

## Draft Public Procurement Bill [B-2020]

### Submission of Public Comments

#### I. Background

1. The Public Affairs Research Institute (PARI) is a Johannesburg-based organisation, attached to the University of the Witwatersrand and University of Cape Town, which studies the effectiveness of state institutions in the delivery of services and infrastructure. Since its establishment in 2010, PARI has generated high-quality research to better understand the drivers of institutional performance in the public sector, and improve implementation of policies in relevant fields.
2. PARI's state reform programme is centrally focused on the relationship between politics and the state administration, it seeks to reduce the influence of corruption and patronage on South African politics, and to develop a public administration that better serves its democratic mandate. This programme provides practical, evidence-based recommendations for reforms in key regulatory and administrative institutions and sectors.
3. One such key area is public procurement reform. In South Africa, public procurement is a significant feature of state operations and of allocative patterns in the broader economy. In 2017, for instance, South African Reserve Bank statistics suggest that government channelled R967-billion through public procurement. This was around 30 percent more than the public sector spent on employee compensation. Public procurement accounted for 19.5 percent of GDP. At this scale, public procurement is fundamental to government's ability to achieve its goals. It is important to economic growth, industrial development, and to the provision of opportunities for upward mobility to categories of previously disadvantaged people.
4. South African public procurement also, unfortunately, suffers from a series of widely recognised problems. It has descended into a veritable crisis of non-compliance, corruption, fruitless and wasteful expenditure, and a widespread operational inability to secure the right goods, services and infrastructure, at the right price, in the right place, at the right time.
5. In a 2014 publication<sup>1</sup>, PARI argued that South Africa's state had become a 'contract state', where state capacity was predicated upon the ability of the state to tap into and manage, through contractual relations, private sector capacities and where corruption and clientelism developed largely around the weaknesses of this 'contract state'. In its more recent work, PARI's position paper on public procurement<sup>2</sup>, which is contained in Part B of this submission, argues for reforms to enable the state to play its intended role in achieving its democratic mandate and supporting economic and social

<sup>1</sup> <https://pari.org.za/contract-state/>

<sup>2</sup> PARI's position paper, recent articles by PARI and other public procurement-related resources can be accessed on <https://pari.org.za/position-papers-public-procurement/>



development. It proposes, among other adjustments, a reorientation of regulatory form to facilitate good purchasing practice and black economic empowerment, while strengthening mechanisms of contract management and enforcement, including through an innovative mechanism to empower and incentivise whistleblowing and the recovery of civil damages suffered by the state due to fraudulent procurement practices.<sup>3</sup>

6. In view of its work in the area of public procurement reform, PARI welcomes the opportunity to make submissions on the draft Public Procurement Bill [B - 2020] (the Bill).
7. **Part A** of this submission includes specific comments in relation to the Public Procurement Bill, whereas **Part B** includes PARI's position paper on Public Procurement, which forms the basis for the submissions contained in Part A.

## II. Part A: Submission

### A. Introduction

1. We welcome the Public Procurement Bill's aim to construct a single, coherent legal framework for the entirety of South Africa's public procurement regime, from the dozens of legislative improvisations of the last quarter of a century.<sup>4</sup> We do note, however, that legislative intervention is only one of the reforms necessary to make our national procurement system work well and for all those living in South Africa.
2. The Bill defines, carves out, and strengthens central regulatory and oversight authority in a proposed Public Procurement Regulator in the National Treasury. It includes specific provisions for conflicts of interest, debarment of suppliers, prohibition of outside interference in procurement functions, the establishment of a Tribunal for internal dispute resolution, and some measures to enhance transparency.
3. At the same time, the Bill promotes a more flexible and expanded approach to preferential procurement from black people, women, veterans, youth, and disabled people. It goes on to facilitate the formalisation of some existing practices, not yet explicitly authorised in South African law, such as geographical set asides in the allocation of contracts, to businesses located in specific provinces, municipalities, townships, and other underdeveloped areas.<sup>5</sup>

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<sup>3</sup> See particularly J. Klaaren and R. Brunette, (2020), 'The Public Procurement Bill needs better enforcement: A suggested provision to empower and incentivise whistle-blowers', *African Public Procurement Law Journal*, 7(1): 17.

<sup>4</sup> J. Klaaren and R. Brunette, (2020), 'The Public Procurement Bill needs better enforcement: A suggested provision to empower and incentivise whistle-blowers', *African Public Procurement Law Journal*, 7(1): 17.

<sup>5</sup> Draft Public Procurement Bill, 2020, s 26.



4. On the whole, the Bill thus gestures towards a more coherent public procurement regime. It seeks to leverage positive synergies between flexibility, broad-based development, and anti-corruption. It aims to carve out wider channels for the economic empowerment of historically disadvantaged groups, at the same time that it works to better-regulate and harness emerging businesses to the public interest.
5. We argue, however, that the Bill falls short in its bid to establish a single, coherent legal and regulatory framework for public procurement in South Africa. It does not fully leverage positive synergies between flexibility, broad-based development, and anti-corruption, because it retains unnecessary rigidities and it fails to underwrite public procurement law with a credible enforcement strategy. We will deal with each of these points in turn.

### *B. A Single, Coherent, Legal and Regulatory Framework for Public Procurement*

1. The legal regime governing public procurement is excessively complicated, fragmented, and it is often internally inconsistent. There are, at our last count, about 22 pieces of primary legislation that deal with public procurement in a significant way. An unsystematic, uncoordinated approach to legal elaboration, often the result of ad hoc and ineffectual responses to emerging problems of corruption and poor performance, has produced subordinate legislation that brings the total of distinct pieces of law to around 85. The result is often to make it difficult to determine which laws are applicable to which procurement processes. Procurement practitioners often cobble together legally incoherent processes which are open to court challenge. The complexity of the regulatory framework dis-incentivises compliance, disrupts routine, and so undermines control. The differentiation of procurement regimes across the public service and municipalities is unnecessary and it makes training of procurement practitioners and the capacitation of functions more costly.
2. The new Public Procurement Bill achieves some consolidation of the existing public procurement landscape. It repeals certain pieces of legislation and asserts the priority of the proposed Public Procurement Act over others. It doesn't, however, reach across to the most persistent source of regulatory inconsistency in South Africa's public procurement regime, namely the Construction Industry Development Board Act administered by the Department of Public Works. The Bill should incorporate this key piece of legislation or it should assert a clear order of precedence over it. The Bill should also require the Public Procurement Regulator to develop and regularly update a consolidated handbook of public procurement rules and practices in order to continuously guide practitioners.
3. The Public Procurement Regulator will be an important source of regulatory power to continuously develop and cohere the public procurement system. We are in favour of the Public Procurement Regulator, suitably empowered, remaining within National Treasury, in its current institutional location as the Office of the Chief Procurement Officer. This is best calculated to limit political interference in its operations and to allow it to draw on broader National Treasury information and expertise. **The Bill should spell this institutional location out clearly. Its drafters should explore special provisions for the appointment and qualifications of the Public Procurement Regulator, to prevent inappropriate politicisation and to ensure the necessary expertise in public procurement.**



### C. *The Balance Between Integrity and Flexibility in Purchasing Methodology*

1. The South African public procurement regime strikes a sub-optimal balance between integrity and flexibility in the construction and application of rules. In South African constitutional law and administrative precedent, public procurement sits within the fold of public financial management. Under the regulatory power of National Treasury, the public procurement function has often struggled to express itself forcefully and coherently. For much of post-apartheid history, it was demoted to the residual Specialist Functions branch and its operations were dispersed across a range of other Treasury divisions. National Treasury regulatory stipulations have replicated this pattern in procuring entities, by mandating supply chain management units within finance departments.
2. The cumulative effect has been to construct public procurement as a formalistic, clerical function, divorcing it from considerations of operational efficacy. Due to the general lack of effective consequence management, this formalism has generated very limited gains in relation to its primary goal - public financial integrity. Actually, the effects have more often been perverse. The empowerment of public finance regulators, bid committees, and supply chain management units has happened at the expense of technical end-users, which has facilitated political manipulation of procurement by removing high-level professionals from playing the role of a check and balance in procurement operations. On the other side of the equation, decision-making has happened at a distance from end-user expertise and procurement has been constrained in terms of the flexibility that is often needed to achieve overarching organisational goals.
3. The Bill largely fails to address this reality. It provides more scope for preferential procurement. It gestures towards principles of strategic procurement, which in theory allows for more flexibility in purchasing approach. **The Bill does not, however, effectively guide the procurement system towards differentiation between more routine and more complex and strategic procurement processes. The infrastructure provisions are too vague and still excessively rigid.** Moreover, in our analysis, the clerical approach adopted within procuring entities is in itself a major source of rigidity and this is a matter of the dispensation of procurement decision-making powers within these entities. These powers should be reallocated to give greater weight to the perspectives and needs of technical end-users.
4. There are a number of ways to do so. First, **rather than simply leaving the power to appoint bid committees with the accounting officer or authority, the Public Procurement Bill should move this power down a level to branch heads. They should appoint relevant experts to the bid committees.** The effect would be to make it more difficult for any single official or network to control the outcome of procurement processes, effectively building a system of checks and balances into bid committees. Second, in some instances subject matter requires very specific forms of procurement process, so that a one-size-fits-all approach is inappropriate. This is often the case for consulting and infrastructure procurement. In such cases, it makes sense to locate procurement processes not within generalist bid committees, but rather within end-user divisions. These can be subject to the broad oversight of supply chain management units and accounting officers/authorities.



5. Importantly, the exclusion of functionality from being an adjudication criterion has generated cut-throat competition, in which bidders attempt to meet the minimum specification and then drive down prices in a predatory fashion, to a point which is often unsustainable for firm reproduction. **The Bill is silent on this problem. It should explicitly re-include functionality as a possible adjudication criterion in public procurement.**

#### *D. Capacity, Compliance, and enforcement*

The problems of capacity, compliance, and enforcement are vexed in South African public procurement. We deal here with regulatory and operational capacity, political interference, transparency, and enforcement in relation to the proposed Bill.

##### **1. Regulatory and administrative capacity**

1. Given the size and scope of the regulatory mechanics proposed in this Bill, there is a lack of capacity within regulatory authorities and procuring entities. In 2016, for instance, the O-CPO had just 68 employees. These were charged with regulating over a thousand organs of state, which delegated procurement powers to tens of thousands of divisions, field offices, schools, hospitals, etc., which in turn entered into as many as two million contracts annually. The O-CPO was not fit for purpose and the situation has not changed appreciably. Public procurement practitioners in the broader public administration are generally well-educated, with university degrees, but not in the area of procurement and related fields. The bid committees and supply chain management units in which they reside often fail effectively to leverage the specialist expertise found in end-user departments.
2. Resolving such capacity issues is largely an operational concern, but the Public Procurement Bill could lead the way in a number of respects. **The Bill could empower the Public Procurement Regulator to engage in proactive, continuous and systematic monitoring and adjustment of the public procurement system. It could do so by requiring that the Regulator publish an annual state of public procurement report which establishes time-series of key indicators, identifies emerging issues, and develops suggestions for systematically resolving them.**
3. Proposals in point 2 below and section C are also relevant here. Political interference in administrative functions tends to chase expertise away from public employment, as these experts lose control of the professional process and are compelled to break professional and often legal norms and rules. Protections against political interference will help to capacitate public procurement operations. **By giving end-user divisions greater power over procurement processes, the proposals in section C bring relevant expertise more centrally into these processes, ensuring that existing capacity is more efficiently utilised.**
4. In addition, we note that **the Bill does not provide a legal basis and framework for the establishment of the current Supply Chain Management Interim Council as a formal body tasked with the professionalisation of the public procurement system. It should do so** - with the Council insulated from political interference and given powers to require that procurement practitioners attain professional qualifications and membership of professional bodies.



## 2. Political interference

1. The procurement system is currently subject to too much political interference. Politicians hold significant powers of appointment, career progression and removal in the South African public administration. These powers are widely used to place associates in key positions, to otherwise manipulate public servants, in ways that cut across segregations of duties, eroding administrative checks and balances. The statutory powers that facilitate these practices create opportunities for corruption, they undermine consequence management, and they remove procurement decision-making from the expertise needed to make the technically right decisions.
2. The Public Procurement Bill seeks to address this by placing a range of legal restrictions on political office-bearers. In terms of section 24, political office-bearers are automatically excluded from participating in procurement processes. In terms of section 55, political office-bearers and their advisers may not be appointed to bid committees. In terms of section 13, administrative officials are prohibited from complying with instructions from political office-bearers, or other people in authority, to the extent that these are inconsistent with the Act. They are further required, when they receive such instructions, to return in writing their objections with reasons. The public office-bearer or other person in authority may then override these objections by issuing further instructions in writing, upon which the affected person must comply and submit a written report to this effect to the Minister of Finance.
3. **These legal provisions are ultimately weak defences against political interference.** In relation to section 24, it is common practice for political office-bearers to direct contracts to family, friends and generally to their political and personal connections. The Bill and its existing legal provisions do not touch these relationships. **The Bill, in order to do so, should follow emerging international practice by enabling determination of the beneficial ownership of suppliers, which is to say, it should establish powers and functions for moving beyond legal ownership toward discerning who ultimately receives the benefits of ownership.**
4. Section 55 may preclude political office-bearers and their advisers from sitting on bid committees. But political office-bearers appoint accounting officers and authorities, who appoint bid committees, so it remains easy for political office-bearers to get proxies onto these committees. Granted, the source of this problem lies beyond the formal domain of public procurement and this Bill. As PARI has recently pointed out<sup>6</sup>, the Public Service Act, the Municipal Systems Act, and other relevant legislation give too much power to political office-bearers in personnel processes. Still, the Public Procurement Bill can do more.
5. The proposals elaborated in section C are again relevant here. **The South African public administration continues to foster pockets of considerable professionalism which can be leveraged into procurement**

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<sup>6</sup> Brunette, R. (2020), *Position Paper on Appointment and Removal in the Public Service and Municipalities*. *Position Papers on State Reform*, Public Affairs Research Institute, available at: <https://pari.org.za/position-paper-recruitment-in-the-public-service/>



**operations.** These pockets often exist in certain end-user functions, such as electricity, water, and sanitation, where very scarce, highly-specialised expertise is needed to deliver services that are in heavy demand with broad and powerful constituencies. **By giving them primary decision-making powers these pockets of professionalism can act as a check and balance in procurement processes.**

6. If the Public Procurement Bill moves in this direction, it will also strengthen the aim of the Bill to provide protection against political interference. Where officials are effectively appointed by the discretion of political office-bearers, there will often be a close personal or political relationship between them. **Where politicians control career prospects and powers of removal over officials, officials are unlikely to go against them. In these circumstances, which hold quite widely across the public administration, officials will generally not operationalise section 13. We thus question the efficacy of section 13 and also point out that this section may have serious unintended consequences in terms of lack of organisational discipline.** The proposals developed in section C above, by locating processes with the stronger, less dispensable, more professionally bound parts of the administrative staff, increase the likelihood that the Bill's aim of protecting against political interference will be achieved.
7. The Bill's protection against political interference might also be strengthened. **It should require that all political instructions move through accounting officers and authorities, with direct, political instructions to lower administrative officials prohibited in order to ensure unity in the line of command and to more effectively filter out both illegality and administrative confusion.** Our research shows that South African public administrations that maintain this principle tend to be more effective, and that horizontal instructions into an administration is an early sign of systematic political and administrative dysfunction.
8. The protection provisions should also extend to instructions and communications issued by persons who are not in a formal position of authority, including powerful figures in party and other structures outside the state and also powerful political appointments within it. The drafters should ensure broad, public transparency of these instructions, except perhaps in well-defined cases involving privacy, proprietary information or national security. In a democracy, **there is little reason why political office-bearers should not be required to make political instructions in public procurement in anything other than broad daylight.**
9. Finally, National Treasury should **build the capacity to adjudicate disputes arising in terms of this section, within appropriate timeframes, and issue a resolution before instructions are actioned.**

### ***3. Transparency and enforcement***

1. While efforts have been made to improve transparency in public procurement, **the current system remains unjustifiably opaque.** The Office of the Chief Procurement Officer has over the last decade constructed the *eTender* Publication online portal and the Central Supplier Database. In part, the purpose of these resources is to make supply chain management information easily accessible to the public. The extent to which this has happened is limited. The data on suppliers and specific tenders and processes is overly confined in scope and often incomplete. Suppliers and processes have multiple identifiers, making it difficult to bring different data points into a coherent image of procurement



operations. **Aggregate data is not collected in standardised ways, with a view to the construction of time-series and the determination of trends. It is not readily available for extra-governmental analysis and advocacy around emerging issues.** The Promotion of Access to Information Act (PAIA) process is resource-consuming and government often follows a too expansive definition of confidentiality. Finally, there are widely-recognised problems of enforcement in relation to maladministration.

2. **The Bill does not address these opacity issues in a satisfactory way.** For instance, Section 20 of the Procurement Bill requires bidders and applicants to make declarations of interest for purposes of registration onto a database to be created by the Regulator in terms of Section 5(1)(j). The provisions of the Bill seem to require a declaration of interest only for purposes of registration onto the database without allowing for declarations of interest to be reviewed regularly, every time a supplier or bidder engages in a procurement process.<sup>7</sup> Section 41 dealing with verification of bidders or suppliers only caters for their verification against a list of debarred bidders and suppliers, without taking into consideration that bidders and suppliers might have developed conflicts of interest since registration on the database without necessarily having been debarred.
3. Moreover, the Bill provides for public observation of adjudication committees,<sup>8</sup> but procurement processes can be manipulated in a wide variety of ways so that adjudication committees don't provide an adequate vantage point.
4. In other ways the Bill appears to go backwards. It establishes a broad and vaguely delineated notion of confidentiality in public procurement. **It empowers the Public Procurement Regulator to collect a broad array of data and to intervene in procurement processes, but section 7 gives it wide discretion to keep information secret,** even implying that it "may" keep this information from the South African Revenue Service and constitutional bodies such as the Public Protector and the National Prosecuting Authority.
5. It is also submitted that **the Bill falls short in meeting its commitment to transparency by denying the public immediate access to vital procurement information** - and having to rely on a time-consuming and protracted process of access to information through the Promotion of Access to Information Act - despite the fact that these processes and decisions involve substantial sums of public money and require public accountability. Further, the Bill falls short in that **it only provides for the publication of the result of a tender and not the contract that is concluded with the successful bidder which would enable civil society to ensure accountability and monitor its implementation.** Lastly, the Bill bars officials from disseminating "confidential" information, which may be construed as a constraint on whistleblowing.<sup>9</sup>
6. **On the side of enforcement, the Bill provides for a prolonged and at this stage unclear three-stage review process.** Firstly, in terms of Section 96, institutions can reconsider their own decisions upon application by a dissatisfied bidder. It would seem that institutions at local government level are also

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<sup>7</sup> Section 5(1)(j) does however provide for the Regulator to "maintain" the database.

<sup>8</sup> Section 5(2)(c)(ii)

<sup>9</sup> Section 7 also bears re-examination in the light of *Competition Commission of South Africa v Standard Bank of South Africa Limited*; *Competition Commission of South Africa v Standard Bank of South Africa Limited*; *Competition Commission of South Africa v Waco Africa (Pty) Limited and Others* (CCT158/18; CCT179/18; CT218/18) [2020] ZACC 2 (20 February 2020).



allowed to reconsider procurement decisions by virtue of Section 96; however, this is not explicitly mentioned in the Bill. Secondly, and if still dissatisfied by this decision, a bidder can, upon application, approach a provincial treasury (if the decision is made by an institution in the provincial sphere of government) or the Regulator (if the decision is made by an institution in the national sphere of government), to reconsider procurement decisions made by procuring entities, Sections 97 and 98 of the Bill, respectively, set out these processes. **There is no provision for such a procedure in relation to institutions at local government level.** For reconsideration applications, dissatisfied bidders are likely to have to rely on PAIA, which allows a 30-day period for response, to obtain a record of procurement decisions, whereas such requests for reconsideration in terms of Sections 96, 97 and 98 of the Bill need to be submitted within 10 days. This represents another reason why this information should be publicly made available as soon as decisions are made.

7. As the third tier of review, the Bill creates a Tribunal to review decisions. As set out in the Bill, however, **it would seem that the Tribunal may have no jurisdiction over local government procurement** since Section 99 of the Bill empowers the Tribunal only to review actions taken by the provincial treasury (in terms of Section 97) or the Regulator (in terms of Section 98)<sup>10</sup>. This is an omission that needs to be addressed. Further, while it is welcomed that the Bill incorporates processes for internal review, it is advisable that the **internal review process be curtailed and monitored closely. For instance, reviews of decisions by an institution might be conducted through the auspices of the Tribunal only**, which allows for independent and expert members to review decisions, before approaching the courts.
8. Review processes are important advances, but they rely heavily on action by competing suppliers, which may be discouraged by loss of future business and who may not be available in certain procurement processes. **The Public Procurement Bill, instead, should provide a precise, statutory definition of confidentiality in the realm of public procurement.** Beyond the ambit of this definition, **it should commit government to an open contracting standard providing for proactive publication of procurement information and data on the online portal and database, according to basic principles of legibility and trackability appropriate to both unassisted and machine learning technology.**
9. Finally, **to cover for well-established gaps in enforcement will and capacity, the Bill should include what is called a qui tam provision. A qui tam provision is a law that defines an offence or an infringement of a right, coupled with a penalty or forfeiture that might be extracted from a person who commits, violates or infringes it.** In public procurement, for example, fraud committed against the state might give rise to a claim for damages by the state. What distinguishes a qui tam mechanism, however, is that it amounts to a statutory grant of a general private right to enforce the law, with efforts in this direction incentivised by a share of the resulting penalty or forfeiture. **Qui tam is an effective and well-established feature of procurement law in other jurisdictions.** In the United States, for instance, in 2017 qui tam accounted for 92% of all damages received by the federal government for ‘false claims’ in public procurement. A Public Procurement Bill need not establish qui tam across the South African state all at once. It simply needs to provide a statutory basis for the mechanism, with allowance for the

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<sup>10</sup> Geo Quinot (2020), ‘Reforming Procurement Law in South Africa’, *African Public Procurement Law Journal*, Volume 7, Number 1, p. 11, <https://applj.journals.ac.za/pub/article/view/27> (accessed 27 June 2020).

President to extend it incrementally and differentially, to specific parts of procurement processes, to specific categories of procurement, or to specific organs of state, by presidential proclamation.<sup>11</sup>

### *E. Conclusion*

As we have sought to highlight through our comments, the draft Bill has addressed some concerns, but there is ample room for its improvement. PARI welcomes an opportunity to expand on these comments, including through participation in public hearings.

Given the centrality of procurement towards addressing the economic and social needs of society, there is an urgency to engaging in decisive debate over the final shape and content of the public procurement bill. As we have stated in our letter, which we jointly submitted with Corruption Watch, this can be more than an important first step towards freeing the South African economy of some of its constraints and internal obstacles and equip it with the tools to chart and pursue a growth path. However, we are strongly of the view that this potential step forward has no chance to happen without political will and direction at the highest and broadest levels on public procurement policy. We therefore call on government to show the will and commitment necessary to ensure that the final bill and procurement firmly support the constitutional requirements of our developmental state.

## **III. Part B: PARI's position Paper on Public Procurement Reform**

Please refer to the next page.

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<sup>11</sup> Jonathan Klaaren and Ryan Brunette, "The Public Procurement Bill Needs Better Enforcement: A Suggested Provision to Empower and Incentivise Whistle-Blowers," *African Public Procurement Law Journal* 7, no. 1 (May 21, 2020): 16–25, <https://doi.org/10.14803/7-1-28>.



## THEMATIC AREA 3:

# REFORMING THE PUBLIC PROCUREMENT SYSTEM IN SOUTH AFRICA

### THE POSITION PAPERS ON STATE REFORM

In his 2019 State of the Nation address, President Ramaphosa acknowledged that ‘our greatest efforts to end poverty, unemployment and inequality will achieve little unless we tackle state capture and corruption in all its manifestations and in all areas of public life’.<sup>1</sup> He also committed, on behalf of government, to work with South African society to fight these threats and strengthen the state’s ability to promote its democratic mandate and address the needs of the people. These significant commitments are indicative of a **widely evidenced momentum in government**, and in society in general, in favour of reversing the erosion of state institutions and reaffirming the values and aspirations of the anti-apartheid project.

This series of position papers is aligned with this momentum. The papers aim to contribute to the development of an overarching strategy for state reform by proposing a set of concrete institutional adjustments to achieve integrity, democratic control, and administrative effectiveness. In identifying these specific interventions, these proposals aim to support and coordinate reform-minded politicians, public servants, and civil society actors around a targeted reform movement.

South Africa’s anti-corruption measures focus on the need for leaders who are more ethical, and on mobilising the citizenry for accountability. But no country has ever transcended an episode of expansive corruption and patronage politics through such efforts alone. Modern governance is defined by institutions designed to minimise reliance on the character of leaders and citizens and recognises that well-designed institutions ensure good people; it is the institutions as they are that corrupts them.

Other views uphold economic growth and equality as self-standing values that possess the power to reduce corruption and patronage. Although these are important, arguments like these elide the extent to which corruption and patronage constrain economic advancement. In contemporary conditions of globally competitive capitalism, a professional and appropriately insulated public administration is necessary for rapid development and effective redistribution.<sup>2</sup> State-building and economic development are inextricable. Insulated public administrations are a boon to economic development and can only be sustainable if they are founded on a reliable commitment to distributing the benefits of growth to everyone. South Africa has never closed this circle.

1 <https://www.gov.za/speeches/President-cyril-ramaphosa-2019-state-nation-address-7-feb-2019-0000>

2 For example: Evans, P., & Rauch, J. E. (1999). ‘Bureaucracy and growth: A cross-national analysis of the effects of’ Weberian state structures on economic growth’. *American sociological review*, 748-765. Kohli, A. (2004). *State-directed development: political power and industrialization in the global periphery*. Cambridge University Press.

### About this paper

This position paper is one of a series of three papers that argue for crucial reforms of the South African state. The goal of these reforms is to realise a rigorous reduction in corruption and in the influence of patronage in South African politics while improving the political responsiveness, efficiency, and developmental effectiveness of its public administration.

This paper deals with reforms to the **public procurement system** in South Africa. The other papers in the series argue for reforms to: a) the appointment and removal of processes in the public service and municipalities, and b) the process of appointment and removal of senior leaders to key criminal justice institutions with an investigative and prosecutorial mandate.

**Suggested citation:** Brunette, R., Klaaren, J. (2020). Reforming the Public Procurement System in South Africa. *Position Papers on State Reform*. Public Affairs Research Institute.

Available online at [www.pari.org.za](http://www.pari.org.za).

To radically reduce corruption and patronage, the goals of establishing the official professionalism and flexibility required by the developmental state will require a public administration that is insulated – in the right sorts of ways – from political interference and factionalism.

In this respect, South Africa should emulate countries that have successfully overcome political crises induced by corruption and patronage. As long as politicians retain effectively unrestrained powers over appointment and promotion, opportunities and incentives will favour pressures to violate the rules in service of narrow political and private interests. Powers of appointment and promotion must be checked and balanced through the assignment of significant duties in the process to institutionally independent administrative commissions. In the same movement, rules must be loosened to enable professional public managers to perform the policy-directed but technical function of improving South Africa.

**This paper focuses on the third thematic area of the series – reform in the public procurement system.** The state procurement system is a major site of corruption in the state (and in the business sector). Reforms to the public procurement system are needed, but they should – we suggest – focus on enabling the state to play its intended role in supporting economic and social development, which is a vital ingredient in reducing pressure to use state resources illicitly to build economic wherewithal. Here we propose a loosening of the rules to facilitate good purchasing practice and black economic empowerment while strengthening mechanisms of contract management, including through an innovative mechanism to incentivise private enforcement of contracts, to ensure delivery of goods and services purchases and to build the capacities in the private sector.

The **paper on reforming the processes for appointments and removals in South Africa's public service and municipalities, thematic area 1**, aims to ensure political control over appointment and removal processes, but simultaneously make it difficult to manipulate appointment and removal to build illicit or inappropriate political and personal networks in public administrations.

The **paper on thematic area 2, appointments and removals of senior leaders in the criminal justice sector** argues that the legal framework that governs the appointment to and removal of senior personnel from key institutions of the criminal justice system has contributed to a blurring of the political-administrative divide and has severely constrained efforts to contain corrupt practices. The paper proposes a series of reforms to the appointment and removal processes, for senior leaders in the National Prosecuting Authority (NPA), the South African Police Service (SAPS), the Directorate for Priority Crime Investigation (DPCI), and the Independent Police Investigative Directorate (IPID). The reforms aim to improve the transparency and rigour of these processes, to better guarantee their independence from partisan politics, while ensuring that the President, as head of state, and the executive, retain their Constitutional powers to appoint without these powers becoming merely administrative or ceremonial in character.

Reforms in the three proposed areas are overlapping and mutually reinforcing. Other areas of government such as state-owned enterprises and other public entities – which we do not deal with here – also require concerted attention. The reform principles developed here are relevant to public entities, but these are established under particular laws outside of the public service and will require reform measures tailored to their particular establishment. There are also problems specific to sectors, such as in education and health. Our view is that the sorts of problems that the reforms developed here intend to fix apply across sectors and are to some extent necessary to resolving their specific issues.

The themes in this series of position papers are a start and do not cover all the reforms required. We hope to expand from these initial papers to cover other potential areas under a state reform project, including, for example, reforms to improve the oversight role of Parliament.

The papers are informed by ongoing conversations with knowledgeable and supportive political office-bearers and public managers. They are a collective product of partnership between civil society organisations, research institutes, and individuals committed to a politics oriented around the achievement of a free and equal society, devoid of racism, sexism, and other forms of oppression and marginalisation, as set out in our Constitution's founding provisions. These papers recognise the importance to this goal of a democratic, lawful and developmental public administration. They are dedicated to supporting the construction of such an administration through activism around specific reforms with widely evidenced efficacy.

While the three position papers include concrete proposals for reform, our suggestions in this regard are likely to be refined in ongoing conversation with government, experts in the field, and wider civil society. We welcome discussion and debate on the way to an effective reform coalition.

## Executive summary

Public procurement is significant in terms of the scope of the state functions it operationalises and the scale of its contribution to public expenditure. The South African government spends almost a trillion rand a year through the public procurement system, around 1.3 times what it pays in employee compensation and 19.5 per cent of gross domestic product (GDP). Public procurement has, as such, powerful effects on the tone and substance of South African politics and in the structure and distributions of its economy.

There is a general consensus, widely evidenced, that South Africa's public procurement system is in crisis. It exhibits high levels of non-compliance and corruption, too often incurs fruitless and wasteful expenditure, and fails to provide the right goods and services, at the right price, and at the right place and time.

The dynamics that have produced this crisis are complex but the causes can, without great distortion, be distilled into just five.

1. **Public procurement is subject to extensive political interference** which, along with a range of ramifications, has served to facilitate corruption and undermine oversight and enforcement.
2. **There are major deficits in the capacity of public procurement functions** at both regulatory and operational levels. The system does not have enough sufficiently skilled public procurement personnel employed within appropriately designed organisational structures.
3. **Public procurement is subject to a complicated, fragmented, often inconsistent, regulatory regime** that results in operational inefficiency, gridlock and confusion, even in the presence of integrity and professionalism.
4. Related to the third point, **public procurement involves stark trade-offs between the procedural integrity necessary for fairness and to protect public funds, and the flexibility associated with the operational substance of purchasing.** Public procurement in South Africa has struck a non-optimal balance between these competing imperatives. The focus on the dictates of public financial management and ad hoc attempts to ensure compliance in the absence of robust enforcement actions, has caused public procurement regulators to tighten the construction and interpretation of rules and procedures which has brought limited – if any – gains in integrity, and has instead created impediments to smooth procurement operations.
5. **There is a mismatch between this formalistic approach to regulation and government's commitment to using public procurement to achieve social and developmental objectives.** Central to this dynamic is the prevalence of annual competitive methods, for small contracts, when building private sector capacities usually requires longer term, relational methods, with contracts that are big enough to facilitate the attainment of economies of scale.

The following seven proposals developed in this paper consider these causes and the contingencies of supporting reform from outside of government.

In relation to **data and transparency**, which is currently poorly provided for and a problem for assessing deterioration and improvement in procurement performance:

**Proposal 1:** National Treasury should update the public on progress and timeframes for the implementation of its Integrated Financial Management System. It should report on investigations being conducted into procurement of this new system and on processes for consequence management.

**Proposal 2:** The Office of the Chief Procurement Officer (O-CPO) should develop, with relevant stakeholders, then publish and commit to, a schedule of data to be collected and kept on a longitudinal basis.

**Proposal 3:** The O-CPO should commit to an open-data and open-contracting standard, and to publishing procurement information in accordance with a schedule developed with relevant stakeholders.

Considering that insulation of the public procurement function is currently addressed in the other position papers in this series, proposals in relation to **capacitation and professionalisation** are:

**Proposal 4:** The National Treasury and the O-CPO should conduct a scientific study of work in relation to the task of reforming and directing, monitoring, supporting, and enforcing development of the procurement system. It should present a business case for bringing the O-CPO up to a staff complement and skills mix appropriate to these efforts.

**Proposal 5:** The Supply Chain Management (SCM) Interim Council should commit to keeping concerned civil society, business, and other experts in the procurement field informed of its vision and road map for professionalisation. Such persons should commit to assisting the SCM Interim Council in realising this vision, by leveraging its contacts in broader society.

In relation to cohering the legal landscape and providing the legal underpinnings for public procurement reform, a **new Public Procurement Bill** should provide for the following:

**Proposal 6:** A single statute for public procurement should be legislated. It should incorporate, and provide for the repeal of, all other statutes that deal with public procurement. It should, in addition, provide for the following:

1. A single public procurement regulatory authority with jurisdiction over the whole public procurement system, including all organs of state currently under the Public Finance Management Act and the Municipal Finance Management Act.
2. Insulation of this single authority from political interference, either by retaining it within the National Treasury or providing special protections against political interference over and above those of an ordinary, independent public entity.
3. A flexible set of procurement principles and methods – i.e., just, open, limited, and direct methods to be defined and combined into a broader set of methods – which can be incrementally differentiated along lines of product, sector, and so on, in the course of evolving a principles-based, strategic, and developmental procurement system.
4. The statute should open the door to a wider set of goals in procurement processes, beyond price and preference alone, including in adjudication, to include functionality, life-cycle costs, industrial development, employment, green procurement, and so on.
5. Stronger powers for the public procurement regulator to compel organs of state into transversal contracts.
6. The ability to set price bands for purchases, e.g., R50 to R80 for a ream of 500 pages of A4 white paper.
7. The statute should, as per Proposal 5 above, establish the Supply Chain Management Interim Council, as a professional body with the relevant powers and functions.
8. The statute should, as per Proposal 3, include a justiciable open contracting and open data provision for public procurement.
9. Establish the basis for modern *qui tam* actions, giving a private right to enforce public procurement law, and incentivise private action through guaranteed minima for civil recoveries.

Sub-clauses (3), (4), (5), and (6) include opportunities to strike a better balance between concerns for procedural integrity and the need for operational flexibility in public procurement. They open out into a vision of what is defined here as a **principles-based, strategic, and developmental procurement system**, which the position paper gestures towards incrementally creating.

In relation to enforcement, the position paper argues that to close gaps in governmental will and capacity, a **general private right to enforce public procurement law** should be included in statute. This should take the form of civil actions for recovery of damages that result from procurement fraud, incentivised by a guaranteed minimum share of recoveries. This mechanism, known as *qui tam*, has been tried and tested elsewhere in the world.

**Proposal 7:** Government must include a *qui tam* provision in the upcoming Public Procurement Bill. It may be necessary to draw on local and international expertise to draft this provision. PARI offers to support development of such a proposal, working in collaboration with a network of experts from civil society and academia. Beyond this, the O-CPO should conduct a business case that defines the institutional parameters and capacity requirements for operationalisation of a *qui tam* provision, an initiative with which such a network could also assist.

## Introduction

This position paper is one of a series – **Position Papers on State Reform** – that argues for specific, crucial reforms of the South African state. The goal is to realise a rigorous reduction in corruption and in the influence of patronage in South African politics while improving the democratic responsiveness, efficiency and developmental effectiveness of public administration. This paper deals with public procurement. It should be read in conjunction with the position papers on personnel practices in the public service, municipalities and other organs of state.

In his 2012 budget speech, then Minister of Finance, Pravin Gordhan, announced the formation in the National Treasury of an Office of the Chief Procurement Officer (O-CPO).<sup>3</sup> In his 2013 speech he declared that this vehicle would initiate a wider push to reform the procurement system; he followed this with an unprecedented acknowledgement of the political challenges involved:

**Let me be frank. This is a difficult task with too many points of resistance ... While our ablest civil servants have had great difficulty in optimising procurement, it has yielded rich pickings for those who seek to exploit it. There are also too many people who have a stake in keeping the system the way it is. Our solutions, hitherto, have not matched the size and complexity of the challenge ... This is going to take a special effort from all of us in government, assisted by people in business and broader society.**<sup>4</sup>

By 2019 important advances had been made: in capacitating the O-CPO, in reviewing existing high-value and long-term contracts for the recovery of monies fraudulently obtained, in renegotiating the terms of contracts, and in intelligently optimising supplier registration, tendering and transversal contracting through the gCommerce platform, the central supplier database (CSD), and the e-tender portal. These advances, however, have not been sufficient. The O-CPO and its supporters have operated under the constraint of periodic and intense political pressure. Progress has been slow.

The draft Public Procurement Bill, which was released for public comment as this position paper was being finalised, outlines important changes in constructing a more coherent regulatory framework for South Africa's public procurement regime in its entirety, and clarifying regulatory authority in a proposed Public Procurement Regulator. While PARI welcomes these changes, this position paper remains relevant: the issues covered here are broader in scope than the reforms contained in the Bill.

With a scope including, but not limited to, the Bill, this paper sets out a wider set of challenges and suggested reforms. It aims to support development of a public procurement system that is better designed and capacitated to play its constitutionally intended role in supporting economic and social development.

The position paper heeds the call to mobilise people in broader society behind public procurement reform. It is to a significant extent a collective product informed by and giving rise to ongoing conversations and actions. Although reform-minded civil society, unionists and business people, cannot feasibly co-direct all the technicalities of public procurement reform, they can and must develop a strategy for applying pressure to push such a reform process in the right general direction. Reform-minded politicians and public administrators, in contemporary conditions, need a bulwark in broader society, in order to do their work; they need to be pushed beyond what they believe possible. It is for this role, as internal and external pressure group, that specific and concrete proposals for public procurement reform are presented below in section 5.

<sup>3</sup> 2012 Budget Speech By Minister of Finance Pravin Gordhan [Web log post]. (2012, February 22). Accessed 10 October 2019 at <https://www.gov.za/2012-budget-speech-minister-finance-pravin-gordhan>

<sup>4</sup> 2012 Budget Speech By Minister of Finance Pravin Gordhan [Web log post]. (2013, February 27). Accessed 10 October 2019 at <http://www.treasury.gov.za/documents/national%20budget/2013/speech/speech.pdf>

# 1. Public procurement in South Africa

## 1.1 The evolution of the procurement system

South Africa under apartheid operated a classically centralised procurement regime, with national functions vested in a State Tender Board that delegated departments and other entities, together with alternative arrangements, for security-related purchasing and state-owned enterprises. Provincial and local governments, as well as the plethora of segregated administrations, operated similar systems.

Tender boards were usually composed of political representatives, state officials, and corporatised interests such as business, industry, professional and other associations. These interests engaged directly in the allocation of tenders; the idea was that they would balance one another out so that distribution of tenders would be impartial. The boards favoured open, competitive tenders but operated loosely and delegated widely; departures from the lowest-priced rule were common. The procurement system veered strongly towards larger, better established businesses, appointed on long-term contracts. The above characteristics were institutionalised in item specifications, and in norms, standards, rules and procedures. Public procurement was exclusively for white businesses; access for black business expanded marginally from the 1960s in segregated administrations, and later, in some historically white administrations, in the years immediately preceding 1994.<sup>5</sup>

The system was widely and justly condemned for its racial bias; generally, and rightly so, the central tender boards were seen as a bottleneck in service delivery, and the specific needs of user departments were often poorly matched.

Public procurement reform was given priority on the agenda of post-apartheid government. The Department of Public Works and the National Treasury led the process – supported by a jointly established Procurement Forum – and by 1997 had produced the Green Paper on Public Sector Procurement Reform. The paper advocated and mapped out the process for breaking up the tender boards; under the Public Finance Management Act and the Municipal Finance Management Act public procurement managerial powers were devolved to the accounting officers and authorities of individual departments and other organs of state. The paper also argued for simplifying procurement procedures and documentation, reducing or eliminating upfront costs such as performance guarantees and the price of bid packs, and unbundling large contracts. These widely implemented reforms were intended to facilitate the participation of smaller, emerging suppliers.

Preferential procurement, written into the 1996 Constitution as s217(2), would also be mobilised to address the inequalities generated by colonialism and apartheid. The Preferential Procurement Policy Framework Act (PPPFA) of 2000 formalised this in a rigid 80/20, 90/10 price and preference points system.<sup>6</sup> The PPPFA was aligned with broad-based black economic empowerment (B-BBEE) legislation and was to become a keystone of its architecture.

The Green Paper also emphasised the need for a more sophisticated, regulatory approach. It argued that a National Procurement Compliance Office should be established to steer the process of reform and evolution of the procurement system with support of the robust powers and functions of standard-setting, monitoring, and enforcement.<sup>7</sup> The office was, however, never created and the Green Paper left its institutional location undecided. Instead, dedicated regulatory authority over public procurement was demoted to National Treasury's residual, multi-purpose Specialist Functions division. Regulatory powers were also dispersed across a number of National Treasury divisions and beyond, into entities like the Construction Industry Development Board under the Department of Public Works, which was made responsible for regulating construction procurement.

In 2013, creation of the O-CPO began to elevate and integrate public procurement regulatory powers and functions which until then had been submerged and disaggregated. The major reform effort announced in the budget speech of that year was a continuation of a reform process begun almost two decades earlier.<sup>8</sup>

5 Brunette, R., Klaaren, J., & Nqaba, P. (2019). Reform in the contract state: Embedded directions in public procurement regulation in South Africa. *Development Southern Africa*, 36(4), 537-554. See <https://pdfs.semanticscholar.org/86b5/f274722ec8afef18d389a3725630504fcfce.pdf>

6 80/20 preference point system for acquisition of goods or services for Rand value equal to or above R30 000 and up to R50 million; 90/10 preference point system for acquisition of goods or services with Rand value above R50 million

7 Notice 691 of 1997: Green Paper on Public Sector Procurement Reform in South Africa. [Web log post]. (1997, April). Accessed on 10 October 2019 at [https://www.gov.za/sites/default/files/gcis\\_document/201409/17928gen6910.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/17928gen6910.pdf)

8 Brunette, R., Klaaren, J., & Nqaba, P. (2019). Reform in the contract state: Embedded directions in public procurement regulation in South Africa. *Development Southern Africa*, 36(4), 537-554. See <https://pdfs.semanticscholar.org/86b5/f274722ec8afef18d389a3725630504fcfce.pdf>

## 1.2 The importance and scale of public procurement

Since the 1980s, states across the globe have made fundamental changes to the ways in which they administer their public functions. The shift from direct provision of services by the state's in-house personnel toward indirect provision through outsourcing – contracting of private providers is a notable feature. South Africa has been no exception to this trend.<sup>9</sup>

Public servants report a massive expansion of the scope of public functions that are now contracted out, which often extends into what are ordinarily considered core public functions. Policy design and analysis processes are often outsourced; it is common for consultants to finalise basic documents, such as Integrated Development Plans and financial statements, that are central to the formulation and implementation of major administrative reform initiatives.

Officials in administrative and technical operations report that they spend more and more time on specification and management of contracts, to the extent that the capacity to perform these functions has been hollowed out by excessive recourse to contracting, which excludes personnel from implementation work and thereby undermines learning and broader career prospects, which in turn makes state employment a less attractive prospect for young professionals. Even the contracting function itself is often contracted out to so-called, often infamous, 'purchasing management units'.

The scale of South African public procurement can also be measured quantitatively. In 2017, based on South African Reserve Bank statistics, 967 billion rand was channelled through public procurement. In the two preceding decades, public sector procurement expenditure rose in relation to total employee compensation, from a ratio of 0.97 to 1.3. In the same period, public procurement as a proportion of gross domestic product increased almost five percentage points, from 14.79 per cent to 19.5 per cent. In 2017 almost a fifth of the South African economy passed through public contracts.<sup>10</sup>

The significance to South Africa of the public procurement system goes beyond its broad scope and huge size. Not only is public procurement an increasingly important feature of public administration, but it is also an increasingly important factor in politics. Political competition for public office – now universally recognised – is often about access to public procurement opportunities. Preferential procurement operates in accordance with a company's B-BBEE score, which includes the extent to which companies themselves contract to suppliers with high scores. Public procurement, therefore, cascades across the South African economy, and acts as a massive lever for demographic and structural transformation.<sup>11</sup> A second important extension of public procurement into economic policy occurs by way of the Department of Trade and Industry's local content programme, which specifies that a percentage of the price of public tenders must go to local producers.

9 Brunette, R., Chipkin, I., Tshimomola, G., & Meny-Gibert, S. (2014). The contract state: outsourcing and decentralisation in contemporary South Africa. Johannesburg: Public Affairs Research Institute. See <http://www.pari.org.za/wp-content/uploads/PARI-The-Contract-State-01082014.pdf>.

10 Brunette, R., Klaaren, J., & Nqaba, P. (2019). Reform in the contract state: Embedded directions in public procurement regulation in South Africa. *Development Southern Africa*, 36(4), 537-554. See <https://pdfs.semanticscholar.org/86b5/f274722ec8afeb18d389a3725630504fcfce.pdf>

11 Bolton, P. (2006). Government procurement as a policy tool in South Africa. *Journal of public procurement*, 6(3).

## 2. Why does public procurement need reform?

There is a lamentable paucity of large-scale and quantitative data – either published or within the public service itself – on the performance of South Africa’s public procurement system. The O-CPO has alluded to some of the reasons for this. It notes that there has been a proliferation of information and communication infrastructures and procedures dealing with public procurement, as well as in related areas like public finance, personnel, logistics, taxation, company registration and so on. The O-CPO argues that the failure to ensure uniformity and integration between these structures has resulted in problems with data quality, comprehensiveness and measurement that undermine comparability between organs of state and across time.<sup>12</sup>

This has, however, not hindered, neither should it be allowed to hinder, the development of a thoroughgoing reform effort. Certainly, more precise and comprehensive evidence can aid reform; its systematic and continuous development ought to be an objective of reform. Information, however, has costs in terms of time and money. Knowledge is never complete and there is an irreducible element of uncertainty in all reform decisions. Calls for more evidence, therefore, can amount to a counsel of perfection against pragmatism – a recipe for conservatism instead of progress.

The extent and variety of the available evidence – from auditor-general reports, from existing and, too often, confidential government studies and investigations, from the public statements of governmental actors, from wide-ranging academic interviews and news media exposé – is such as to render public procurement reform a matter of urgency. A general consensus has emerged based on this evidence that public procurement has descended into a veritable crisis of non-compliance, corruption and operational inability to secure the right goods and services, at the right price, in the right place, at the right time.

Public procurement is producing large, deleterious effects in the tone and substance of South African politics. While there is ample reason to believe that it has facilitated a significant redistribution of market share, managerial responsibility and employment in the economy, there are grounds for arguing that it has not done enough and that it too often fails to foster suppliers that are sustainable and productive.

It can be argued, furthermore, again from the same sources of evidence, as well as from international experience, that positive changes to this system can be developed based on what we already know about the causal underpinnings of the crisis in public procurement. More than that, in all existing policy processes, evidence-gathering does not simply precede implementation; instead, they are interwoven, in the sense that implementation also precedes evidence.<sup>13</sup> Put another way, one sees how something ‘works’ by making incremental adjustments to it. The sorts of institutional adjustments advocated here are, like experiments in physics, ways of rearranging variables in order to illuminate causality. They are, again, ways of doing that are by available evidence more than likely to improve the public procurement system – chosen and designed to produce minimal expense and disruption.

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12 National Treasury (2015) Public Sector Supply Chain Management Review. Accessed on 10 October 2019 at <http://www.treasury.gov.za/publications/other/SCMR%20REPORT%202015.pdf>

13 See Simon, H.A. (1947) *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organization*. New York, N.Y.: Macmillan Inc.; March J.G. and H.A. Simon (1958) *Organizations*. Hoboken, N.J.: John Wiley and Sons Inc.

### 3. What caused the problems?

The South African public procurement system is complex. It is operated by over a thousand organs of state that delegate to tens of thousands of divisions, field offices, schools, hospitals, and so on, with hundreds of thousands of registered suppliers entering into over two million transactions annually. The causes of its problems can, however, without great violence to this complexity, be reduced to the five that follow.

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#### 3.1 Political interference and lack of enforcement

Political interference in procurement operations is enabled by **a system of political control over appointments, promotions, and dismissals** across South Africa's public administration.

Integrity in public procurement relies on a system of checks and balances. In South Africa, responsibilities are divided in order to achieve this integrity across the stages of the procurement process between end-user departments, supply-chain-management units, bid-specification committees, bid-evaluation committees and bid-adjudication committees – not to mention a range of oversight authorities. The idea is that no single person or group is in a position to control outcomes across stages and direct contracts illicitly to themselves or to their connections. However, when small groups of politicians appoint their allies at the key points across this process, or otherwise bend public servants into submission by threats of curtailment of their career prospects and more, then the system of checks and balances ceases to function and the stages of the process are bridged by political appointments.

It is evident that this sort of politicisation of – essentially administrative – procurement operations is a pervasive feature of South Africa's procurement system. Politicisation is – with an influence that extends even into the criminal justice system – a fundamental cause of the lack of enforcement of compliance in the public procurement system and the consequent erosion of rules, procedures and discipline associated with corruption. The outcome is a loss of control that has become a major impediment to operational efficacy and to incentivising the formation of sustainable and high-level capacities in suppliers.

Because political interference and how to address it is the subject matter of the position papers on personnel practices in the public service and municipalities and in the criminal justice institutions this position paper focuses on causes and solutions more specific to public procurement.

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#### 3.2 A lack of capacity

A second cause, in part interlinked with the first, is **a lack of capacity within regulatory authorities and procuring entities**; that is, a lack of sufficiently skilled public procurement personnel in sufficient numbers employed within appropriately designed organisational structures. Inasmuch as public procurement has grown in scope and scale, non-compliance, corruption and poor performance have attained epidemic proportions. Efforts to adequately staff and train public procurement regulation and operations are not commensurate with the enormity of the problem.

The O-CPO is charged with modernising and regulating a procurement system that churns out as many as a million contracts annually. In 2016, it had just 68 employees. The provincial treasuries operate supply chain management support units that complement the O-CPO in provinces and so-called 'delegated' municipalities, which include all except 17 of South Africa's largest municipalities. The 204 employees of these units brought the total in 2016 to 272, 27 per cent short of the 374 funded posts available.

A large number of these employees are directly involved in procurement processes like transversal contracting, and the establishment and maintenance of information and communication technology systems. Only 157 employees were involved in traditional regulatory functions: policy, norms and standards, monitoring, supporting and enforcing. Employees tend to have reasonable levels of educational attainment – most have postgraduate qualifications – but very few have extensive formal education in procurement or closely related fields such as supply-chain management and logistics. Very few are members of public procurement professional bodies, specifically the Chartered Institute of Procurement and Supply (CIPS).

A number of other state employees, in divisions like the Office of the Accountant General in the National Treasury, and in other entities like the Auditor General and the Construction Industry Development Board, deal with public procurement regulation as part of more general responsibilities and focusing on particular aspects. There are strong arguments, however, based on subject matter specificity and specialisation, for dedicated public procurement regulation, which appears to have been woefully under-capacitated. The

O-CPO reports, for instance, that in the ten months preceding February 2018, 2,704 state employees were doing business with the state, with R8 billion in payments. Furthermore, gaps in the data mean the actual figures for employees doing business with the state are understated.<sup>14</sup>

In fact, regulations prohibiting state employees from doing business with the state only cover the tip of a vast and unquantifiable iceberg; the usual practice is to register family members, friends and other personal and political relations as directors of businesses to hide their provenance. Nevertheless, in 2016, only 55 personnel in the O-CPO and provincial treasuries dealt specifically with public procurement monitoring and compliance.

Public procurement practitioners involved in operations in broader organs of state display a similar profile of skills and professionalisation; they are relatively well-educated, but not widely, in procurement and related fields. Most are not enrolled in public procurement professional bodies. Anecdotally, personnel numbers in relation to workload are more balanced here, but people involved in procurement processes often report in interviews that due diligence is attenuated by overburdening. Earlier and later stages in supply chain processes are often neglected in organisational design and staffing. In other words, organs of state focus on purchasing and logistics, but do not adequately address demand management, procurement planning, contract management and performance evaluation.

Furthermore, professionals such as engineers and architects report that over-outsourcing reduces them to glorified contract managers; this is associated with a loss of skill and numbers and a hollowing out of public procurement capacity. These concerns require more dedicated study and are dealt with in the proposals below.

### 3.3 An excessively complicated, fragmented, and inconsistent legal regime

A third cause is the state of the legal regime for public procurement. The **regulatory framework for South Africa's public procurement laws is unnecessarily complex, and fragmented and inconsistent**. The four most important statutes are the Public Finance Management Act, the Municipal Finance Management Act, the Preferential Procurement Policy Framework Act and the Construction Industry Development Board Act, but many of the significant and decisive rules are contained in diverse sector statutes. There are about 22 pieces of primary legislation that deal with public procurement in a significant way. Regulatory authority, including to set legal rules, is dispersed across multiple national organs of state of which the most important are the National Treasury and the Construction Industry Development Board. An unsystematic, uncoordinated approach to legal elaboration, often the result of ad hoc responses to emerging problems of corruption and poor performance, has produced subordinate legislation that brings the total of distinct pieces of law to around 85. There is uncertainty as to the legal status of instruments at the lower end of this regulatory architecture. Although the binding nature of National Treasury practice notes and guidance documents is sometimes asserted, it is open to question.<sup>15</sup>

There is real difficulty, even for those experienced and expert in public procurement, to determine which laws are applicable to which intended procurements. Procurement practitioners, forced to cobble procedure together from this welter of regulation, often come out with incoherent processes that are open to court challenge. The complexity of the regulatory framework – combined with a general lack of consequence management – further disincentivises compliance and disrupts routine, and thus undermines control. Unnecessary differentiation of procurement procedure across different organs of state makes training of procurement practitioners – and therefore, capacitating functions – more costly.

<sup>14</sup> National Treasury (2018) State Employees Conducting Business With Government. Accessed on 11 October 2019 at [http://ocpo.treasury.gov.za/Resource\\_Centre/Publications/Report%20of%20State%20doing%20business%20with%20government.pdf](http://ocpo.treasury.gov.za/Resource_Centre/Publications/Report%20of%20State%20doing%20business%20with%20government.pdf)

<sup>15</sup> Quinot, G. (2014). *An institutional legal structure for regulating public procurement in South Africa. Research report on the feasibility of specific legislation for National Treasury's newly established Office of the Chief Procurement Officer.* <http://africanprocurementlaw.org/wp-content/uploads/2016/01/OCPO-Final-Report-APPRRU-Web-Secure.pdf>.

### 3.4 A sub-optimal relationship between integrity and flexibility in the construction and application of rules

Not only does the regime exhibit an excessively complex, fragmented and inconsistent legislative framework, but there **are also stark trade-offs in public procurement** between the procedural integrity necessary for fairness and to protect public funds, and the flexibility associated with the operational substance of purchasing. A fourth cause of problems in public procurement in South Africa is that the balance between procedural integrity and operational flexibility has not been optimal.

The provenance of this reality is easy to comprehend when viewed through the lens of South Africa's British administrative inheritance, in which public procurement was traditionally seen as a public financial competency. As noted above, in terms of the Constitution and subsequent legislation and practice, public procurement regulation was not only placed within the National Treasury, but was also effectively demoted from an agency – the State Tender Board, which was responsible to the Minister of Finance – to a series of subdivisions, known as the supply chain management (SCM) Office, within the Specialist Functions branch of National Treasury. When procurement operations were decentralised to procuring organs of state, they were guided toward placing their SCM units under the chief financial officers of these organisations and procurement practitioners struggled to express themselves in public procurement policy processes. Public financial management, which was more concerned with integrity – increasingly inordinately so, given the growing crisis of non-compliance and corruption – subordinated public procurement to its own logic. National Treasury, the auditor-general, and related agents of regulation tightened interpretations of rules and procedures. In the process, there was a tendency for the operational substance of public procurement to be displaced.

Whereas the legal framework for public procurement provides for some flexibility in the choice of purchasing method, and for deviations, rigid compliance orientation has tended, increasingly, to constrain these possibilities and has fixed procurement processes in austere defined procedures and timeframes. The Preferential Procurement Policy Framework Act, as interpreted by the courts, excludes functionality as an adjudication criterion, and confines purchasing decisions to price and preference. This makes it exceedingly difficult to secure the right goods and services where products are complex and highly differentiated. Justifications for deviations are often too strictly construed, especially given capacity constraints in drawing them up. To the extent that this tightening is the only mechanism available to public financial regulators for improving compliance, it is understandable.

Stricter rules, however, are a problematic substitute for enforcement. The inevitable reality is that rigidity has simply constrained those practitioners who already displayed integrity, and intend to follow the rules and procedures. Politicians and public administrators who have bridged checks and balances with their political connections are still able to break the rules with impunity. In fact, they have often used them to pull power away from practitioners with more operational concerns.

Corruption and anti-corruption have as it were eaten away at public procurement from both ends; the inefficiencies associated with corruption have been augmented by the inefficiencies associated with anti-corruption.<sup>16</sup>

### 3.5 A failure to match procurement procedure to developmental objectives

The fourth cause is related to the fifth – **the mismatch between procurement operations and the development objectives for public procurement**. South Africa is committed to using public procurement to foster the formation and viability of firms that are owned, operated, and staffed at all levels by categories of previously disadvantaged people, and those that assist in developing the capacities of disadvantaged people through skills development, supplier and enterprise development, and broader socioeconomic development efforts. The Department of Trade and Industry has developed the local content programme to leverage public procurement to the advantage of local industrial development.

Although government has not maintained a comprehensive time series of the extent to which these objects have been achieved, the data available suggests significant gains, even if these can be improved on. In 2018, the O-CPO reported that 66% of registered suppliers were B-BBEE Level 1, the highest level of contribution to black economic empowerment; 57% of suppliers were majority owned by black people; 22% were majority owned by black women; 23% were majority owned by youth; and 18% were majority owned by black people living in rural areas or townships.<sup>17</sup>

<sup>16</sup> Brunette, R., Klaaren, J., & Ngaba, P. (2019). Reform in the contract state: Embedded directions in public procurement regulation in South Africa. *Development Southern Africa*, 36(4), 537-554. See <https://pdfs.semanticscholar.org/86b5/f274722ec8afeb18d389a3725630504fcfce.pdf>

<sup>17</sup> [http://ocpo.treasury.gov.za/Resource\\_Centre/Publications/Report%20State%20of%20Gov%20Suppliers%20Report.pdf](http://ocpo.treasury.gov.za/Resource_Centre/Publications/Report%20State%20of%20Gov%20Suppliers%20Report.pdf)

It is reasonable to assume that many suppliers were still in the process of updating their credentials on the Central Supplier Database (CSD), from which these figures were drawn. O-CPO statistics, admittedly incomplete, and drawn from government's payment system, indicate that in the last eight months of 2017, 36% of national and provincial procurement budgets went to Level 1 contributors, a further 17% went to Level 2 contributors, and that the total, up to Level 4 contributors was 75%.<sup>18</sup>

Gaps in the data notwithstanding, it seems clear that although demographic parity in public contracting has not been achieved, it is equally apparent that it is on the way to doing so. Government reported that between March 2015 and July 2017, R59.95 million was "locked into the country" by the local content programme.<sup>19</sup> So, although it can be assumed that a much larger proportion of the procurement budget was spent domestically, the local content programme itself failed to breach 5% of the total (967 billion rand).

Beyond these absolute figures, are serious questions about the viability of the firms being fostered by public procurement given that government contracting is so highly politicised. When suppliers are politically or personally connected, political and personal considerations will tend to attenuate good procurement planning, specification, contracting and performance management. Deficits in administrative capacity can result in a similar looseness. If procurement plans are unpublished and unreliable, and suppliers are subject to political caprice, they will lack the certainty necessary to invest in productive capacities. Suppliers who are not reliably and rigorously compelled to perform on contract, at an appropriate level, are unlikely to build the productive capacities necessary for doing so. Middleman suppliers, which function simply by purchasing supplies and services in the market and then selling these to government at a mark-up, are common. Many suppliers that win contracts amount to little more than shelf-companies. Cutting corners in contracting processes is rife.

The issue is, however, not only the failure to construct compliant and capacitated procurement functions; there is also a broader mismatch between the basics of the public procurement regulatory regime and its expressed developmental objectives.

At its centre the regulatory regime favours annual contracting through competitive processes; contracts are small and competition is on the basis of price and preference, as defined in B-BBEE scores. In most areas a year is not enough time to foster the productive capacity of a supplier. Indeed, short time horizons encourage suppliers to seek quick profits by depressing production costs. The level of competition in South Africa is often so intense as to be destructive. It is not uncommon for hundreds of suppliers to vie for a single tender, often pushing prices below the costs of production in the hope that this can be made up later with contract deviations and the cutting of corners. Contracts are unbundled to smaller suppliers with little regard for attaining the economies of scale needed by competitive enterprises. The focus on price marginalises functionality and broader value for money. Preferences are rigidly fixed in statute and B-BBEE scoring applies to the whole firm instead of to its offer on a specific tender, which means that the system fails to fully explore opportunities for maximising black economic empowerment on contracts where associated costs can be minimised.

<sup>18</sup> [http://ocpo.treasury.gov.za/Resource\\_Centre/Publications/2018%20State%20of%20procurement%20spent.pdf](http://ocpo.treasury.gov.za/Resource_Centre/Publications/2018%20State%20of%20procurement%20spent.pdf)

<sup>19</sup> [https://www.gov.za/sites/default/files/gcis\\_document/201805/industrial-policy-action-plan.pdf](https://www.gov.za/sites/default/files/gcis_document/201805/industrial-policy-action-plan.pdf)

## 4. Proposals for reform

The O-CPO and the National Treasury are involved in an ongoing reform drive, which should be supported and, where appropriate, built upon. The following proposals, responsive to the causes of problems in public procurement described above, are crafted with a view to performing this external, pressure and facilitation role.

### 4.1 Data and transparency

The O-CPO has begun to publish reports on the state of the public procurement system. The gCommerce platform, central supplier database, and e-tender portal are welcome opportunities to generate rich, longitudinal data about this system. However, maximising these opportunities is hampered by the archaic, unintegrated, and deteriorating nature of government's broader information technology systems – most prominently, BAS (the accounting system), PERSAL (personnel), and LOGIS (logistics). The State Information Technology Agency (SITA), National Treasury, and the Department of Public Service and Administration have been working on modernising government's information technology with the Integrated Financial Management System (IFMS). However, progress has been slow and the procurement process for the new system has been mired in allegations of corruption. The O-CPO has also not indicated what data it is collecting and whether it plans to do so over a sufficiently long period to begin to discern trends in public procurement. Proposals 1 and 2 emanate from these considerations.

**Proposal 1:** National Treasury should update the public on progress and timeframes for implementation of the Integrated Financial Management System. It should also report on investigations being conducted into procurement of the new system and on processes for consequence management.

**Proposal 2:** The O-CPO should – with relevant stakeholders – develop, publish and commit to, a schedule of data to be collected and kept on a longitudinal basis.

The new information technology that deals with public procurement also offers opportunities for publishing data and other information on the procurement system and, in fact, on procurement processes in real time. Currently, too much valuable information is not in the public domain. Much more can be done to promote transparency in South Africa's public procurement, along the lines of international initiatives such as the Open Contracting Partnership and the Construction Industry Transparency Initiative.

**Proposal 3:** The O-CPO should commit to an open data and open contracting standard, publishing procurement information in accordance with a schedule developed with relevant stakeholders.

### 4.2 Insulating, capacitating and professionalising public procurement

Because politicians have the power to set overarching laws and policies and direct impartial implementation thereof, they should not be directly involved in decision-making in procurement, which is a quintessentially administrative function. Public procurement reformers must be centrally concerned, then, with insulating public procurement processes from political interference. What this entails is support for the proposals in the position papers on personnel practices.

Public procurement policy is more directly related to issues of capacitation and professionalisation. In regard to capacitation, it seems clear that the O-CPO needs to build the internal capacity it needs to design and drive modernisation, and monitor, investigate and ensure compliance and anti-corruption. A number of the proposals offered here require further, although not prohibitive, financial outlays for staff. Generating data and monitoring trends and emerging issues in public procurement requires work hours, as does, for instance, maintaining transparency of the system. Although budget formulators may balk at extra expenditure, austerity should not become a justification for not spending money that will have the net effect of saving money.

**Proposal 4:** The National Treasury and the O-CPO should conduct a scientific study of work in relation to the task of reforming and directing, monitoring, supporting, and enforcing development of the procurement system. It should present a business case for bringing the O-CPO up to a staff complement and skills mix appropriate to these efforts.

It is likely that a similar initiative will be needed for provincial treasuries and for procuring organs of state themselves. The same can be said for discerning the appropriate balance between insourcing and outsourcing in organs of state. These will necessarily require a longer term, more decentralised and difficult process, which the O-CPO can begin to address by generating and publishing data on capacity, as per proposals 2 and 3. A movement for state reform would need a dedicated plan of action to support this kind of work.

In the area of professionalisation, the National Treasury has recently established a Supply Chain Management (SCM) Interim Council responsible for developing a roadmap for public sector supply chain professionalisation and coordinating stakeholders into the effort. The SCM Interim Council has a bearing on political interference inasmuch as membership of professional bodies and the induction of procurement practitioners into the norms and standards of professionalism will create resources for and inclinations toward resistance to unwarranted political interference. Professional requirements for training and continuous education have obvious, important consequences for capacitation. There is considerable scope for a broader set of actors to assist this Interim Council in its work, especially by lobbying professional organisations and universities to develop appropriate supply chain management programmes.

**Proposal 5: The Supply Chain Management (SCM) Interim Council should commit to keeping civil society informed about its vision and road map for professionalisation. Civil society should commit to assisting the SCM Interim Council in realising this vision by leveraging its contacts in broader society.**

### 4.3 A single statute that coheres and provides for reform of the public procurement legal landscape and system

Since 2016, government has been committed to introducing a Public Procurement Bill into Parliament. The Minister of Finance has promised to table it in Parliament in the course of the current financial year. The Bill responds to the problems of fragmentation and inconsistency in the present public procurement legal framework and will play a significant role in enabling and constraining the process of wider reform, including for the proposals in this position paper. It will have a number of moving parts, some quite technical and probably beyond the scope of a broader societal movement for public procurement reform.

The key statutory proposals of such a movement should be as follows. Some of the sub-clauses of this proposal will be elaborated on below.

**Proposal 6: A single statute for public procurement should be legislated, and should incorporate and provide for the repeal of all other statutes that deal with public procurement. It should also provide for the following:**

1. A single public procurement regulatory authority with jurisdiction over the whole public procurement system, including all organs of state currently under the Public Finance Management Act and the Municipal Finance Management Act.
2. Insulation of this single authority from political interference, either by retaining it within the National Treasury or providing special protections against political interference over and above those of an ordinary, independent public entity.
3. A flexible set of procurement principles and methods – i.e., just, open, limited, and direct methods to be defined and combined into a broader set of methods – which can be incrementally differentiated along lines of product, sector, and so on, in the course of evolving a principles-based, strategic, and developmental procurement system.
4. The statute should open the door to a wider set of goals in procurement processes, beyond price and preference alone, including in adjudication, to include functionality, life-cycle costs, industrial development, employment, green procurement, and so on.
5. Stronger powers for the public procurement regulator to compel organs of state into transversal contracts.
6. The ability to set price bands for purchases, e.g., R50 to R80 for a ream of 500 pages of A4 white paper.
7. The statute should, as per Proposal 5 above, establish the Supply Chain Management Interim Council, as a professional body with the relevant powers and functions.
8. The statute should, as per Proposal 3, include a justiciable open contracting and open data provision for public procurement.
9. Establish the basis for modern *qui tam* actions, giving a private right to enforce public procurement law, and incentivise private action through guaranteed minima for civil recoveries.

#### 4.4 A single regulatory authority with jurisdiction over the whole system

The O-CPO should be empowered to drive the process of cohering and continuously adjusting the public procurement system. These powers must traverse the whole system – in provincial and local government and public entities. This may involve subsuming all or some of the powers of regulators like the Construction Industry Development Board and the State Information Technology Agency. It might work with the provincial treasuries, which have occasionally been important sources of experimentation and innovation in the public procurement system, but with a clear, if arms-length, line of authority from the O-CPO down. These concerns cohere with Proposal 6 (item 1) above.

Appropriate location of this regulatory authority is a recurring debate among reformers of public procurement that goes back to the Green Paper. The O-CPO is currently the main contender, but its position must be formalised in statute. The advantages of the O-CPO, as presently instituted, are that it can ride on the powers of National Treasury under section 216 of the Constitution and draw on its capacity and prestige. Perhaps most importantly, the O-CPO can benefit from the relative immunity of National Treasury from political interference.

It has been argued, not implausibly, and even though progress has been made in liberating public procurement from a narrow concern with public financial management, that retaining the O-CPO in National Treasury carries the risk of perpetuating the subordination of procurement. There are also conflicts between National Treasury's role as a public procurement regulator, on the one hand, and as a procuring entity in its own right, on the other. On these grounds, it has been argued, for instance, that the regulatory functions of the O-CPO should be consolidated and carved out into a public entity responsible directly to Parliament.<sup>20</sup>

These and a range of other options bring into play a number of values that are difficult to adjudicate on any single scale. Whatever the ultimate decision, which will be announced in preliminary fashion in the Public Procurement Bill, reform-minded people should be agreed that the regulatory authority remain free of political interference. Proposal 6 (item 2) above provides for its insulation.

#### 4.5 A principles-based, strategic, developmental approach to procurement

Jurisdictions across the globe are engaging with reform and improvement of their public procurement systems. A common question is how to optimise the relationship between procedural integrity – which in South Africa has meant the elaboration of more rigid rules – and the operational flexibility, especially in more complex processes, needed to achieve efficiency, effectiveness, and the promotion of social policy. The answer is often presented in terms of **principles-based regulation and strategic procurement**.

In 2009, the Organisation for Economic Co-operation and Development (OECD) proposed a set of integrity principles designed to counter corruption in a public procurement system.<sup>21</sup> The World Bank, through its research initiative, Benchmarking Public Procurement, has also developed indicators closely based on the principles it believes underpin a good public procurement system.<sup>22</sup> These and other sets of principles are part of a shift in regulatory strategy away from rules and towards the use of standards and results monitoring to improve public procurement systems.<sup>23</sup> In developing such an approach, South Africa can use the principles in section 217 of its Constitution, which states that public procurement should proceed within a system that is fair, equitable, transparent, competitive and cost-effective.

In practice related to principles-based regulation, strategic procurement often involves a more pragmatic, flexible and differentiated approach to procurement methodology.<sup>24</sup> In answer to this approach in its own operations, the O-CPO has a Chief Directorate: Strategic Procurement. The basic idea of strategic procurement is that it recognises the importance of ensuring added value across each stage of the procurement process, from demand management, market research and specification, through purchasing to contract and relationship management and review.

Although strategic procurement accepts that certain products, say those that are very price sensitive, or where there are many suppliers and competitive markets, are best purchased through competitive bidding, it argues that the range of products is such that significant differentiation in purchasing approach is needed along lines of product-type, sector, and purchasing entity. In many cases, for instance when products are complex, highly specific in their applications and few suppliers exist, a more relational, long-

20 Quinot, G. (2014). *An institutional legal structure for regulating public procurement in South Africa. Research report on the feasibility of specific legislation for National Treasury's newly established Office of the Chief Procurement Officer.* <http://africanprocurementlaw.org/wp-content/uploads/2016/01/OCPO-Final-Report-APRRU-Web-Secure.pdf>.

21 Organisation for Economic Co-operation and Development. (2009). *OECD principles for integrity in public procurement.* OECD Publishing.

22 World Bank, "Benchmarking Public Procurement 2016: Assessing Public Procurement in 77 Economies" 2016, <http://bpp.worldbank.org/~/media/WBG/BPP/Documents/Reports/Benchmarking-Public-Procurement-2016.pdf>.

23 Black, J. (2008). Forms and paradoxes of principles-based regulation. *Capital Markets Law Journal*, 3(4), 425-457. <https://doi.org/10.1093/cmlj/kmn026>.

24 Kraljic, P. (1983). Purchasing must become supply management. *Harvard business review*, 61(5), 109-117. See also, <http://www.treasury.gov.za/publications/other/SCMR%20REPORT%202015.pdf>

term and performance-based procurement methodology is necessary. This sort of differentiation is already advanced in the area of infrastructure procurement. The approach opens out into a recognition of the importance of a range of other adjudication criteria for public procurement, beyond price and preference, to include functionality, total lifecycle costs, and so on.

**Developmental procurement** refers to the use of public procurement to achieve broader developmental policy objectives. There are good arguments for the proposition that the Preferential Procurement Policy Framework Act, along with the Broad-Based Black Economic Empowerment Act, have been too rigid in their establishment at statutory level of the 90/10, 80/20 points system, which are based on firm-level B-BBEE scores rather than contract-level scores. There are also a range of policy concerns, such as green procurement, that have no expression in preferences. Beyond the points system lie strong complementarities between principles-based regulation, strategic procurement, and such developmental concerns. These complementarities can help create the flexibility needed to build new productive capacities in the private sector by way of mechanisms such as longer term, performance-based relationships around larger contracts that attain economies of scale.

South Africa should set its sights on this emerging vision of a principles-based, strategic, developmental procurement system that is better able to tailor its processes to its operational and social policy subject matter. This approach also recognises that procurement law and procedure is a means to achieve governmental aims, and is not an end in itself.

The process, however, of moving towards such a system will be complicated and may involve broader institutional reforms in organs of state, for instance, the creation of chief procurement officers elevated to sit alongside chief financial officers and chief operations officers in strategic management. It will need to be rolled out in a tightly controlled, incremental manner alongside efforts to depoliticise and professionalise public procurement. Reform-minded people need to monitor this process and its vital interconnections. We propose to deal with this initially as a statutory matter in which statutory room must be created for the process to evolve. That room is provided for in 4.3 and 4.4 above.

The public procurement regulator, as part of a principles-based, strategic, and developmental approach to public procurement, should also have stronger powers to compel organs of state into transversal contracts, to intelligently leverage government purchasing power and fostering economies of scale in strategic sectors. It should be able to set price bands within which purchases must fit, to avoid rampant over-expenditure in key areas such as housing. These concerns are addressed here in 5.5 and 5.6.

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## 4.6 Enhanced enforcement mechanisms

Capacity and political considerations have tended to undercut oversight and enforcement operations in South Africa's public procurement system. Capacity shortfalls have resulted in a tendency to ration these functions, which has opened up regulatory gaps. Addressing this in public procurement requires capacitation of a central regulatory authority, along the lines of Proposal 4.

The most direct way in which political considerations have impinged upon regulatory decision-making has been through politicisation of the personnel practices of broader criminal justice institutions, such as the South African Police Service and the National Prosecuting Authority. In organs of state, oversight functions have suffered a similar fate; this is addressed in the position papers on personnel practices in the public service, the municipalities, and the criminal justice institutions.

Indirectly, regulatory functions that have not been directly politicised have generally held back enforcement actions, especially where these would implicate more powerful politicians and political networks. To avert the ever-present threat of direct politicisation, regulatory functions are compelled to operate in political terms.

The civil recovery and criminal enforcement mechanisms available to regulators, and the leadership of organs of state, have been undermined by these dynamics. The Public Audit Amendment Act, now law, gives the Auditor General the power to take appropriate remedial action, to issue certificates of debt where accounting officers and authorities fail to comply with this action, and to refer matters for criminal investigation. Although this is a welcome development, the Auditor General is nevertheless unlikely to fully escape the limited capacity and politicisation that have attenuated the efforts of other independent, public sector oversight and enforcement agencies. There is a long history of other countries that have developed creative and refined enforcement mechanisms to fill such gaps.

These hinge on what is known as *qui tam*, shorthand Latin for 'he who sues on behalf of the King as well as for himself'. Any *qui tam* mechanism includes a law that defines an offence or an infringement of a right, coupled with a penalty or forfeiture that might be extracted from a person who violates or infringes the law. In public procurement, for example, fraud committed against the state might give rise to a claim

for damages by the state. What distinguishes a *qui tam* mechanism, however, is that it amounts to a statutory grant of a general private right to enforce a specific law for the state, with efforts in this direction incentivised by a share of the resulting penalty or forfeiture.

*Qui tam* has an ancient pedigree. It originated in late-republican Roman law more than two thousand years ago and was developed in English law, especially from the fourteenth century. Today, in the US, *qui tam* is arguably the most effective technique available to the federal government for rooting out corruption and fraud in public procurement. The US Department of Justice reported *qui tam* settlements and judgements of over 3 billion dollars in 2017, or 92% of all damages for 'false claims', which American law defines as fraud or 'reckless disregard for truth or falsity' in dealing with the state.<sup>25</sup>

A number of features of modern *qui tam* account for its success. While public investigators and prosecutors might defer to political interests, *qui tam* enables private actors to pick up the slack. Evidence gathering by public investigators and consultants is costly in terms of personnel time and money. Although whistle-blowers can save the state these outlays by bringing inside information out into the open, there are prohibitive disincentives for whistle-blowing: whistle-blowers are commonly dismissed from their jobs, informally blacklisted in the job market, socially ostracised, subjected to counter-investigations and -litigation, and worse. *Qui tam*, however, evens them up for their commitment to public integrity, with the prospect of a large reward with which to establish themselves in another professional field, geographical location, and so on, with the costs being borne not by the government, but by corrupt combinations themselves, towards damages they must pay to the state.<sup>26</sup> Further to these points, US law provides for triple damages in *qui tam* actions, to enhance incentivisation and not prejudice the fiscus.

*Qui tam* actions are normally launched by whistle-blowers employed in the state or large private enterprises who have linked up with law firms that specialise in these kinds of lawsuits. *Qui tam* is a civil action, with the burden of evidence on a balance of probabilities. It is not a replacement for, but a complement to, traditional public enforcement. Evidence gleaned from *qui tam* proceedings can be used subsequently in criminal actions.

There are a number of other features of modern *qui tam* that constrain any possibilities for its abuse. A *qui tam* litigant, known as a 'relator', must be an 'original source' of information, in other words, they either voluntarily bring forth information before any public disclosure or provide additional information that is independent of, and materially adds to, publicly disclosed allegations.

Relators must file, with the relevant information under seal for a specified time period – 60 days in the US – to give government and the Department of Justice, an opportunity to investigate and decide whether to intervene and take up the action; decline to intervene and allow the relator to act on behalf of the state; or, move to have the action dismissed with the possibility of review by a court. In the US, if the government joins, the relator is entitled to a minimum of 15 and a maximum of 25 per cent of the recovery in the event of success. If the government declines to join, the relator is entitled to a minimum of 25 and a maximum of 30 per cent to cover the costs of litigation. These arrangements amount to a sophisticated series of checks and balances between *qui tam* litigants, the government, and the courts. The effectiveness of specialist law firms in particular, as repeat players, is dependent on their trustworthiness; a reputation for vexatious and frivolous lawsuits may lead to penalties and a failure to be taken seriously by both government and the courts in future proceedings.<sup>27</sup>

Ordinary laws that apply to fraud, defamation, and so on also apply to *qui tam* litigants. Courts will adjust rewards between the minima and maxima according to such factors as the quality of the information provided, the expertise and legwork performed by supporting lawyers, and the litigant's complicity in giving rise to fraud against the state.

The available evidence suggests that arguments raised against *qui tam*, around the possibility of its abuse, are largely unfounded. In South Africa, a serious concern with corruption in public procurement should lead naturally to a serious consideration of *qui tam* as a remedy.

**Proposal 7: Government must include a *qui tam* provision in the upcoming Public Procurement Bill. Civil society can offer to draw on local and international expertise to draft this provision. Beyond this, the O-CPO should conduct a business case defining the institutional parameters and capacity-requirements for the operationalisation of a *qui tam* provision, with which civil society can also assist.**

<sup>25</sup> [https://www.justice.gov/civil/page/file/1080696/download?utm\\_medium=email&utm\\_source=govdelivery](https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery)

<sup>26</sup> Braithwaite, J. (2008). *Regulatory capitalism: How it works, ideas for making it work better*. Edward Elgar Publishing.

<sup>27</sup> *ibid*

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## ACKNOWLEDGMENTS

PARI is indebted to a number of civil society organisations, experts, government officials and individuals who provided written comments and participated as readers of previous versions of this paper. These organisations and individuals include (in alphabetical order): David Lewis (Corruption Watch), Michael Nassen Smith, Geo Quinot (Stellenbosch University), Niall Reddy, Glen Robbins (University of KwaZulu-Natal), Lisa Seftel (Strategic Dialogue Group), Ron Watermeyer (University of the Witwatersrand) and representatives from the Department of Planning, Monitoring and Evaluation (DPME).

Additionally, PARI wants to acknowledge the following individuals and organisations whose representatives attended at least one of three separate workshops to fine-tune these proposals and participate in efforts to organise around the theme of state reform. They include (in alphabetical order): Ahmed Kathrada Foundation, ANC Stalwarts and Veterans Group, Auwal Socio-Economic Research Institute (ASRI), Black Sash, Prof. Anthony Butler (University of Cape Town), Centre for Complex Systems in Transition, Centre for Development and Enterprise, Corruption Watch, Council for the Advancement of the South African Constitution (CASAC), Dullah Omar Institute (DOI), Kris Dobie (Ethics Institute), Freedom House, Ms. Trish Hanekom, Johannesburg Against Injustice (JAI), Len Mortimer (Stellenbosch University), Prof. Vinothan Naidoo, Nelson Mandela Foundation, Organisation Outdoing Tax Abuse (OUTA), Public Service Accountability Monitor (PSAM), SANGOCO, Studies in Poverty and Inequality Institute (SPII), and #UniteBehind.

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