
THE GOVERNMENT PROCUREMENT REVIEW

THIRD EDITION

EDITORS

JONATHAN DAVEY AND AMY GATENBY

LAW BUSINESS RESEARCH

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The Government Procurement Review
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Third Edition

Editors

JONATHAN DAVEY AND AMY GATENBY

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CONTENTS

Editors' Prefacevii
	<i>Jonathan Davey and Amy Gatenby</i>
Chapter 1	AUSTRALIA.....1
	<i>Geoff Wood and Anne Petterd</i>
Chapter 2	AUSTRIA14
	<i>Philipp J Marboe and Nina Lassner</i>
Chapter 3	BELGIUM26
	<i>Dirk Lindemans, Frank Judo, Aurélien Vandeburie and Stijn Maeyaert</i>
Chapter 4	BRAZIL38
	<i>Massami Uyeda Junior and Rodnei Iazzetta</i>
Chapter 5	CANADA52
	<i>Theo Ling and Jonathan Tam</i>
Chapter 6	EUROPEAN UNION.....66
	<i>Clare Dwyer and Michael Rainey</i>
Chapter 7	FINLAND82
	<i>Toni Malminen</i>
Chapter 8	FRANCE95
	<i>Romarc Lazerges</i>
Chapter 9	GERMANY111
	<i>Olaf Otting and Udo H Olgemöller</i>

Chapter 10	GHANA.....	122
	<i>Divine Kwaku Duwose Letsa</i>	
Chapter 11	GREECE	139
	<i>Irene Economou</i>	
Chapter 12	INDIA	157
	<i>Sunil Seth and Vasanth Rajasekaran</i>	
Chapter 13	ITALY	168
	<i>Filippo Bucchi, Maria Vittoria La Rosa and Gabriella Ungaro</i>	
Chapter 14	LUXEMBOURG	183
	<i>Benjamin Marthoz</i>	
Chapter 15	MALTA	201
	<i>Adrian Delia and Matthew Paris</i>	
Chapter 16	MEXICO	212
	<i>Javier Arreola E and Vanessa Franyutti J</i>	
Chapter 17	PORTUGAL.....	225
	<i>Paulo Pinheiro, Rodrigo Esteves de Oliveira, Catarina Pinto Correia and Ana Marta Castro</i>	
Chapter 18	ROMANIA.....	238
	<i>Oana Gavrilă and Mariana Sturza</i>	
Chapter 19	RUSSIA.....	250
	<i>Olga Revzina and Lola Shamirzayeva</i>	
Chapter 20	SOUTH AFRICA.....	261
	<i>Andrew Molver and Michael Gwala</i>	
Chapter 21	SPAIN.....	277
	<i>Raquel Ballesteros</i>	

Chapter 22	SWEDEN290 <i>Ulf Djurberg and Natali Phalén</i>
Chapter 23	SWITZERLAND301 <i>Astrid Waser, Marcel Meinhardt</i>
Chapter 24	TAIWAN312 <i>Pauline Wang and Claire C Lin</i>
Chapter 25	TURKEY326 <i>Okan Gündüz and Burçak Ünsal</i>
Chapter 26	UNITED KINGDOM.....337 <i>Amy Gatenby, Bill Gilliam and Clare Dwyer</i>
Chapter 27	UNITED STATES352 <i>David S Gallacher</i>
Appendix 1	ABOUT THE AUTHORS.....369
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS ...387

EDITORS' PREFACE

We are delighted to introduce this, the third edition of *The Government Procurement Review*. It brings even wider geographic coverage than the second edition, now covering six continents and 27 national chapters (including the EU chapter).

The political and economic significance of government procurement is plain. Government contracts are of considerable value and importance, often accounting for 10 to 20 per cent of GDP in any given state. Government spending is often high-profile and has the capacity to shape the future lives of local residents.

Even as the economic climate improves, it is perhaps no surprise that, with austerity the watchword throughout the developed economies, governments seek to demonstrate more effective, better-value purchasing; nor that many suppliers view government contracts as a much-needed revenue stream offering relative certainty that they will be paid. A concern to simplify procurement procedures and increase opportunities for small and medium-sized enterprises is also prevalent, particularly in the EU.

The World Trade Organization's revised Agreement on Government Procurement (GPA) now covers the 28 EU Member States, Armenia, Canada, Hong Kong (China), Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, Chinese Taipei and the United States. Montenegro and New Zealand were invited to accede to the GPA on 29 October 2014. Eight other states have started the process of acceding (Albania, China, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman and Ukraine).

In last year's preface, we mentioned potential new, protectionist clouds on the procurement horizon with the European Parliament having approved measures that would prevent firms from bidding for larger public contracts unless their home country allows reciprocal access to EU firms. While the European Parliament viewed these measures as encouraging third countries to reciprocate in opening markets, some (including the International Chamber of Commerce) feared it would have the opposite effect, provoking trade wars. It seems, for the moment at least, that these proposals are not proceeding, which in the authors' view is to be welcomed.

Regardless of these possible difficulties, we expect that the principles of transparency, value for money and objectivity enshrined in the UNCITRAL Model Law on Public Procurement and in the national legislation of many states will continue gradually to have a positive effect.

The biggest single development internationally in the period since the second edition is undoubtedly the adoption of new EU directives and progress towards the required national implementation, Member State by Member State. The New Directives cover, respectively, mainstream public sector and utilities procurement (replacing the 2004 directives) and concessions, an area previously only partly covered by the EU regime. The new directives have been described as effecting evolution rather than revolution, but cynics, pointing to the lengthening of the directives and the addition of new procedures, query whether the originally stated aims of simplification and 'flexibilisation' (a word that could only have been invented in Brussels!) have really been achieved.

At the time of writing, only the United Kingdom has implemented the mainstream directive, with the deadline for transposition being 18 April 2016.

Incidentally, when reading chapters regarding European Union Member States, it is worth remembering that the underlying rules are set in the directives at EU level. Readers may find it helpful to refer to both the European Union chapter and the relevant national chapter, to gain a fuller understanding of the relevant issues. As far as possible, the authors have sought to avoid duplication between the EU chapter and national chapters.

Some national authors have reported significant increases in challenges to contract award decisions, and this is certainly the experience in the United Kingdom. While it is clear that there are considerable variations between jurisdictions in the willingness or ability of suppliers to challenge, it seems to us that the increased risk of challenge can help hold awarding authorities to account and is likely to encourage greater compliance with national procurement rules. It may be that, in jurisdictions where bringing procurement challenges is either difficult or expensive, further measures are needed to amplify this effect.

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to this third edition as well as the tireless work of the publishers in ensuring that a quality product is brought to your bookshelves in a timely fashion. We hope you will agree that it is even better than previous editions, and we trust you will find it to be a valued resource.

Jonathan Davey and Amy Gatenby

Addleshaw Goddard LLP

London

May 2015

Chapter 20

SOUTH AFRICA

Andrew Molver and Michael Gwala¹

I INTRODUCTION

The law regulating government procurement in South Africa has been developed predominantly since its transition into a constitutional democracy, albeit that certain remnants of the previously existing common law have remained. Government procurement is dealt with specifically in Section 217 of the Constitution, which requires organs of state in the national, provincial and local spheres of government, and any other institution identified in national legislation, to contract for goods or services ‘in accordance with a system which is fair, equitable, transparent, competitive and cost-effective’.² The entire legislative framework regulating government procurement in South Africa is based upon these five foundational principles, which are echoed in various further pieces of legislation, most notably the Public Finance Management Act³ (PFMA) and the Local Government: Municipal Finance Management Act⁴ (MFMA).

A further hallmark of government procurement law under South Africa’s constitutional dispensation lies in the constitutional imperative of public procurement being employed as a means of addressing discriminatory policies and practices under the public procurement system of the previous dispensation. The Constitution specifically indicates that the above-mentioned five foundational principles of public procurement do not prevent organs of state or other institutions from implementing procurement policies that provide for ‘categories of preference in the allocation of contracts’ and ‘the protection or advancement of persons, or categories of persons, disadvantaged by unfair

1 Andrew Molver and Michael Gwala are partners at Adams & Adams.

2 Section 217(1) of the Constitution of the Republic of South Africa of 1996.

3 Act 1 of 1999.

4 Act 56 of 2003.

discrimination'.⁵ In fact, the Constitution makes provision for the enactment of national legislation to prescribe a framework within which the policy of preferential procurement must be implemented.⁶

The Preferential Procurement Policy Framework Act⁷ (PPPFA) prescribes the framework within which these preferential procurement policies may be implemented. In terms of the PPPFA, an organ of state must determine its preferential procurement policy and implement it within the framework established by that Act. This framework prescribes that preference points may be allocated for specific goals, such as contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability. Aside from limited exceptions (which are touched on below), all government procurement in South Africa takes place within this framework.

A further key piece of legislation is the Broad-Based Black Economic Empowerment Act⁸ (the B-BBEE Act), which empowers the Minister of Trade and Industry to issue codes of good practice on black economic empowerment that may include, *inter alia*, 'qualification criteria for preferential purposes for procurement and other economic activities'. The B-BBEE Act requires every organ of state and public entity, as defined therein, to apply any relevant code of good practice issued in terms of the B-BBEE Act in developing and implementing a preferential procurement policy.⁹ It is these codes that determine the B-BBEE status of any procuring entity and, hence, that determine the preference points allocated to any bidder in terms of the preferential procurement framework.

Lastly, the Promotion of Administrative Justice Act¹⁰ (PAJA) provides for the judicial review of 'administrative action', which includes almost all government procurement decisions, and sets out both the codified grounds of review and established remedies. Those procurement decisions falling outside the ambit of the PAJA may be reviewed in terms of the constitutional principle of legality, which constitutes a component of the rule of law.

South Africa is not a member of the European Union and the European Union directives therefore do not apply to government procurement within the South African context. South Africa is a founding member of the World Trade Organization but is neither a party nor an observer to the Agreement on Government Procurement.

II YEAR IN REVIEW

The period under review has witnessed fundamental developments in both the legislation and jurisprudence regulating government procurement in South Africa.

5 Section 217(2) of the Constitution of the Republic of South Africa of 1996.

6 Section 217(3) of the Constitution of the Republic of South Africa of 1996.

7 Act 5 of 2000.

8 Act 53 of 2003.

9 Section 10(1)(b) of the Local Government: Municipal Finance Management Act 53 of 2003.

10 Act 3 of 2000.

New draft Treasury Regulations have been published by the National Treasury; these are more comprehensive than the Regulations presently in force and aim to deal with issues that the current Regulations do not expressly deal with, such as that concerning unsolicited bids.

On 19 December 2014, the President assented to the Public Administration Management Act¹¹ (PAMA), the commencement date of which has still to be proclaimed. The PAMA will prohibit all state employees at all levels of government from doing business with the state.¹² The prohibition will apply to all employees in their personal capacities as well as to companies in which such employees are directors. A contravention of this prohibition will constitute a criminal offence and may lead to a termination of employment. Furthermore, state employees will be obligated to disclose their financial interests as well as the interests of their spouse or 'a person living with that person as if they were married to each other'.¹³

New B-BBEE codes of good practice (the codes) have been issued and the amendment of the B-BBEE Act has introduced a number of new measures, including those to: establish a B-BBEE Commission to play an oversight and advocacy role with regard to B-BBEE and to investigate complaints relating to B-BBEE, B-BBEE transactions and 'fronting practices'; introduce various criminal offences for misrepresentation or providing false information regarding a firm's B-BBEE status or engaging in 'fronting practices'; introduce a statutory right for government and public entities to cancel any contract or 'authorisation' awarded because of false information on B-BBEE status; impose an absolute obligation on government and public entities to take the codes into account in their procurement policies and in issuing licences and authorisations; and to impose an obligation on South African listed entities to provide a report to the B-BBEE Commission on their compliance with B-BBEE.¹⁴

The judgment of the Constitutional Court (the highest court on constitutional matters) in the matter of *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v. Chief Executive Officer, South African Social Security Agency and Others*¹⁵ gave certainty to a long line of conflicting judgments regarding the effect of non-compliance with express tender requirements on the validity of a bid or tender process. The Court reiterated that the assessment of the materiality of compliance with the legal requirements of any procurement process is no longer encumbered with excessive formality, as was previously the case. Instead, the materiality of any deviance from legal requirements involves a simple assessment of whether, despite the irregularity, there was compliance with the statutory provisions viewed in light of their purpose. This has ushered in a non-formalistic and purposive approach to the assessment of procurement irregularities – provided the

11 Act 11 of 2014.

12 Section 8 of the Public Administrative Management Act 11 of 2014.

13 Section 9 of the Public Administrative Management Act 11 of 2014.

14 A contravention may result in a fine or up to 10 years' imprisonment for individuals and the firm may be fined up to 10 per cent of its annual turnover and be banned from contracting with government and public entities for 10 years.

15 2014 (1) SA 604 (CC).

purpose of any statutory provision has been substantially achieved without causing any prejudice, any non-compliance will neither be material nor fatal to the validity of the process.

In its subsequent remedial judgment in the *AllPay* matter, following the court's prior finding that the award of the tender was constitutionally invalid, the Constitutional Court affirmed the 'default position' to be that the consequence of constitutional invalidity is for the conduct to be corrected or reversed. However, the court emphasised the multidimensional aspects of its 'just and equitable' remedial discretion under the PAJA in the context of procurement disputes, and noted that an appropriate remedy will not necessarily lie in a simple choice between setting the contract aside or maintaining it. The Court thus suspended the declaration of invalidity of the contract pending a re-run of the tender process within a framework set by the Court, which had the effect that the contract concluded pursuant to the unlawful tender process remained in force.¹⁶

Previously, the State Tender Board governed procurement at the national and provincial levels, while various provincial ordinances were in place to govern the procurement of goods and services at local government level. Under the above-mentioned legislative framework, however, the impetus was towards a decentralisation of procurement powers and functions, with all organs of state within all spheres of government, as well as other accountable institutions, having their own supply chain management policies and units in place, and for their respective accounting officers to be responsible and accountable for procurement-related functions. A spate of procurement irregularities resulting in a crisis of fruitless and wasteful expenditure has caused the South African government to reconsider this approach. Recent policy developments have, therefore, been aimed towards the re-centralisation of government tenders through, *inter alia*, increased oversight by the National Treasury, the establishment of the Office of the Chief Procurement Officer, the creation of a central supplier database and a centrally controlled, electronic tender portal.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

Section 217(1) of the Constitution imposes the five foundational principles of public procurement on all organs of state in the national, provincial or local spheres of government, or any other institution identified in national legislation. Section 239 of the Constitution further defines an organ of state as any department of state or administration in the national, provincial or local sphere of government, or any other functionary or institution that exercises a power or performs a function in terms of the Constitution, a provincial constitution or any legislation.

Not all institutions that are subject to the procurement provisions of the Constitution are bound by the PFMA and the PPPFA. The PFMA only applies to those national public entities that are not only established in terms of legislation, but that

16 *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v. Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC).

are also fully or substantially funded by way of a levy imposed in terms of national legislation, and accountable to Parliament.¹⁷ Similarly, the PPPFA only applies to those institutions falling within the ambit of Section 239 of the Constitution that are also recognised by the Minister of Finance through notice to also be subject to the provisions of the PPPFA.¹⁸ Universities are a type of institution typically falling outside the reach of the PFMA and PPPFA.

For procurement decisions to be subject to review under the PAJA, they must be taken in the exercise of a public power or the performance of a public function.¹⁹ In this respect, our courts have recently found that the procurement by a public body that is 'domestic in nature' (i.e., not directed towards the exercise of a public power or fulfilment of a public function) does not constitute administrative action that can be reviewed under the PAJA.²⁰

ii Regulated contracts

Generally, the five foundational principles of South African public procurement law would demand that the procuring authority advertises and holds a competitive bidding procedure. If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids are recorded and approved by the accounting officer or accounting authority.²¹ Within the local government context an accounting officer may deviate from the supply chain management policy if there is an emergency,²² if the goods or services are produced or available from a single provider only²³ or if the acquisition is of special works of art or historical objects where specifications are difficult to compile,²⁴ if the acquisition is of animals for zoos²⁵ and in any other case where it is impractical or impossible to follow the official procurement processes.²⁶

The threshold value of contracts is also used to determine the appropriate type of procurement procedure. At national or provincial government level, the following thresholds apply: for contracts up to 2,000 rand contracting authorities may procure by means of petty cash (no quotation or competitive bidding); for contracts above 2,000 rand but not more than 10,000 rand, verbal or written quotations may be obtained; and for contracts above 10,000 rand but not more than 500,000 rand, written

17 Section 1(19) of the Public Finance Management Act 1 of 1999.

18 Section 1 of the Preferential Procurement Policy Framework Act 5 of 2000.

19 Section 1 of the Promotion of Administrative Justice Act 3 of 2000.

20 *Eden Security Services CC v. Cape Peninsula University of Technology*, unreported, referred to as [2014] ZAWCHC 148, 8 September 2014.

21 Regulation 16A.6.4 of the Treasury Regulations of 2005.

22 Regulation 36(1)(a)(i) of the Municipal Supply Chain Management Regulations of 2005.

23 Regulation 36(1)(a)(ii) of the Municipal Supply Chain Management Regulations of 2005.

24 Regulation 36(1)(a)(iii) of the Municipal Supply Chain Management Regulations of 2005.

25 Regulation 36(1)(a)(iv) of the Municipal Supply Chain Management Regulations of 2005.

26 Regulation 36(1)(a)(v) of the Municipal Supply Chain Management Regulations of 2005.

price quotations should be obtained. All contracts above 500,000 rand are subject to a competitive bidding process.²⁷ At municipal level, the same thresholds generally apply, except that written price quotations should be obtained for contracts above 10,000 rand and up to 200,000 rand, and above this value competitive bidding must be used.²⁸

Because of the competitive process followed in public procurement, contracting parties may not conclude a contract that is materially different from that specified in the initial call for bids. This means that no material amendments are permissible. Further, transferring an existing contract to another supplier or provider without a new procurement procedure is generally not allowed. There may, however, be instances where contracts transfer by operation of law (such as the sale of a business as a going concern), in which case the contracting authority's consent may still be necessary. Certain contracts with contracting authorities allow for transfer under specific circumstances.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Accounting officers or accounting authorities of organs of state subject to the PFMA may opt to participate in transversal term contracts facilitated by the relevant treasury, in which event the accounting officer or accounting authority may not solicit bids for the same or similar product or service during the tenure of the transversal term contract.²⁹ The accounting officer or accounting authority may also, on behalf of the department, constitutional institution or public entity, participate in any contract arranged by means of a competitive bidding process by any other organ of state, subject to the written approval of the organ of state and the relevant contractor.³⁰

A municipality may procure goods or services under a contract secured by another organ of state. This is, however, subject to: the initial procurement having been done by tender process; there being no reason to believe this was not validly procured; there being demonstrable benefits or discounts as a consequence; and, lastly, there being written approval from the other organ of state and the provider of the goods or services.³¹

In appropriate circumstances framework agreements are permitted, provided that there must first be a public tender process through which the successful bidders with whom the framework agreement is concluded are selected. The award of a job-specific contract under a framework agreement does not, by law, require an additional competitive procedure. However, in practice, most contracting authorities require quotations from at least three of the suppliers with whom framework agreements have been concluded, while some contracting authorities use a rotation system.

27 National Treasury Practice Note No. 8 of 2007/2008.

28 Regulation 12(2)(a) of the Municipal Supply Chain Management Regulations of 2005.

29 Regulation 16.A6.5 of the Treasury Regulations of 2005.

30 Regulation 16A.6.6 of the Treasury Regulations of 2005.

31 Regulation 32(1) of the Municipal Supply Chain Management Regulations of 2005.

ii Joint ventures

Municipalities may choose to provide municipal services by entering into a service delivery agreement with a municipal entity, another municipality or a national or provincial organ of state.³² In such an instance, where the arrangement resembles a public-public partnership, the municipality is not required to comply with the usual procurement rules. Other instances where the ordinary prescripts of procurement law may potentially not apply will be where a contracting authority is contracting with its wholly-owned subsidiary (where that subsidiary is practically an extension of the contracting authority). Procurement from a joint venture in which a private party has a shareholding will generally require that a procurement process be followed, unless the appointment of the private joint venture partner (i.e., the acquisition of shares by the private party in the joint venture) occurred through a public procurement process and the contract between the joint venture and the contracting authority was specifically envisaged therein.

The setting up of a public-private partnership (PPP) always requires a procurement procedure. A PPP can only exist where the private party:

- a* performs an institutional function on behalf of the institution;³³
- b* acquires the use of state property for its own commercial purposes;³⁴
- c* assumes substantial financial, technical and operational risks in connection with the performance of the institutional function or use of state property;³⁵ and
- d* receives a benefit for performing the institutional function or from utilising the state property.³⁶

V THE BIDDING PROCESS

i Notice

As a general rule, bids must be advertised in at least the Government Tender Bulletin.³⁷ Organs of state must disclose up front the criteria that will be applied in the selection and evaluation process and bids may not be evaluated on undisclosed criteria.

According to the South African government, from April 2015 bids are no longer published in the Government Gazette but appear electronically on a centrally managed 'e-Bid' portal. The Finance Minister announced the centralisation of government bids during his budget speech on 25 February 2015, saying that from April 2015 all suppliers doing business with the government will have to register with a central supplier database. This database will interface with the South African Revenue Service, the Companies and Intellectual Property Commission, and the payroll system. The intention is for bid award notices also to be published electronically.

32 Section 80(1) of the Municipal Systems Act 32 of 2000.

33 Regulation 16.1(a) of the Treasury Regulations of 2005.

34 Regulation 16.1(b) of the Treasury Regulations of 2005.

35 Regulation 16.1(c) of the Treasury Regulations of 2005.

36 Regulation 16.1(d) of the Treasury Regulations of 2005.

37 Regulation 16.A6.3(b) of the Treasury Regulations of 2005.

ii Procedures

The type of procurement procedure to be used in each case is determined by the amount involved (see above section regarding regulated contracts). All procurement, either by way of quotations or through a bidding process, must be within the threshold values determined by the National Treasury. The accounting officer or accounting authority must ensure that bid documentation and the general conditions of a contract comply with the instructions of the National Treasury and must include evaluation and adjudication criteria, including the criteria prescribed in terms of the PPPFA.

Generally speaking, the process followed in competitive bids is by way of a committee system involving at least a bid specification committee, a bid evaluation committee and a bid adjudication committee.³⁸ The bid specification committee must compile the specifications for each procurement. The bid evaluation committee must evaluate bids in accordance with the specifications for a specific procurement and the points system as set out in the supply chain management policy of the procuring entity and as prescribed in terms of the PPPFA.³⁹ Lastly, the bid adjudication committee must consider the report and recommendations of the bid evaluation committee, and either, depending on its delegations, make a final award or a recommendation to the accounting officer to make a final award, or make another recommendation to the accounting officer on how to proceed with the relevant procurement.⁴⁰

iii Amending bids

As a general rule, changes to the bid specifications after a call for bids have been advertised, to allow bidders to amend or withdraw their bids after submission has the potential to defeat the requirements of fairness and transparency and it is, therefore, generally not allowed. Notwithstanding the purposive approach recently introduced by the Constitutional Court, it has subsequently been confirmed that bidders cannot validate defective bids by submitting mandatory documentation after the close of the tender.⁴¹

VI ELIGIBILITY

i Qualification to bid

A bidder may not be awarded a tender if:

- a* the bidder or its directors are listed as a company or persons prohibited from doing business with the public sector;
- b* the bidder fails to provide written proof from the South African Revenue Service that it has no outstanding tax obligations or has made arrangements to meet outstanding tax obligations;

38 Regulation 16A6.2 of the Treasury Regulations of 2005, and Regulation 26(1)(a) of the Municipal Supply Chain Management Regulations of 2005.

39 Regulation 28(1)(a)(ii) of the Municipal Supply Chain Management Regulations of 2005.

40 Regulation 29(1)(b)(ii) of the Municipal Supply Chain Management Regulations of 2005.

41 *Rodpaul Construction CC v. Ethekwini Municipality* 2014 JDR 1122 (KZD).

- c* the bidder has committed a corrupt or fraudulent act in competing for the particular contract;
- d* the bidder has abused the institution's supply chain management system; and
- e* the bidder failed to perform on any previous contract.⁴²

Before a bid is assessed on its merits, it will be checked whether or not it is 'responsive' in the sense that it includes all requisite information and documentation. Non-responsive bids are usually, in terms of the relevant bid documentation, disqualified and not considered any further.

ii Conflicts of interest

Employees in the public sector may not perform remunerative work outside their employment except with the written permission of the executive authority of the relevant department.⁴³ The members of contracting authorities are also prohibited from holding private interests in contracts with that contracting authority.⁴⁴ The PFMA requires supply chain management officials and other role players to 'recognise and disclose any conflict of interest that may arise'.⁴⁵ In all tender processes, a bidder is required to complete and submit a declaration of interest form in which it is required to declare any relationship it may have with any employee of the state. Failure to submit this form generally results in disqualification.

As stated previously (see Section II), the PAMA will prohibit all state employees at all levels of government from doing business with the state. The PAMA will supersede and homogenise the legislation and regulations presently in place in respect of conflicts of interest.

The Prevention and Combating of Corrupt Activities Act states that any person who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person, as an inducement to award a tender, is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders.⁴⁶

In addition to the above-mentioned preventative measures, legislation also provides corrective measures that permit decisions to be reviewed and set aside where, for example, there has been bias, the decision was taken for an ulterior purpose or motive, or because of the unauthorised or unwarranted dictates of another person or body.⁴⁷

42 Regulations 16A.9.1 and 16A.9.2(a)(iii) of the Treasury Regulations of 2005, Regulation 38 of the Municipal Supply Chain Management Regulations of 2005.

43 Section 30(1) of the Public Service Act 103 of 1994.

44 Section 17(1) of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

45 Regulation 16A8.3 of the Treasury Regulations of 2005.

46 Section 13(1) of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

47 Section 6(2) of the Promotion of Administrative Justice Act 3 of 2000.

iii Foreign suppliers

There is nothing prohibiting foreign suppliers from bidding. However, they do not normally qualify for a B-BBEE status and lose out on the associated preference points allocated under the PPPFA. Foreign bidders may also struggle to meet minimum local content requirements where these apply.

VII AWARD

i Evaluating bids

All bid documentation must include the evaluation and adjudication criteria, including the criteria prescribed in terms of the PPPFA. Furthermore, an invitation to tender must indicate whether that tender will be evaluated on functionality and, in these scenarios, must also indicate the evaluation criteria for measuring functionality, the weight of each criterion, the applicable values and the minimum qualifying score for functionality.⁴⁸ Functionality, price and preference (i.e., in respect of B-BBEE status) should be weighted and assessed in the manner prescribed by the PPPFA and Preferential Procurement Regulations. In terms of this framework, for a tender to be regarded as an acceptable tender and be considered further it must achieve the minimum qualifying score for functionality as indicated in the tender invitation.⁴⁹ Only tenders that meet the minimum functionality threshold shall progress to evaluation in terms of price and preference.⁵⁰ At that stage, the tenders shall be assessed on the basis that, in contracts with a value of one million rand or less, price shall count for 80 points and preference shall count for 20 points and, in contracts with a value of more than one million rand, price shall count for 90 points and preference shall count for 10 points.⁵¹ Bid points are applied on the basis that the bidder with the lowest price will achieve 80 or 90 points for price, depending on the contract value, with the price scores of the remaining bidders being determined relative to that of the lowest-priced bid by employing the formula prescribed by the Preferential Procurement Regulations. The preference points, which are added to the points allocated in respect of price, are determined by having regard to each bidder's status in terms of the codes issued under the B-BBEE Act.

Unless objective criteria justify otherwise, the tender must be awarded to the bidder scoring the highest number of points.⁵² It follows that the functionality of any given bid serves only as a gatekeeping measure, while the award of the bid to the ultimately successful bidder will be determined on the basis of how that bidder, once having passed the functionality threshold, scored in terms of price and preference. A division of the High Court has recently found that the functionality of a particular bid, especially where this is significantly superior to that of the lowest-priced bid without being considerably

48 Regulation 4(1) of the Preferential Procurement Regulations of 2011.

49 Regulation 4(4) of the Preferential Procurement Regulations of 2011.

50 Regulation 4(5) of the Preferential Procurement Regulations of 2011.

51 Section 2(1)(b) of the Preferential Procurement Policy Framework Act 5 of 2000 and Regulation 6 of the Preferential Procurement Regulations of 2011.

52 Section 2(f) of the Preferential Procurement Policy Framework Act 5 of 2000.

more expensive, may constitute an objective criterion justifying the award of the tender to somebody other than the highest scoring bidder.⁵³ This approach is, however, yet to be endorsed by South Africa's highest courts.

Once a tender award has been made it must be published in the Government Tender Bulletin and other media by means of which the tender was advertised.⁵⁴

ii National interest and public policy considerations

As indicated above, preferential procurement policies have been used to promote substantive equality through the application of preferential treatment to designated groups when awarding government contracts.

In addition to this, the Department of Trade and Industry may designate particular sectors in line with national development and industrial policies for local production, where only locally produced services, works or goods or locally manufactured goods with a stipulated minimum threshold for local production and content will be considered in respect of government tenders.⁵⁵ Where there is no designated sector, a specific tendering condition may be included to the effect that only locally produced services, works or goods or locally manufactured goods with a stipulated minimum threshold for local production and content will be considered, on condition that the prescript and threshold are in accordance with specific directives issued for this purpose by the National Treasury in consultation with the Department of Trade and Industry.⁵⁶

There is no express prohibition that tender invitations may not specify that goods and services must have national quality marks. That being said, where it is necessary for a tender to specify a particular brand name or quality mark to clarify an otherwise incomplete tender specification, the tender must specifically indicate that an 'equivalent' product will be permitted.⁵⁷ For the most part South African law on government procurement does not provide for different rules for different sectors. Although the PFMA and MFMA regulate the financial management of national and provincial government and local government respectively, the principles and requirements underscoring both pieces of legislation is much the same. There are a few bodies and industries with their own specific procurement requirements, but these are by far the exception.

53 *Rainbow Civils CC v. Minister of Transport and Public Works, Western Cape and Others* (21158/2012) [2013] ZAWCHC 3 (6 February 2013).

54 Regulation 16A.3(b) of the Treasury Regulations of 2005.

55 Regulation 9(1) of the Preferential Procurement Regulations of 2011.

56 Regulation 9(3) of the Preferential Procurement Regulations of 2011.

57 Paragraph 3.4.2 of the National Treasury's Supply Chain Management Guide for Accounting Offices/Authorities of 2005. In the matter of *Searle and Others v. Road Accident Fund and Others* 2014 (4) SA 148 ASP it was held that the NT Guide forms part of what the Constitutional Court in *AllPay* described as the 'constitutional and legislative procurement framework', which contains supply chain management prescripts that are legally binding. It was accordingly held that the NT Guide is legally binding and not merely an internal prescript that may be disregarded at a whim.

VIII INFORMATION FLOW

Authorities must provide clear notification of the intended procurement, including the applicable process, methodology and criteria. Naturally, all bidders are entitled to the same measure of information, failing which the fairness and equity of the bidding process would be compromised.

It is a trite principle of South African administrative law in general that all interested parties are required to be notified of administrative decisions. The implication of this is that bidders are entitled to be notified of the outcome of their bids, irrespective of whether these are successful or not. Furthermore, bidders are also entitled to be provided with notification of the award of the tender, which must be provided within a sufficiently reasonable time to enable aggrieved bidders to challenge the procurement decision should they so desire.⁵⁸ Where a procurement decision constitutes administrative action as defined in the PAJA (which is usually the case), the decision maker is also enjoined to provide adequate notice of any right of review or internal appeal available to interested parties, together with adequate notice of the right of such parties to request reasons for the decision.⁵⁹

The above position is entrenched by Section 32(1) of the Constitution, which grants everybody the right of access to any information held by the state. The Promotion of Access to Information Act⁶⁰ (PAIA), which was enacted to give effect to this constitutional right, permits any person to request any information held by the state, which the state is enjoined to provide, subject to there being no grounds for refusal. Within the procurement context, this normally results in bidders being entitled to the procurement file after the tender decision has been made, with certain confidential information belonging to other bidders being withheld.

The PAIA may not be relied upon following the commencement of judicial proceedings to challenge a procurement award. In that context, however, the procuring authority is obligated in terms of the rules of court to make the complete 'record' of the procurement decision (which includes all information received and generated by it in that regard) available to the applicant, which is then entitled to rely upon this in supplementing its case. Under pending judicial proceedings confidentiality is not a bar to the disclosure of the documentation (in those circumstances only privilege would allow this), and where there is information of a commercially sensitive nature the record can be provided to the parties under certain confidentiality constraints, although that is not the norm.⁶¹

58 Regulation 16A 6.3(d) of the Treasury Regulations of 2005.

59 Sections 3(2)(b)(iv) and 3(2)(b)(v) of the Promotion of Administrative Justice Act 3 of 2000.

60 Act 2 of 2000.

61 Rule 53(1)(b) of the Uniform Rules of Court issued under the Supreme Court Act 59 of 1959, as amended.

IX CHALLENGING AWARDS

Public procurement expenditure accounts for a particularly high portion of South Africa's GDP. With recent economic growth being relatively slow, there has been a notable increase in competition for government contracts. A high level of irregularity and corruption within the government procurement context has resulted in challenges of procurement awards becoming quite commonplace.

Thus far the South African judicial system has been notably robust in granting appropriate remedies where justified, with many tender awards being reviewed and set aside on an annual basis. Generally speaking, judicial review proceedings would take in the region of six months to one year to finalise, albeit that they can be conducted more quickly (where expedited time periods are agreed to) or over longer periods (where complexities and interlocutory issues arise). The institution of judicial review proceedings does not automatically suspend the implementation of the tender, and it is therefore in an aggrieved bidder's interests to interrupt the implementation of the tender, either by agreement or urgent interdictory application, pending the outcome of the judicial review proceedings.

i Procedures

The overwhelming majority of procurement awards constitute administrative action, as defined in the PAJA. For this reason, the procedure ordinarily applicable for challenging procurement decisions is as prescribed in the PAJA. In consequence thereof, prior to instituting judicial review proceedings it is required that an applicant first exhausts any internal remedy provided for under any other law.⁶²

Any proceedings for judicial review must be instituted 'without unreasonable delay and not later than 180 days' after the date on which any proceedings instituted in terms of internal remedies are completed or, where no such remedies exist, from the date on which the person concerned was informed of the decision, became aware of the decision and the reasons for it or might reasonably have been expected to have become aware of the decision and the reasons.⁶³ Our courts have found that the requirement that judicial review proceedings be instituted 'without unreasonable delay' is independent from that requiring such proceedings to be instituted within 180 days of the exhaustion of internal remedies or of having become aware of the decision and reasons for it.⁶⁴ Judicial review applications can therefore be dismissed on account of an unreasonable delay, notwithstanding the proceedings having been initiated within the prescribed 180-day period. Aggrieved bidders must therefore act with the utmost expediency when seeking to challenge procurement awards.

62 Section 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000.

63 Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000.

64 *City of Cape Town v. South African National Roads Agency Ltd and Others* (6165/2012) [2013] ZAWCHC 74.

The PAJA allows ‘any person’ to institute proceedings to review administrative action.⁶⁵ It is accepted that any such an applicant would still need to satisfy the court of its interests in relation to the matter, to enjoy *locus standi*.

In the limited instances where government procurement does not constitute administrative action, and it is reviewed on the constitutional principle of legality, the common law would apply. Although it does not have the same crisp requirements as regards the procedure for instituting review applications, it is advisable to try and adhere to the aforementioned principles applicable to the review of procurement decisions constituting administrative action.

ii Grounds for challenge

In short, procurement decisions may be challenged on both procedural and substantive grounds. The PAJA enumerates various grounds of review that include: lack of authority; bias; non-compliance with a mandatory and material procedure or condition; procedural unfairness; material influence by an error of law; ulterior purpose or motive; consideration of irrelevant considerations or failure to take relevant considerations into account; unauthorised or unwarranted influence; arbitrariness or capriciousness; unlawfulness; irrationality; failure to take a decision and unreasonableness.⁶⁶

Although the grounds of review provided for under the PAJA are not specifically available for reviews brought in terms of the principle of legality, the latter is rapidly developing as a parallel body of law, based upon the rule of law, and encompasses general substantive grounds of review (such as lawfulness and rationality), while those of a procedural nature are being developed by our Constitutional Court at a strong pace.

iii Remedies

South African courts are empowered in terms of PAJA to ‘grant any order that is just and equitable’, which would include giving orders:

- a* directing the procuring authority to give reasons or act in the manner the court requires;
- b* prohibiting the procuring authority from acting in a particular manner;
- c* setting aside the procurement decision and remitting this for reconsideration or, in exceptional cases, substituting the procurement decision or correcting a defect resulting from it;
- d* in exceptional circumstances, directing the procuring authority to pay compensation;
- e* declaring the rights of parties relating to the procurement decision; or
- f* granting a temporary interdict or other temporary relief.

Not only do courts have discretion as regards the aforesaid remedies, but they are also constitutionally obligated to declare that any law or conduct that is inconsistent with

65 Section 6(1) of the Promotion of Administrative Justice Act 3 of 2000.

66 Section 6 (2) of the Promotion of Administrative Justice Act 3 of 2000.

the Constitution is invalid to the extent of such an inconsistency.⁶⁷ That being said, in exercising its just and equitable jurisdiction, courts may either limit the retrospective effect of the declaration of invalidity or suspend the declaration of invalidity for any period and on any conditions. As indicated above, in the recent matter of *AllPay*, the Constitutional Court, despite finding a procurement process to have been constitutionally invalid, suspended the effect of the invalidity pending the outcome of a new tender – albeit that it has required the successful bidder to account for its profits upon the conclusion of the tender (ostensibly in light of the fact that no bidder may profit from an unlawful procurement contract).⁶⁸

Ordinarily, aggrieved bidders are not entitled to claim damages arising from breaches of procurement law, and must therefore act with haste to secure meaningful relief in relation to the tender itself. This would include either setting aside the tender decision for re-adjudication, obtaining an order of substitution in respect of the award of the tender or alternatively obtaining an order directing the commencement of a new tender process, where the initial process or formulation of the tender documentation was flawed. A bidder is, however, entitled to recover damages where it can show that it would have been awarded the tender but for fraud or dishonesty on the part of the procuring authority. In the case of otherwise unlawful tender decisions, compensation can be awarded for out-of-pocket expenses, with interest.⁶⁹

Although not subject to fines, bidders in breach of procurement procedures will be listed on the National Treasury's tender defaulters' register, in terms of which they will be precluded from being awarded procurement contracts for as long as they remain on the register (which can be for between five and 10 years). Officers of the procuring authority who are in contravention of procurement laws will incur liability and sanctions in terms of the governing legislation.⁷⁰

X OUTLOOK

A draft Supply Chain Management Bill is currently being prepared by the National Treasury. Among other things, it will fully establish the Office of the Chief Procurement Officer (OCPO), whose mandate will be to modernise and oversee the South African public sector procurement system to ensure that the procurement of goods, services and construction works uphold the five foundational principles of public procurement and all relevant legislation. The OCPO will not be directly involved in procurement, but will lead and manage procurement reform, maintain the procurement system and oversee the

67 Section 172(1) of the Constitution of the Republic of South Africa of 1996.

68 *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v. Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC).

69 *Darson Construction (Pty) Ltd v. City of Cape Town* 2007 (4) SA 488 (C).

70 Public Finance Management Act 1 of 1999 and Local Government: Municipal Finance Management Act 56 of 2003.

way in which government does business with the private sector.⁷¹ This is in line with the policy shift towards increased and centralised control of government procurement, and we expect to see further developments of this nature in the future.

71 www.treasury.gov.za/publications/other/SCMR%20REPORT%202015.pdf, page 8 (last accessed 30 March 2015).

Appendix 1

ABOUT THE AUTHORS

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Adams & Adams

Andrew Molver, a partner at Adams & Adams, is a litigation specialist with particular expertise in public procurement and administrative law. As a founding member of the firm's public procurement law group, a large part of his practice involves the judicial review or enforcement of tender awards, in respect of which he has handled various high-profile and high-value matters both for and against organs of state and other public bodies. Andrew also advises several private sector clients and public authorities on a range of procurement-related issues within multiple industry sectors.

In addition to his public procurement related work, Andrew's administrative law experience extends across several practice areas, including education, health insurance, property rights, licensing and registration, local government and general regulatory work.

He also advises and litigates on constitutional matters, in which respect he currently represents a prominent constitutional institution in various ongoing matters concerning the enforcement and interpretation of its powers.

MICHAEL GWALA

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Michael Gwala is a partner specialising in public law, including public procurement law, and is a founding member of the public procurement law group at Adams & Adams.

He regularly acts as a public procurement transaction adviser for government departments and entities and has been involved in a number of large procurement transactions.

Michael has a corporate and commercial law background, having worked as a commercial lawyer for some time, including working in the mergers and acquisitions department of one of the magic circle law firms in New York State.

In addition to practising as an attorney in South Africa, Michael is also admitted to practise as an attorney and counsellor-at-law in the state of New York.

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