

A STRATEGIC PUBLIC PROCUREMENT PARADIGM FOR SOUTH AFRICA: REFLECTIONS OF THE JOINT STRATEGIC RESOURCE (“JSR”) ON THE DEVELOPMENT OF THE SOUTH AFRICAN PUBLIC PROCUREMENT BILL, 2023

**Jonathan Klaaren,
Ryan Brunette,
Geo Quinot &
Ron Watermeyer**

(2025) 12 APPLJ 11

ABSTRACT

South Africa's public procurement regime, established in the context of public sector reform initiatives of the late 1990s and early 2000s, requires reform. The drafting process for new public procurement legislation has been a long and winding one, and much of it has taken place beyond public scrutiny. In 2022, a revised version of the 2020 Public Procurement Bill was introduced into the National Economic Development and Labour Council (“Nedlac”). The early deliberations in Nedlac were attended, at the request of business and labour, by a small number of outside individuals and organisations with expertise in public procurement. The Task Team soon formalised this function with those individuals and organisations, styled as a Joint Strategic Resource (“JSR”), coordinated by the Public Affairs Research Institute (“PARI”), and including the African Procurement Law Unit (APLU), the Wits School of Construction Economics and Management, and Corruption Watch. A crucial aspect of JSR's work, agreed to in principle between all the social partners, was to provide the legal basis for moving public procurement in South Africa toward a new strategic procurement paradigm. The JSR was asked to support the Task Team by theorising this concept and suggesting how it could be embedded in the Bill. The JSR prepared a proposed draft of the Public Procurement Bill, which is available as Annexure C of the Final NEDLAC Report on the Bill (“the JSR Draft”). The present contribution explains the strategic procurement paradigm that underpins the JSR Draft of the Bill. We argue that the JSR Draft demonstrates that strategic procurement is appropriate to the South African context for adoption and implementation as the key concept in a comprehensive public procurement statute.

A STRATEGIC PUBLIC PROCUREMENT PARADIGM FOR SOUTH AFRICA: REFLECTIONS OF THE JOINT STRATEGIC RESOURCE (“JSR”) ON THE DEVELOPMENT OF THE SOUTH AFRICAN PUBLIC PROCUREMENT BILL, 2023

Jonathan Klaaren

University of the Witwatersrand, School of Law and the Wits Institute for Social and Economic Research (WiSER)

Ryan Brunette

Public Affairs Research Institute

Geo Quinot

Department of Public Law, Stellenbosch University

Ron Watermeyer

School of Construction Economics and Management, Faculty of Engineering and the Built Environment, University of the Witwatersrand

1 Introduction

South Africa’s public procurement regime, established in the context of public sector reform initiatives of the late 1990s and early 2000s, requires reform. Efforts to remodel the country’s public procurement legislation were initiated as far back as 2013 with the establishment of the Office of the Chief Procurement Officer (“OCPO”). The OCPO was tasked with modernising South Africa’s procurement system, reducing leakage from the system, and realising maximum value on the government’s substantial spending in procurement in line with section 217 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”).

¹ The Joint Strategic Resource (“JSR”) comprised Ryan Brunette (Public Affairs Research Institute (“PARI”)), Jonathan Klaaren (PARI, Wits School of Law, Wits Institute for Social and Economic Research (“WiSER”)), Geo Quinot (African Procurement Law Unit (“APLU”)), Ron Watermeyer (Wits School of Construction Economics and Management), and members of the Corruption Watch Team. The activities of the JSR are explained in more detail in the contribution. All co-authors participated in the operation of the JSR; Jonathan Klaaren wrote the first draft of this collective paper and all co-authors participated in finalising it by May 2023. The editing assistance of Sarah Meny-Gibert is gratefully acknowledged as is funding from the Millenium Trust towards these activities.

The drafting process of the Public Procurement Bill of 2023¹ (“the Bill”) has been a long and winding one. The reform process within which the draft legislation was, at least initially, embedded was announced by the Minister of Finance in his 2013 Budget Speech.² In 2014, the OCPO, a division of the National Treasury, commissioned Professor Geo Quinot from Stellenbosch University to provide in-depth institutional and policy research on legal reform.³ The research informed an early draft of the Bill, but this work was soon shelved. The OCPO then engaged the Public Affairs Research Institute (“PARI”) at the University of the Witwatersrand to work on a second draft – that document itself drawing on earlier OCPO texts. In the process, the work became more detailed as Professor Quinot was reengaged to lead the drafting of regulations alongside the development of the statutory text.

In 2017, and thereafter, coinciding with the emergence of the Preferential Procurement Regulations of that year,⁴ these instruments evolved largely beyond public scrutiny. Civil society grew increasingly concerned about the direction and pace of public procurement legislative reform.⁵ The publication for comment of the draft Public Procurement Bill in 2020⁶ (“the 2020 Bill”) was thus cautiously welcomed, although the consensus among both practitioners and civil society actors was that the draft was underwhelming.⁷ Moreover, comments were made on the Bill, which subsequently become the subject of requests in terms of the Promotion of Access to Information Act (“PAIA”). In the meantime, legislative development again disappeared into internal National Treasury processes, until the introduction of a further revised bill in the National Economic Development and Labour Council (“Nedlac”) in 2022.

¹ B18B-2023 introduced into the National Assembly on 30 June 2023. The Bill has subsequently been signed into law on 23 July 2024 as the Public Procurement Act 28 of 2024. The Act has not come into force yet.

² Brunette, Klaaren & Nqaba 2019: 537–554.

³ Quinot 2014.

⁴ Quinot 2018: 856–867.

⁵ Brunette & Klaaren 2020.

⁶ Public Affairs Research Institute 2020; Quinot, Williams-Elegbe & Anthony 2020.

⁷ See general commentary on the draft Bill as contained in the 2020(1) special edition of the *African Public Procurement Law Journal* [online] Available at <<https://appljournals.ac.za/pub/issue/view/10>>.

The Bill was introduced into Nedlac on 13 April 2022. In subsequent months, the Nedlac Public Finance and Monetary Policy Chamber in collaboration with the Trade and Industry Chamber established the Public Procurement Bill Task Team (“the Task Team”) comprised of government, business, and labour to engage on the Bill. The Task Team met 15 times between 6 May 2022 and 7 October 2022. This series of meetings is more frequent than for many Nedlac processes (and this excludes the “one-a-sides” and bilateral discussions held between the social partners). Remarkably, business and labour were aligned on most issues. They often found themselves speaking in unison to persuade government about policy positions.

The early meetings of the Task Team were attended, at the request of business and labour, by a small number of outside individuals and organisations with expertise in public procurement. Between June and October 2022, the Task Team formalised those individuals and organisations' function to support the Public Procurement Bill Task Team of the Nedlac. This formalisation was styled as a Joint Strategic Resource (“JSR”), coordinated by PARI. The JSR was asked to support the process as directed by business and labour with research, advice, and related inputs. A crucial feature of the Bill, agreed to in principle between all the social partners, was to provide the legal basis for moving public procurement in South Africa toward a new strategic procurement paradigm. The JSR was asked to support the Task Team by theorising this concept and suggesting how it could be embedded in practice in the Bill.

The JSR prepared a proposed draft of the Public Procurement Bill, which is available as Annexure C of the Final Nedlac Report on the Bill (“the JSR Draft”).⁸ The present contribution explains the strategic procurement paradigm that underpins the JSR Draft.

⁸ *Nedlac Report on the Public Procurement Bill - JSR Version: Public Procurement Bill (14 October 2022) Annexure C.* [online] Available at <<https://Nedlac.org.za/Nedlac-reports-and-research/>>. The full Nedlac Report on the 2022 Public Procurement Bill can be found on the Nedlac website under 'Nedlac Plans and Research', and contains the following: The main Nedlac Report on the Public Procurement Bill; JSR Explanatory memorandum to the PPB; JSR Version of the Public Procurement Bill; Government Response to the JSR version of Bill; Government Public Procurement Bill - Post Nedlac consultation; Update on the Implementation of State Capture Recommendations on procurement (National Treasury); Labour motivation on incentivised whistle-blowing provision; Business inputs re JSR.

As part of its work within the Task Team, the JSR was briefed to produce several concept notes. These are publicly available⁹ and cover the following topics:

1. Concept note on recently published infrastructure policy and its implications for the Public Procurement Bill (26 June 2022).
2. Concept note on the tension between the draft Public Procurement Bill and Accounting Officer/Authority responsibilities (4 July 2022).
3. Concept note on public oversight through an open tendering system for goods, works and services (6 July 2022).
4. Concept note on public oversight through an open tendering system for public infrastructure (6 July 2022).
5. Concept Note on the Definition of Public Office Bearer, its Application to Clause 17 of the Bill, and the Automatic Exclusion of Political Exposed Persons from Public Procurement (9 July 2022).
6. Concept note on centralisation versus decentralisation of public procurement (15 July 2022).
7. Concept note on migrating from an administrative to a strategic procurement system (21 July 2022).
8. Concept note on Credentialing for those engaged in soliciting and evaluating tenders (9 October 2022).

By the end of its Nedlac work, the JSR had produced a 14 October 2022 JSR version of the Public Procurement Bill ("the JSR Draft"). The intention was to give the social partners a concrete account of how a specific vision of strategic procurement could be incorporated into the Bill.

This contribution does not aim to provide justification or to defend the specific text of the JSR Draft. The reader who is interested in that draft and its specific justification, can refer to Annexure B of the Final Nedlac Report on the Public Procurement Bill, which contains an explanatory memorandum.¹⁰ Part 5 of this contribution also comments on the structure of the JSR Draft and the arrangement of its chapters.

As for its content, the current contribution leaves things there because the JSR Draft was written under certain significant constraints. First, the JSR was constrained to work from the structure – and, to a significant degree, the content – of the version of the Bill that the OCPO had introduced into Nedlac. Second, the internalised norm of confidentiality

⁹ Links to these documents are available in the PARI preprint version of this contribution [pdf]. Available at <https://pari2.wpenginepowered.com/wp-content/uploads/2023/07/PPP28-06MAINfinx-1.pdf>.

¹⁰ *Nedlac Report on the Public Procurement Bill - JSR Version: Explanatory Memorandum (14 October 2022)* Annexure B. [online] Available at <<https://nedlac.org.za/nedlac-reports-and-research/>>.

practiced by the social partners at Nedlac (including the members of the JSR), and the limited number of interests within the process, constrained the ability to conduct wider stakeholder research and discussion. A third fundamental constraint was the limited period allowed for the drafting process, which was pressed into a few weeks' part-time work.

The JSR drafting process, therefore, often identified serious issues with the National Treasury's Bill, but it did not have the time and resources to address these. The Public Procurement Bill as introduced in Nedlac, for instance, applies across national, provincial, and local spheres of government; however, it tends to take the perspective of a national department's procurement function. Regardless of the fact that the weight of public procurement in South Africa occurs, instead, in the parastatals and local government,¹¹ the Bill almost entirely ignores these institutional peculiarities. The Bill, therefore, carries a high risk of producing legal confusion. It could actually undermine the distinctive accountability systems of these different spheres of the state. Indeed, concern about such an outcome was why the Public Finance Management Act ("PFMA") and Municipal Finance Management Act ("MFMA") were drafted separately, but the Public Procurement Bill gives little regard to those intricacies.

Given these limitations to drafting, the prime significance of the JSR version of the Public Procurement Bill is perhaps that it represents a proof of concept ("POC"). It is – we would argue – a coherent (if imperfect and incomplete) legal instrument building on and embodying the strategic approach to procurement. It demonstrates that the ideas and themes we discuss in this contribution are capable of translation into, and operationalisation within, a legal text. We argue that the JSR Draft demonstrates that the strategic procurement approach – as we here define and explain it – is appropriate to the South African context to be adopted and implemented as the key concept in a comprehensive public procurement statute.

In this contribution, however, we go one step further. We will argue that the strategic procurement approach (understood as allowing for an administrative approach in appropriate purchasing contexts) is technically superior to the overall administrative approach to procurement which still dominated and underpinned the OCPO's Bill at the conclusion of the Nedlac process, and which made it into the final

¹¹ OCPO 2018 *State of Procurement Spent.Pdf*. [pdf] Available at: <http://ocpo.treasury.gov.za/Resource_Centre/Publications/2018%20State%20of%20procurement%20spent.pdf> [Accessed 26 February 2023].

legislation. The remainder of this contribution elaborates on this argument.

2 Strategic procurement is not the administrative approach to procurement

Our analysis of the current procurement regime is that it follows an administrative paradigm. This paradigm emerges from and is best suited for the procurement of basic, "off-the-shelf" goods and services, which are well-defined, easily specified, and without critical risks for public finance and service delivery. The administrative paradigm is also aligned with the procedural rules of public financial management, particularly as it is put into place by the two principal legal instruments of National Treasury, the PFMA and the MFMA, and their associated regulations, guidelines, directions and instruction notes.

The administrative paradigm stipulates rigid public procurement processes. Consistent with a financial procedures approach, it puts into place such rigid procedures in order to ensure legibility, compliance, and expenditure control. Institutionally, the administrative paradigm is thus characterised by the movement of decision-making powers away from technical professionals in end-user functions toward more clerical purchasing units, bid committees and finance divisions.

3 The administrative paradigm is both cause and effect of the problems of the current procurement system

We argue that the administrative paradigm is tightly intertwined with the current problems of the public procurement system: it is both cause and effect of the ills of the current regime. It is the cause of such problems because this way of thinking about procurement has subjected purchasing processes to constraints that often have little reasonable relationship with delivery priorities. It, furthermore, has disempowered technical and operational professionals in the state. This has marginalised expert input into procurement and eroded an important check on illicit interference in the bureaucracy. Issues with the current South African approach to public procurement have been acknowledged by a large number of significant public policy actors, including the Zondo Commission of Enquiry into State Capture.

There are at least five major problems with the current regime. First, the design of the system is more appropriate for off-the-shelf products and well-defined services than for public infrastructure and other complex purchases. This lack of attention or appreciation for public infrastructure specifically has been well-recognised in several recent government-

approved policy papers, but this policy consensus does not find adequate expression in the Bill.¹²

Second, the current system constrains procuring institutions from engaging key suppliers, managing interdependencies between contracts, and responding to unexpected contingencies arising from more complex purchases. This rigidity is, in particular, a blow to effective preferential procurement, since it impedes the development of the long-lasting relationships needed to build a long-term perspective and enduring capacity within suppliers over time, and it is an obstacle to public infrastructure delivery.

Third, the current system of one-size-fits-all procurement rules based on financial management, and the location of custodianship of these rules within units of supply chain ("SCM") management, actually conflicts with the intended PFMA/MFMA location of both power and accountability with the accounting officers or authorities of government departments and entities. Due to the rigidity of the procurement rules and institutional design requirements, the accounting officers or authorities are prevented from adapting the rules to the specific contracting or acquisition environment of the organisation they are purportedly in charge of. Instead, such officers often end up being told by subordinates that the rules do not allow for procurement to be done in ways the officers and authorities think are appropriate.

Fourth, the influence of the administrative paradigm and the character and institutional location of the specific procurement rules as elaborated by the OCPO distances institutional decision-making on procurements of all types from specialist technicians in portfolio, programme and project management divisions. While they have little to no substantive policy expertise or experience, clerical personnel in SCM units rather than those in line or operational departments end up calling the procurement shots.

Fifth, and finally, in the absence of well-understood principles, transparency and enforcement, corrupt actors often have impunity within the current public procurement system. Clerical SCM units, bid committees, and financial functions have readily been filled with political and other inappropriate appointments. Rather than constraining opportunities for corruption, the administrative paradigm has, therefore, arguably facilitated state capture by eroding the authority and influence of professional technical functions, which are not as easily politicised.

¹² Watermeyer & Phillips 2020.

The result is a procurement system that suffers from the worst of both procedural rigidity for ethical public servants and rampant non-compliance for the connected. The outcome is a litany of inappropriate purchasing decisions, time and cost overruns, substandard or no delivery, and high levels of irregularity and corruption.

4 More than infrastructure: Embedding strategic procurement in the Bill

As explained above, the initial impetus for the JSR version of the Public Procurement Bill was the desire of all Nedlac's social partners to incorporate strategic procurement into the draft legislation it was discussing and developing. The brief was most clear with respect to Chapter 5 of the Public Procurement Bill and its treatment (or lack thereof) of infrastructure. Unlike the February 2020 version of the Public Procurement Bill put out for public comment, the OCPO Public Procurement Bill brought to Nedlac in 2022 had no specific section or chapter dealing with infrastructure. This was a major surprise to those outside OCPO, since the inclusion of at least a separate chapter dealing with infrastructure was one of the few features of the 2020 Bill that found favour with expert practice, policy communities and broader civil society.

As it tasked the JSR with drafting provisions of the Bill that would allow for strategic procurement, the Nedlac Task Team's minimum expectation was thus that the JSR would restore appropriate (presumably separate) regulation of public infrastructure procurement in the alternative legislative text it developed. The JSR did restore appropriate regulation of public infrastructure procurement, but it did so by elaborating a conception of strategic procurement which both incorporated infrastructure but also moved beyond it. The effect was to obviate the need for a separate chapter dealing with infrastructure and, instead, to extend the ethos of strategic procurement throughout the Bill. In this sense, strategic procurement was taken beyond infrastructure alone and mainstreamed within the Bill.

The JSR developed a conception of strategic procurement defined by the following three elements: First, accounting officers and authorities should ideally have freedom to develop implementation frameworks which respond to the specific purchasing environments of the procuring institutions that they lead. Second, procurement must often be located as a strategic function able to be tightly linked to specialist project and service delivery functions. Third, professionals in these functions should have the flexibility to develop purchasing strategies that tailor processes to the requirements of specific purchases. Fourth, the weight of ensuring integrity should be shifted from restrictive rules toward stronger mechanisms of enforcement, which could be activated by a wider array of stakeholders.

This meant that the JSR developed a generic concept of strategic procurement. What is being procured is a collection of contracts that need to function together as a project. While this fits the classic understanding of public works and of public infrastructure as a category of procurement beyond goods and services, it is not limited to the usual understanding of public infrastructure as it includes the public procurement of systems, such as information technology systems and others. In this approach, the JSR, thus, defined procurement as follows: "the process which creates, manages and fulfils contracts which are concluded following the application of a selection method in Part 2 of Chapter 5". This definition is at the heart of distinguishing the strategic procurement paradigm from the existing dominant one of administrative procurement.

5 Consequential changes to the Public Procurement Bill

The JSR concluded that properly embedding strategic procurement in the Bill would require moving beyond Chapter 5 to make consequent changes to other chapters. Given the time available within the Nedlac process, the JSR made changes to Chapters 1 to 4. Two chapters were not thoroughly revised, viz Chapters 6 and 7. Chapter 6 covers the topic of dispute resolution and essentially sets up an administrative tribunal to hear and resolve disputes arising within the public procurement system. Chapter 7 covers the topic of enforcement matters and largely deals with aspects such as regulation-making power. One topic of Chapter 7 – confidentiality and access to information – overlapped significantly with the subject matter of Chapter 3 – Procurement Integrity – and thus the JSR did a significant amount of drafting with attention to Chapter 7. Confidentiality and access to information is covered as part of Chapter 3, as will be explained in the treatment of this chapter later on in this contribution.

In summary, the changes made by the JSR working within the structure of the National Treasury Bill are the following:

Preamble to the Public Procurement Bill: Procurement is contextualised in terms of constitutional imperatives. Whereas the National Treasury's Bill leads with section 216 of the Constitution (providing for financial norms and standards), the JSR Draft leads with section 217 of the Constitution, which has public procurement as its subject-matter.

Chapter 1: Definitions, Objects, Purposes, Application and Administration of Act: The JSR version of the Bill clearly articulates the objects and purposes of the legislation.

The purposes of the Bill describe what the procurement system seeks to promote by unpacking the specific concepts associated with the section 217 constitutional principles of fair, equitable, transparent, competitive, and cost-effective procurement. Each of these five principles is given further definition, moving much further beyond the current soft law definition of these terms in the General Procurement Guidelines ("the Guidelines") under the authority of National Treasury.¹³

Chapter 2: Public Procurement Office ("PPO"), Provincial Treasuries and Procuring Institutions: The JSR version does not engage with the thorny question of the location of appropriate regulatory authority, but nonetheless reshapes the roles and responsibilities of the PPO to cater for the paradigm of strategic procurement. To do so, the JSR Draft establishes clear and comprehensive requirements for procuring institutions.

Chapter 3: Procurement integrity: The JSR Draft adds stronger regulation and transparency around politically-connected persons. Even more fundamentally, the JSR version of the Bill adds requirements for an open contracting system. This allows for transparency and for coordination, leading to cost-efficient and effective procurements. Additionally, the JSR Draft adds a provision for the encouragement of whistleblowing in procurement through incentives. This policy has been demonstrated to be of particular efficacy in the field of public procurement and was approved in principle by the Zondo Commission. These integrity-enhancing interventions are seen as a critical accompaniment to a movement toward strategic procurement generally.

Chapter 4: Framework for Preferential Procurement Policy: The JSR Draft continued its theme of constitutional elaboration and aligned the provisions for preferential procurement with section 217 of the Constitution. In order to do so, the JSR Draft uses the concept of "targeted treatment", which it drew from international standards obtained from the ISO network.

Chapter 5: Supply Chain Management and Bidding Process: This chapter saw a nearly complete rewrite from the JSR. The chapter was redrafted as "Procurement Practices, Procedures and Methods", in terms of a vision for an accessible statute outlining and thereby consolidating the South African public procurement system.

¹³ National Treasury *General Procurement Guidelines* [pdf] Available at <<http://www.treasury.gov.za/legislation/pfma/supplychain/general%20procurement%20guidelines.pdf>> [Accessed 11 November 2022].

The JSR concluded with incidental adjustments to certain sections and sub-sections of Chapters 6 and 7 of the original National Treasury Bill.

6 Guardrails for a Public Procurement Bill built around strategic procurement

A common framing of the strategic procurement approach is that it is “relaxing” the rules and allowing for “more flexibility”. We would contest this framing since we have conceived strategic procurement not as a departure from the rules-based administrative paradigm, but rather as a distinct paradigm itself built on constitutional principles as applied to the diversity of public procurement contexts, including but not limited to public infrastructure.

Nonetheless, concern for its anti-corruption resilience is a particular theme of the public discussion on the strategic procurement approach. This concern is fair, particularly given South Africa's recent experience of state capture. This part of the contribution, thus, enumerates the specific parts of the JSR version of the Public Procurement Bill that function as guardrails in order to keep public procurement within constitutional and public parameters. There are five guardrails:

First, the JSR Draft aligns strongly with the principles and purposes of section 217. It also aligns strongly with the public administration principles of Chapter 10 of the Constitution. The soft power of the Constitution is thus mobilised here in maintaining the public-interest purposes of procurement processes and preventing the diversion of government commercial activity for private gain.

Second, the JSR Draft elaborates, in a parliamentary accessible statute, clear principles according to which the actions and capacities of procuring institutions and officials will be measured. This assessment occurs as an initial matter in the minds of public officials, but also in the legal divisions of both public and private parties to these government contracts. Where necessary, the power of judicial review and the remedies of the courts are available, and are indeed enabled and facilitated through the provision of clear parliamentary parameters for public procurement.

Third, the JSR Draft extends strategic procurement authorisation to procuring institutions gradually. The JSR Draft maintains the possibility of using all the procedures of administrative procurement. It requires procuring institutions to adhere to an administrative approach modelled by National Treasury until they meet objective standards of ability and integrity in implementing the Act. It is only when procuring institutions meet these standards that they will be allowed to move toward a strategic procurement system, with continuous monitoring and the

possibility of imposing tighter constraints should they fall below these standards in future. This differentiated implementation approach is seen particularly in the drafting of Chapter 2 of the Bill.

Fourth, the JSR Draft empowers the PPO to prohibit undesirable practices and to monitor procuring institutions. The PPO, as designed here, is subject to the internal processes of National Treasury and is organisationally thus short of the capabilities of an independent regulatory authority. Nevertheless, in the JSR Draft, the PPO has a number of tools at its disposal to keep actors within the system on their public missions.

Fifth, the JSR Draft bolsters PPO oversight by introducing enhanced procedures for transparency, incentivised whistleblowing and enforcement.

7 The JSR's vision for the Public Procurement Bill is a statute implementing constitutional policy

As we as the JSR drafted a text oriented to strategic procurement and presented such text to the Nedlac Task Team, the response from government was often to the effect that the topics covered in our draft statute could be, would be, and should be covered later in the form of regulations. As the JSR process unfolded, we realised, however, that there was a fundamental difference in the vision for the legislation at issue between ourselves and our colleagues from National Treasury.

In our view, the Public Procurement Act ("the PPA") should create a single regulatory framework consistent with the Constitution. This should be an act of Parliament that defines and articulates a public procurement system as envisaged in section 217 of the Constitution. The Act should, therefore, embed statutorily the principles for procurement and establish checks and balances framed around section 217 of the Constitution.

The law should further allow for the flexible, strategic, and effective pursuit of policy objectives which redress the imbalances of the past and simultaneously commit to sustainable procurement and economic development. The PPA cannot rely on regulations and instructions from the PPO to interpret the intent of the Act but needs to establish clear procurement principles, allowing for effective and strategic action by procuring institutions and facilitating across-government coordination.

Accounting officers or authorities and procuring institutions should be allowed to develop and implement their procurement systems around the objectives of the PPA, the principles embedded in the Act, and the various overarching procedures that the system establishes. They should be sure that their decisions and actions will be scrutinised with data and

document disclosures at specified points within the procurement cycle on an open online platform managed by the PPO.

In addition, while the procurement system should not be over-determined by the objective of anti-corruption, the statute must be one that advances transparency and combats corruption. We, thus, adopted the principle of open contracting in order to advance these objectives as well as those of efficacy and cost-effectiveness. Overall, we aimed for a statute that would provide for public procurement that is developmental in economic nature and outlook, aspiring to expand the productive base of the economy and to support innovation and investment. This meant that preferential procurement policies (including local content) were part and parcel of the statute.

The choice for a statute rather than for regulations and further instructions from the PPO is a fundamental one. The legal architecture of the National Treasury's Public Procurement Bill contained little if any hope of preventing a repetition of the failure of earlier generations of regulatory instruments in this field. We argue this was not so much the fault of OCPO drafting, but rather of the fundamental choice not to exercise, through Parliament, the policy-making power of the state to adopt, promulgate, and enforce a comprehensive public procurement statute. Thus, the PPA should itself contain clear and accessible substantive policy choices in this area and not delegate and allow for such decisions to be taken (or fail to be taken) in the sub-units of National Treasury.

8 Conclusion

When we finalised these reflections, the legislative process around the Public Procurement Bill still remained somewhat fluid. A later (May 2023) version of the Bill was approved by Cabinet, and subsequently adopted by Parliament and signed into law by the President. The PPA has not come into operation yet, but is currently the subject of a constitutional challenge and the drafting of regulations to operationalise the Act is underway.

It remains our view that the PPA must provide a framework for addressing the manifestly evident problems in South Africa's public procurement system as explained in this contribution. While the PPA as adopted does not wholly achieve this goal, the drafting of regulations under the Act and future amendments to the Act may yet provide opportunities to this effect. We accordingly urge all role players and especially civil society to continue engaging with the legislative process and to carefully consider the argument and the issues canvassed in the course of the JSR development of a Public Procurement Act built around the strategic procurement approach.

Bibliography

Brunette, R., Klaaren, J. & Nqaba, P. 2019. Reform in the Contract State: Embedded Directions in Public Procurement Regulation in South Africa. *Development Southern Africa* [e-journal] 36: 537-554 <<https://doi.org/10.1080/0376835X.2019.1599712>>.

Brunette, R. & Klaaren, J. 2020. *Reforming the Public Procurement System in South Africa* (Public Affairs Research Institute, May 2020). [pdf] Available at: <<https://47zhcvtioul2ftipgrxo9fj9-wpengine.netdna-ssl.com/wp-content/uploads/2020/05/PROC05-05-20.pdf>>.

OCPO 2018 *State of Procurement Spent.Pdf*. [pdf]. Available at: <http://ocpo.treasury.gov.za/Resource_Centre/Publications/2018%20State%20of%20procurement%20spent.pdf> [Accessed 26 February 2023].

Public Affairs Research Institute. 2020. *Draft Public Procurement Bill [B-2020] Submission of Public Comments* (July 2020). [pdf] Available at: <https://47zhcvtioul2ftipgrxo9fj9-wpengine.netdna-ssl.com/wp-content/uploads/2020/07/PARI_20200630_DraftProcurementBill_Submission.pdf>.

Quinot, G., Williams-Elegbe, S. & Anthony, A. 2020 *African Procurement Law Unit Comments*. [pdf] Available at: <<http://africanprocurementlaw.org/wp-content/uploads/2020/06/APLU-Submissions-on-the-Draft-Public-Procurement-Bill-2020-South-Africa-Final.pdf>>.

Quinot, G. 2014. *An Institutional Legal Structure for Regulating Public Procurement in South Africa* (March 2014). [pdf] Available at: <<http://africanprocurementlaw.org/wp-content/uploads/2016/01/OCPO-Final-Report-APRRU-Web-Secure.pdf>>.

Quinot, G. 2018. The Third Wave of Preferential Procurement Regulations in South Africa. *Journal of South African Law / Tydskrif Vir Die Suid-Afrikaanse Reg* 4:856-867 [online] Available at: <<http://hdl.handle.net/10019.1/107494>>.

Quinot, G., Williams-Elegbe, S. & Anthony, A. 2020. *African Procurement Law Unit Comments*. [pdf] Available at: <<http://africanprocurementlaw.org/wp-content/uploads/2020/06/APLU-Submissions-on-the-Draft-Public-Procurement-Bill-2020-South-Africa-Final.pdf>>.

National Treasury *General Procurement Guidelines*. [pdf] Available at: <<http://www.treasury.gov.za/legislation/pfma/supplychain/general%20procurement%20guidelines.pdf>> [Accessed 11 November 2022].

Nedlac Report on the Public Procurement Bill - JSR Version: Public Procurement Bill (14 October 2022) Annexure C. [online] Available at: <<https://Nedlac.org.za/Nedlac-reports-and-research/>>.

Watermeyer, R. & Phillips, S. 2020. *Public Infrastructure Delivery and Construction Sector Dynamism in the South African Economy Final Report* (National Planning Commission, 25 April 2020). [pdf] Available at: <<https://www.nationalplanningcommission.org.za/assets/Documents/Public%20infrastructure%20delivery%20and%20construction%20sector%20dynamism%20in%20the%20South%20African%20economy.pdf>>.