO 6082:2025 points out that there is no "one-size-fits-all" allocation of roles and responsibilities to support project delivery as project governance arrangements should be appropriate to a particular project and client organisation. Nevertheless, figure 1 illustrates an appropriate allocation of roles and responsibilities for an organ of state based on the guidance provided in ISO 6082:2025.

#### **4 Giving effect to section 24(1)(b), (c), and (d) PPA with ISO 10845-1 procurement processes, methods and procedures**

The ISO 10845 family of standards, which are based on standards such as SANS 294:2004, SANS 10403:2003 and the CIDB SFU,<sup>48</sup> provides a procurement system which reflects the constitutional imperatives required from a procurement system.<sup>49</sup> The ISO 10845-1 procurement procedures were furthermore modelled around various international practices which were in use at the time it was first published in 2010. An annex to the first edition indicates the equivalency between the procurement procedures included in ISO 10845-1 and the World Bank, the World Trade Organisation ("WTO"), the United Nations Commission on International Trade Law ("UNCITRAL") and the European Union ("EU") procurement procedures. As such, these generic procedures are not industry or country specific; they are universally applicable.

The ISO 10845 family of standards, all of which have been adopted as South African national standards, provide a wide range of generic procurement processes, methods and procedures for the three procurement types identified in the PPA.<sup>50</sup> This enables key components of a procurement system to be readily established and implemented within an institution. The range of selection methods as provided for in ISO 10845-1:2020 are indicated in table 5. The current MFMA SCM

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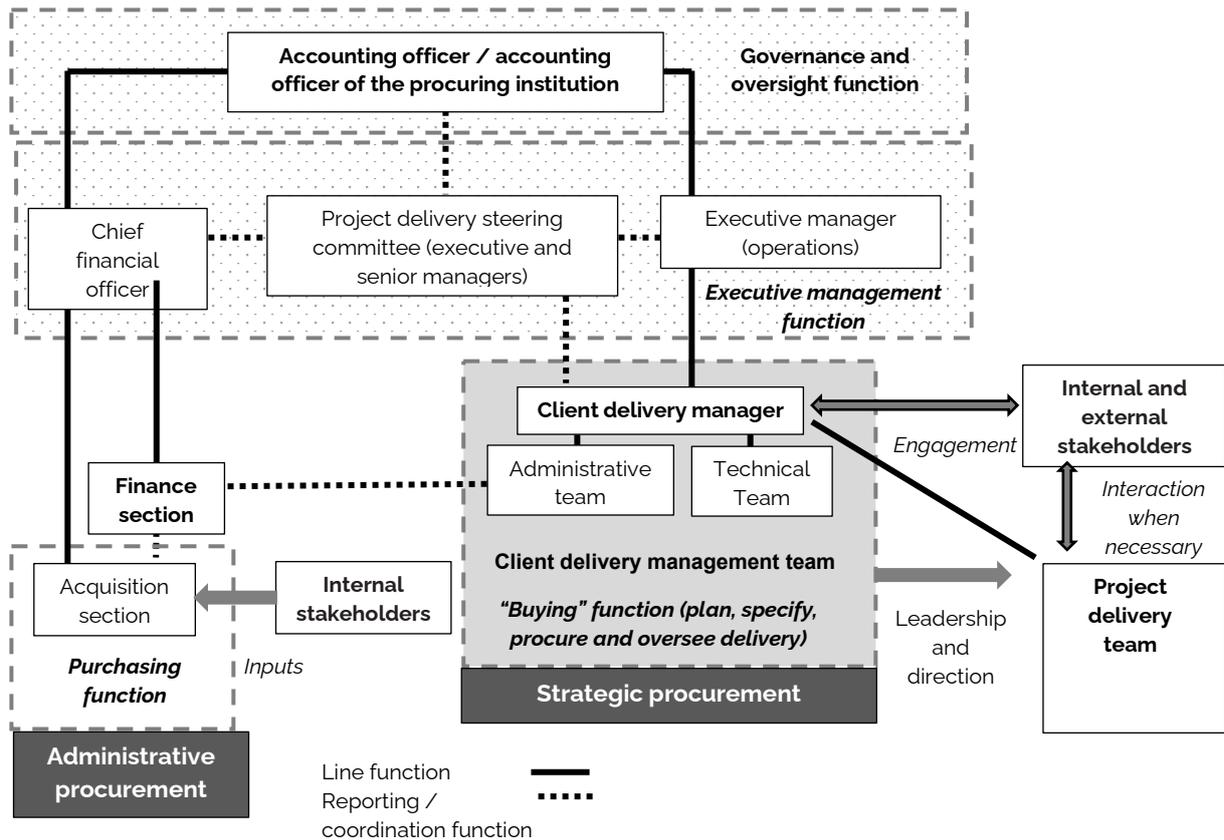
<sup>47</sup> Watermeyer 2022: 393, 394; ISO 6082:2025.

<sup>48</sup> CIDB 2006.

<sup>49</sup> Watermeyer 2011: 2-5.

<sup>50</sup> Watermeyer 2012: 1222-1227.

Regulations make provision for petty cash purchases, written or verbal quotations, formal written price quotations and a competitive bidding process. Table 5 makes provision for all these procurement methods. Opportunities to engage with tenderers during the tender process are provided in the proposal procedure using the two-stage system, the competitive negotiations procedure and the negotiations procedure. ISO 10845-1 also makes provision for public auctions.



**Figure 1: Example of allocation of roles and responsibilities for administrative and strategic procurements**

ISO 10845-1 makes provision for the calling of expressions of interest to pre-qualify tenderers to be admitted to a tender process should they qualify or be selected to do so. This pre-qualification method forms an integral part of the nominated, open and restricted competitive negotiations selection methods. Another form of pre-qualification is eligibility criteria which need to be satisfied for a submission to be evaluated. Such criteria can be used to pre-qualify tenderers using the open, quotation, proposal procedure and open competitive negotiations selection methods.

ISO 10845-1 provides four standard evaluation methods (Method 1: Financial offer; Method 2: Financial offer and quality; Method 3: Financial offer and preferences and Method 4: Financial offer, quality and preferences) where quality is "the totality of features and characteristics of a product or service that bears on the ability of the product or service to satisfy stated or implied needs". Weightings and points are allocated to the parameters that are scored in methods other than method 1 where financial offer only is evaluated. The weighted scores for each of the parameters evaluated are added together. The tenderer with the highest score is the most competitive. The introduction of quality in the evaluation of tenders in terms of methods 2 and 4 introduces a reasoned judgement in evaluating the cost effectiveness of awarding a contract to a particular tenderer as it combines the financial offer with the ability of the product or service to satisfy stated or implied needs. Furthermore, it enables matters that form an integral part of the tender offer, and which cannot be directly expressed in monetary terms and are justifiable in terms of procurement outcomes, to be considered alongside financial offer and, if applicable, preference. This enables the most economically advantageous or best value offer to be identified.

**Table 5: Options for selection methods (ISO 10845-1)**

Selection method		Description
Negotiation		A tender offer is solicited from a single tenderer.
Competitive selection procedure (A contract is normally awarded to the contractor having the lowest financial offer or highest number of tender evaluation points)	Nominated	Tenderers that satisfy prescribed criteria are entered into an electronic database and are invited to submit tender offers based on search criteria and their position on the database. Tenderers are repositioned on the database upon appointment or upon submission of a tender offer.
	Open	Tenderers may submit tender offers in response to an advertisement by the procuring entity to do so.
	Qualified	A call for expressions of interest is advertised and thereafter only those tenderers who satisfy objective criteria and who are selected to submit tender offers, are invited to do so.
	Quotation	Tender offers are solicited from not less than three tenderers in any manner the procuring entity chooses, subject to the procedures being fair, equitable, transparent, competitive and cost-effective.
Proposal procedure		Tenderers submit technical and financial proposals in two envelopes. The financial

	using the two-envelope system	proposal is only opened should the technical proposal be found to attain the minimum threshold score.
	Proposal procedure using the two-stage system	Non-financial proposals are called for. Tender offers are then invited from those tenderers that submit acceptable proposals based on revised procurement documents. Alternatively, a contract is negotiated with the tenderer scoring the highest number of evaluation points
	Confined market	Tenders are invited from a limited number of tenderers who can provide goods, services or works which are not freely available in the market, or which are provided solely for the procuring entity.
	Shopping	Written or verbal offers are solicited in respect of readily available goods obtained from three sources. The goods are purchased from the source once it is confirmed in writing.
Competitive negotiation procedure (The number of tenderers competing for the contract are reduced through a series of negotiations until the remaining tenderers are invited to submit final offers)	Restricted competitive negotiations	A call for expressions of interest is advertised and thereafter only those tenderers who satisfy objective criteria and are selected to submit tender offers, are invited to do so. The procuring entity evaluates the offers and determines who may enter into competitive negotiations.
	Open competitive negotiations	Tenderers may submit tender offers in response to an advertisement. The procuring entity evaluates the offers and determines who may enter into competitive negotiations.

The negotiated, open and qualified procedures in ISO 10845-1 can also be used for disposals. For example, the University of the Witwatersrand wanted to dispose of the Frankenwald Estate (a 284-hectare undeveloped tract of land with town planning and development rights) in terms of an outright sale or the development of the estate in accordance with a hold-and-develop strategy. A call for an expression of interest was

made. This was followed with the competitive negotiation procedure with the evaluation of submissions in accordance with method 2 (financial offer and quality) to identify a partner to engage with in a hold-and-develop strategy.

The ISO 10845-1 methods are sufficiently flexible to be applied in all three types of procurement and to stimulate and promote innovation in acquiring goods or services and any combination thereof. ISO 22058:2022, drawing upon the contents of the ISO 10845 family of standards, provides guidance on the development of procurement strategies and tactics. This provides an effective toolbox for strategic procurements relating to procurement in other countries, the provision and maintenance of infrastructure and capital goods, the disposal and letting of goods, and the promotion of innovation.

## 5 Conclusions

The process to arrive at the PPA in its present form has been a long drawn-out one. The drafters led by National Treasury's OCPO have favoured an administrative type of procurement and the perpetuation of the current SCM system. Consultations with stakeholders have convinced the decision-makers that a strategic procurement system is also required. As previously explained in this paper, the PPA as finally enacted, makes provision for both administrative and strategic procurement.

The effective implementation of the PPA's version of strategic procurement should take place through the use of standards and guidelines (soft law), particularly for procurement in the context of public infrastructure.<sup>51</sup> Strategic procurement is best implemented through national and international standards such as the ISO 10845 family of standards, ISO 22058, ISO 201502 and ISO 6082. This is echoed in NIP 2050 which calls for infrastructure delivery to be operating at the highest global standard. Those engaged in the delivery of projects are very familiar with standards and their application whereas those engaged in administrative procurement are not. NIP 2050 envisages that the regulatory framework will be designed specifically for infrastructure procurement and delivery and that a specialised section in National Treasury, staffed with suitably qualified and experienced built-environment professionals, will oversee such a framework.

However, as National Treasury currently has no such staff within the OCPO, the question arises as to who should lead the development of the regulations. Differentiated regulations according to type of procurement

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<sup>51</sup> Klaaren & Watermeyer 2022: 3, 6, 7, 8.

are very much on the table. Section 63(7)(a) permits the Minister to make regulations for different categories of procurement. Indeed, section 63(7)(b) requires the Minister to make regulations for type 2 procurements.

The PPA process for making regulations is a lengthy one which includes consultations with affected ministers and representatives of local government prior to their issuing for public comment and ends with parliamentary scrutiny. Section 68 of the PPA includes a precedent setting review provision which requires the Minister within 24 months after the first publication of the Act (July 2026) to review the implementation of this Act and the need for amendments. Such a review is required to consult stakeholders, including Nedlac, during the review, and within 27 months of first publication of the Act (October 2026) to make public a report on the review and submit it to Parliament.

Accordingly, at least three options are open. Firstly, the CIDB is very familiar with standards and has a mandate for the standardisation and uniformity in procurement documentation, practices and procedures for infrastructure. The CIDB staff are thus well placed to do so. The CIDB can update and expand their SFU to address all aspects of strategic procurement linked to international standards. This will enable the implementation of this prospective framework, with the exception of governance arrangements, within the current SCM Regulations, thus accelerating the impact of the drafting of the PPA. National Treasury can issue a departure from the SCM Regulations in terms of sections 79 of the PFMA and section 170 of the MFMA removing the requirements relating to a SCM unit within the office of an institution's chief financial officer to enable full implementation ahead of the regulations.

Secondly, the PPA has amended the CIDBA to permit the Minister of Public Works and Infrastructure to issue procurement regulations with the concurrence of the Minister of Finance. This is another option which can be considered.

Thirdly, the expertise and the policy integration potential of national and international standards as referred to and discussed here in this paper can be specifically catered for and drawn upon by National Treasury as part of their in-house drafting efforts. This one is perhaps not the most elegant or effective option for accelerating infrastructure delivery but is certainly a feasible one.

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