

THE GOVERNMENT  
PROCUREMENT  
REVIEW

FIFTH EDITION

**Editors**

Jonathan Davey and Amy Gatenby

THE LAWREVIEWS

THE GOVERNMENT PROCUREMENT  
LAW REVIEW

The Government Procurement Law Review  
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# CONTENTS

PREFACE.....	v
<i>Jonathan Davey and Amy Gatenby</i>	
Chapter 1	ARGENTINA..... 1
<i>Juan Antonio Stupenengo and Paula Omodeo</i>	
Chapter 2	AUSTRALIA..... 12
<i>Geoff Wood and Anne Petterd</i>	
Chapter 3	AUSTRIA..... 24
<i>Philipp J Marboe</i>	
Chapter 4	BELGIUM ..... 35
<i>Frank Judo, Dirk Lindemans, Aurélien Vandeburie, Stijn Maeyaert and Kenan Schatten</i>	
Chapter 5	BRAZIL..... 48
<i>Michele Lyra da Cunha Tostes, Filipe Scherer Oliveira, Julia Batistella Machado and Victor Aguiar Jacuru</i>	
Chapter 6	CANADA..... 58
<i>Theo Ling, Daniel Logan and Jonathan Tam</i>	
Chapter 7	CHILE..... 72
<i>José Luis Lara and Antonia Schneider</i>	
Chapter 8	EUROPEAN UNION ..... 83
<i>Clare Dwyer, Michael Rainey and Kina Sinclair</i>	
Chapter 9	FINLAND..... 96
<i>Anna Kuusniemi-Laine, Johanna Lähde, Laura Nordenstreng-Sarkamo and Marjut Kaariste</i>	
Chapter 10	FRANCE..... 108
<i>Vincent Brenot and Emmanuelle Mignon</i>	



## Contents

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Chapter 11	GERMANY.....	121
	<i>Olaf Otting, Udo H Olgemöller and Christoph Zinger</i>	
Chapter 12	GHANA.....	132
	<i>Divine Kwaku Duwose Letsa and Elizabeth Ashun</i>	
Chapter 13	INDIA.....	148
	<i>Sunil Seth and Vasanth Rajasekaran</i>	
Chapter 14	ITALY.....	158
	<i>Filippo Pacciani and Luca Morichetti Franchi</i>	
Chapter 15	MEXICO.....	170
	<i>Javier Arreola E and Vanessa Franyutti J</i>	
Chapter 16	NETHERLANDS.....	181
	<i>Bregje Korthals Altes and Mathieu Schimmel</i>	
Chapter 17	PORTUGAL.....	188
	<i>Paulo Pinheiro, Rodrigo Esteves de Oliveira, Catarina Pinto Correia and Ana Marta Castro</i>	
Chapter 18	RUSSIA.....	200
	<i>Olga Revzina, Lola Shamirzayeva and Olga Vasilyeva</i>	
Chapter 19	SOUTH AFRICA.....	212
	<i>Andrew Molver and Gavin Noeth</i>	
Chapter 20	SPAIN.....	229
	<i>Raquel Ballesteros</i>	
Chapter 21	UNITED KINGDOM.....	240
	<i>Amy Gatenby, Bill Gilliam and Louise Dobson</i>	
Appendix 1	ABOUT THE AUTHORS.....	255
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	273

# PREFACE

Welcome to the fifth edition of *The Government Procurement Review*.

We noted in last year's preface the potentially momentous nature of a UK vote in favour of 'Brexit' (the UK's vote to exit the European Union) though at the time a 'leave' vote seemed the less likely outcome. Indeed, the past year has been one of momentous political events in the US and Europe. And, while the UK has voted to leave the EU, elections in France and Germany this year, involving populist contenders, have the potential to force further reform and reshaping of the EU.

Brexit will have significant consequences for the laws of the UK, with 10 per cent of all UK secondary legislation being derived from the EU, and procurement law is no exception: while the status quo on exit will be maintained for a period after that exit takes effect, procurement law reform is already in the sights of the UK's Prime Minister and Chancellor of the Exchequer, with both having referred to procurement law as a focus post-Brexit, pointing to a balance between encouraging the UK supply chain while not propping up uncompetitive domestic industries. Given the fact that the UK will seemingly not be signing up to the single market, it remains to be seen what accommodation (if any) the UK will make with the EU on procurement law. However, it must be remembered that, even if the UK were instead to opt to sign up to the WTO's Government Procurement Agreement (GPA), much of what many EU lawyers might consider the basic nuts and bolts of EU procurement law are actually also enshrined in the GPA, examples being the obligations to run a transparent, impartial and non-discriminatory process.

Last year's preface also contemplated ratification of the Trans-Pacific Partnership (TPP), involving 12 nations (including the US) responsible in aggregate for 40 per cent of global economic output, but the US withdrawal from the agreement, announced in January, has left the remaining TPP partners struggling to keep it alive. President Trump has also signalled the end of TTIP, the proposed trade deal between the EU and the US.

Elsewhere in the world, changes continue apace. While EU Member States have been adopting new national laws to give effect to the 2014 EU Directives, legislative changes have been made or are pending in many other countries. Among these, Mexico is introducing major reforms, particularly on combating corruption, and Australia is making changes in anticipation of joining the GPA. Meanwhile in Brazil, another country rocked by political upheaval, the government has been unable to pursue its procurement objectives in full, while in South Africa public procurement has been used as a policy tool to address economic and socio-economic issues.

When reading the chapters regarding European Union Member States, it is worth remembering that the underlying EU rules are set out at EU level. Readers may accordingly find it helpful to read the EU chapter first and then to read the relevant country chapter so as to gain a comprehensive understanding of the issues.

Last but not least, we would like to take this opportunity to acknowledge the efforts of all of the contributors to this edition as well as the tireless work of the publishers in ensuring that this work is published in good order and to time. We hope that you will find this edition a useful resource that adds value to your business or organisation.

**Jonathan Davey and Amy Gatenby**

Addleshaw Goddard LLP

London

May 2017

# SOUTH AFRICA

*Andrew Molver and Gavin Noeth*<sup>1</sup>

## I INTRODUCTION

The law of government procurement in South Africa is informed primarily by 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’.<sup>2</sup> 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 Act<sup>3</sup> (PFMA) and the Local Government: Municipal Finance Management Act (MFMA).<sup>4</sup>

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 discrimination’.<sup>5</sup> 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.<sup>6</sup>

The Preferential Procurement Policy Framework Act<sup>7</sup> (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.

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1 Andrew Molver is a partner and Gavin Noeth is a senior consultant 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.

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.

A further key piece of legislation is the Broad-Based Black Economic Empowerment Act<sup>8</sup> (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.<sup>9</sup> 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 Act<sup>10</sup> (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

Recent policy developments have been aimed at placing greater reliance on public procurement as a tool for achieving economic transformation and addressing socio-economic imbalances deriving from South Africa’s pre-democratic past. In the year under review this was substantively given effect through the coming into effect of the new Preferential Procurement Regulations of 2017, which were issued into law on 20 January 2017, replacing the Preferential Procurement Regulations of 2011. The regulations aim to use public procurement as a lever to promote socio-economic transformation, empower small enterprises, rural and township enterprises and designated groups, and to promote local industrial development.<sup>11</sup>

The 2017 Preferential Procurement Regulations introduce a number of significant changes. Perhaps the most controversial is that the regulations purport to give government the power to apply ‘pre-qualification criteria to advance certain designated groups’ in awarding state tenders. Regulation 4 permits an organ of state to advertise any invitation to tender on condition that only a particular category of bidders may tender, which categories include those having a ‘stipulated minimum B-BBEE status level’, exempted micro enterprises (EMEs) and qualifying small business enterprises (QSEs) and bidders agreeing to subcontract a minimum of 30 per cent to various categories of EMEs or QSEs. By permitting organs of state to apply a pre-qualification criterion that requires all tenderers to have a minimum B-BBEE status level, the regulations appear to circumvent the limitations imposed by the PPPFA as to what weighting is to be attached to a tenderer’s B-BBEE status in evaluating and awarding a tender. Whereas under the PPPFA a maximum of 10 or 20 points out of 100 (depending on

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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.

11 Media statement issued on behalf of National Treasury, dated 23 January 2017: [www.treasury.gov.za/comm\\_media/press/2017/2017012301%20%20Media%20Statement%20revised%20PPR.pdf](http://www.treasury.gov.za/comm_media/press/2017/2017012301%20%20Media%20Statement%20revised%20PPR.pdf).

the value of the tender) can be allocated for B-BBEE status, the new regulations elevate the importance of B-BBEE status to the extent that it can entirely preclude certain bidders from tendering at all, irrespective of how functional and cost-effective such bidders might be. This contradicts the PPPFA's clear intention to promote price as the most determinative factor in awarding government tenders, with the matter of 'preference' playing a substantially smaller role. It is likely that a challenge will be brought to have this regulation declared *ultra vires* and invalid.

Other noteworthy changes introduced by the new Preferential Procurement Regulations include the following:

- a a change in the threshold of the evaluation of a bid on the basis of price and preference, whereby tenders are assessed on the basis that, in contracts with a value of equal to or above 30,000 rand and up to 50 million rand (the previous threshold was up to 1 million rand), price shall count for 80 points and preference shall count for 20 points (out of a total of 100 points) and in contracts with a value of more than 50 million rand, price shall count for 90 points and preference shall count for 10 points (previously above 1 million rand); and
- b organs of state are required to identify tenders, where it is feasible, in which the successful bidder must subcontract a minimum of 30 per cent of the contract value for contracts above 30 million rand to certain categories of qualifying entities.

The Department of Justice and Constitutional Development recently published a proposed Code of Good Administrative Conduct in terms of the Promotion of Administrative Justice Act (PAJA).<sup>12</sup> The Code is intended to provide guidance to administrators to ensure that the decisions they take are lawful, reasonable and procedurally fair. It also aims to help administrators comply with the requirement that reasons must, when requested, be given for decisions. The Code does not impose additional legal obligations on administrators than those imposed by the Constitution and PAJA, but is there to assist administrators to comply with their legal duties and, in doing so, improve their services. That being said, the draft Code indicates that administrators should follow the guidelines in the Code as closely as possible as departure from the guidelines could be an indication that the Constitution and the requirements of PAJA have not been complied with. The deadline for public comment on the Code was 17 February 2017 and publication of the final Code is now awaited.

The Department of Trade and Industry has also initiated a new 'Strategic Partnership Programme' (SPP)<sup>13</sup> to develop and support programmes or interventions aimed at enhancing the manufacturing and services supply capacity of suppliers with links to strategic partners' supply chains, industries or sectors. The objective of the SPP is to encourage large private-sector enterprises in partnership with government to support, nurture and develop small to medium-sized enterprises (SMEs) within the partner's supply chain or sector to be manufacturers of goods and suppliers of services in a sustainable manner and to support B-BBEE policy through encouraging businesses to strengthen the element of Enter and Supplier Development of the B-BEE Codes of Good Practice. The SPP will be available on a cost-sharing basis between government and the strategic partners for infrastructure and

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12 Promotion of Administrative Justice Act 3 of 2000.

13 [www.thedti.gov.za/editmedia.jsp](http://www.thedti.gov.za/editmedia.jsp) (last accessed 7 March 2017).

business development services necessary to mentor and grow enterprises. The grant will be capped at a maximum of 15 million rand per financial year over a three-year period based on the number of qualifying suppliers and is subject to the availability of funds.

In the matter of *State Information Technology Agency SOC Ltd v. Gijima Holdings (Pty) Ltd* the Supreme Court of Appeal held that where a state organ seeks to set aside its decision to award a tender under PAJA, it does not have the liberty of avoiding the 180-day time limit within which PAJA requires such reviews to be brought by instead bringing the review in terms of the broader constitutional principle of legality.<sup>14</sup> The Court held that where administrative action (which includes procurement decisions) is under review, the principle of legality should only 'act as a safety-net or a measure of last resort when the law allows no other avenues' to challenge the administrative action, and not as a 'first port of call or an alternative path to review, when PAJA applies'.<sup>15</sup> However, the question of whether a litigant has a choice of instituting a review application in terms of PAJA or legality was left open by the Constitutional Court in the recent case of *City of Cape Town v. Aurecon South Africa (Pty) Ltd*.<sup>16</sup> The Court did, however, emphasise that whether a litigant brings a review application under PAJA or in terms of the principle of legality, the application must still be brought within a reasonable time period.

### 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 spheres 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 and provincial public entities that are not only established in terms of legislation, but that are also fully or substantially funded by way of a levy imposed in terms of national legislation, and accountable to Parliament. 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.

The PFMA regulates procurement by national and provincial public entities through Regulations 16 and 16A of the Treasury Regulations of 2005 (the Treasury Regulations) issued in terms of the PFMA. Regulation 16 of the Treasury Regulations, which deals with public-private partnerships (PPPs), applies to all national and provincial departments and the national and provincial public entities listed in Schedule 3 to the PFMA,<sup>17</sup> while Regulation 16A, which deals with general supply chain management, only applies to the national public

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14 *State Information Technology Agency Soc Ltd v. Gijima Holdings (Pty) Ltd* [2016] ZASCA 143; [2016] 4 All SA 842 (SCA); 2017 (2) SA 63 (SCA) at para 16.

15 Id at para 38.

16 *City of Cape Town v. Aurecon South Africa (Pty) Ltd* [2017] ZACC 5.

17 Regulation 16.1 of the Treasury Regulations 2005.

entities listed in Part A of Schedule 3 of the PFMA and provincial public entities listed in Part C of Schedule 3 of the PFMA, thereby excluding national and provincial public business enterprises from these regulations.<sup>18</sup> Under Regulation 16A the procurement of goods and services as well as the disposal and letting of state assets, including the disposal of goods, is no longer required.<sup>19</sup> Even though certain public entities are not bound by these regulations, they are still bound by Section 217 of the Constitution.

The MFMA regulates procurement by municipal entities through the Municipal Public Private Partnership Regulations of April 2005 and the Municipal Supply Chain Management Regulations of May 2005, both issued in terms of Section 168 of the MFMA.

## 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. Where 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 a competitive bidding process are recorded and approved by the accounting officer or accounting authority.<sup>20</sup> Within the local government context, an accounting officer may deviate from the supply chain management policy if there is an emergency,<sup>21</sup> if the goods or services are produced or available from a single provider only,<sup>22</sup> or if the acquisition is of special works of art or historical objects where specifications are difficult to compile,<sup>23</sup> if the acquisition is of animals for zoos,<sup>24</sup> and in any other case where it is impractical or impossible to follow the official procurement processes.<sup>25</sup>

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 price quotations should be obtained. All contracts above 500,000 rand are subject to a competitive bidding process.<sup>26</sup> At the 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.<sup>27</sup>

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. Further, transferring an existing contract to another supplier or provider without a new procurement procedure is generally not allowed.

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18 Regulation 16A of the Treasury Regulations 2005.

19 Regulation 16A.3 of the Treasury Regulations 2005.

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

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

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

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

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

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

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

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



## IV SPECIAL CONTRACTUAL FORMS

### i Framework agreements and central purchasing

In the national and provincial spheres of government accounting officers or accounting authorities of organs of state 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.<sup>28</sup> 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.<sup>29</sup>

A municipality may procure goods or services under a contract secured by another organ of state. This is, however, subject to:

- a the initial procurement having been done by tender process;
- b there being no reason to believe this was not validly procured;
- c there being demonstrable benefits or discounts as a consequence; and
- d there being written approval from the other organ of state and the provider of the goods or services.<sup>30</sup>

The Finance Minister, in a meeting of the National Assembly in March 2016, noted that this practice is subject to 'misuse' and announced that the regulation is being scrutinised as part of the above-mentioned broader review process targeting the entire legislative framework for supply chain management. Guidelines to assist municipalities with the appropriate application of the regulation are expected to be finalised by July 2016.<sup>31</sup> To date no changes have been made to the regulation, nor have any such guidelines been published. However, the High Court in *Blue Nightingale Trading 397 (Pty) Ltd T/A Siyenza Group v. Amathole District Municipality*<sup>32</sup> provides the necessary guidance on the interpretation and application of Regulation 32(1) of the Municipal Supply Chain Management Regulations.

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.

National Treasury published the Standardised PPP Provisions as National Treasury PPP Practice Note Number 01 of 2004, which must be used in conjunction with the National Treasury PPP Manual issued as a series of National Treasury PPP Practice Notes in 2004.

Although the Standardised PPP Provisions provide standard terms, project-specific annexures dealing with a range of specifications, penalties, payments and other project-specific issues must be developed and included for each PPP agreement on a case-by-case basis.

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

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

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

31 [www.legalbrief.co.za/diary/legalbrief-today/policy-watch/legislation-municipal-procurement-abuse-to-be-tackled/#redir](http://www.legalbrief.co.za/diary/legalbrief-today/policy-watch/legislation-municipal-procurement-abuse-to-be-tackled/#redir) (last accessed 1 April 2016).

32 [2016] 1 All SA 721 (ELC); [2015] ZAECCLC 16 (ELC); [2016] JOL 35098 (ELC).

Standardised PPP provisions have not yet been developed for municipal PPPs. The Municipal Service Delivery and PPP Guidelines of 2007<sup>33</sup> require that such provisions be developed in accordance with the national and provincial Standardised PPP Provisions.<sup>34</sup>

## ii Joint ventures

PPPs have been dealt with above. PPPs are joint ventures between organs of state and the private sector. A PPP can only exist where the private party:<sup>35</sup>

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

PPPs on both a national and provincial level, as well as a municipal level, are procured by way of open tender.<sup>36</sup> 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.<sup>37</sup> In such 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.

## V THE BIDDING PROCESS

### i Notice

The processing of bids through the centrally managed eTender Publication portal became compulsory for national and provincial government entities with effect from 1 April 2016, and will become compulsory for municipalities from 1 July 2016.<sup>38</sup> In addition, bids must

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33 Paragraph 7 of Module 5. These guidelines were jointly issued by the Minister of Finance and the Minister for Provincial and Local Government pursuant to Section 168(1)(d) of the MFMA.

34 The writer of this section acted for lenders on the first ever municipal PPP to reach financial close in South Africa.

35 Definition of public-private partnership in Regulation 16.1 of the Treasury Regulations of 2005 and definition of public-private partnership in Regulation 1 of the MFMA PPP Regulations.

36 Regulation 16.5 of the PFMA PPP Regulations read as a whole, read with PPP Manual Module 5: PPP Procurement; Regulation 4 of the MFMA PPP Regulations read as a whole, read with Municipal Service Delivery and PPP Guidelines Module 5: PPP Procurement.

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

38 [www.sanews.gov.za/south-africa/e-tender-publication-portal-launched](http://www.sanews.gov.za/south-africa/e-tender-publication-portal-launched).

be advertised in at least the Government Tender Bulletin.<sup>39</sup> 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.

## ii Procedures

The type of procurement procedure to be used in each case is determined by the amount involved (see above 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 contract comply with the instructions of the National Treasury, and they 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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup>

## iii Amending bids

As a general rule, changes to the bid specifications after a call for bids has 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. Bidders also cannot validate defective bids by submitting mandatory documentation after the close of the tender.<sup>43</sup>

## 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;

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39 National Treasury Instruction Note 1 of 2015/2016. However, in *MEC for Public Works and Infrastructure, Free State Provincial Government v. Mofomo Construction CC* (A138/2016) [2016] ZAFSHC 196 (24 November 2016), the court held that constructions tenders (which is subject to other specialised legislation requiring construction tenders to be advertised on the website of the Construction Industry Development Board) are not required to be published on the Government Tender Bulletin, as would be the case for non-construction tenders.

40 Regulation, and Regulation 26(1)(a) of the Municipal Supply Chain Management Regulations.

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

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

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

- 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;
- 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; or
- e* the bidder failed to perform on any previous contract.<sup>44</sup>

Before a bid is assessed on its merits, it will be checked whether 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.<sup>45</sup> The members of contracting authorities are also prohibited from holding private interests in contracts with that contracting authority.<sup>46</sup> The PFMA requires supply chain management officials and other role players to 'recognise and disclose any conflict of interest that may arise'.<sup>47</sup> Municipalities are prohibited from making any award to a person who is in the service of the state or, if that person is not a natural person, of which any director, manager, principal shareholder or stakeholder is a person in the service of the state; or who is an adviser or consultant contracted with the municipality or municipal entity.<sup>48</sup> 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.

The Public Administration Management Act<sup>49</sup> (PAMA) promulgated in 2014 will, upon its commencement (the date of which is still to be announced), 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 currently 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, agrees to or offers to accept any gratification from any other person, whether for the benefit of him 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.<sup>50</sup>

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44 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.

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

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

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

48 Regulation 44(a) to (c) of the Municipal Supply Chain Management Regulations.

49 Act 11 of 2014 (commencement date still to be announced).

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

In addition to the above-mentioned preventative measures, legislation also provides corrective measures that permit decisions to be reviewed and set aside where the outcome was unduly influenced.<sup>51</sup>

### **iii Foreign suppliers**

There is nothing prohibiting foreign suppliers from bidding. However, in order to qualify for B-BBEE status and earn the associated preference points allocated under the PPPFA they will need to form a bidding consortium or joint venture with appropriate B-BBEE entities. In order to be compliant and competitive, foreign bidders must 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 such scenario, must also indicate the evaluation criteria for measuring functionality, the weight of each criterion, the applicable values and the minimum qualifying score for functionality.<sup>52</sup> 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 the 2017 Preferential Procurement Regulations.<sup>53</sup>

In terms of the 2017 Preferential Procurement Regulations, for a tender to be regarded as being acceptable and to be considered further it must meet any pre-qualification criteria and the minimum qualifying score for functionality as indicated in the tender invitation.<sup>54</sup> Only tenders that meet the pre-qualification criteria (if any) and the minimum functionality threshold shall progress to evaluation in terms of price and preference.<sup>55</sup> At that stage, the tenders shall be assessed on the basis that, in contracts with a value equal to or above 30,000 rand and up to 50 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 50 million rand, price shall count for 90 points and preference shall count for 10 points.<sup>56</sup> 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 2017 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.

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

52 Regulations 4(2) and 5 of the Preferential Procurement Regulations of 2017.

53 Preferential Procurement Regulations of 2017.

54 Regulation 4(4) of the Preferential Procurement Regulations of 2017.

55 Regulations 6 and 7 of the Preferential Procurement Regulations of 2017.

56 Section 2(1)(b) of the Preferential Procurement Policy Framework Act 5 of 2000 and Regulations 6 and 7 of the Preferential Procurement Regulations of 2017.

Unless objective criteria justify otherwise, the tender must be awarded to the bidder scoring the highest number of points.<sup>57</sup> If two or more tenderers score an equal number of points the contract must be awarded to the tenderer with the highest B-BBEE score.<sup>58</sup>

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 found that the functionality of a particular bid, especially where this is significantly superior to that of the lowest-priced bid without being considerably more expensive, may constitute an objective criterion justifying the award of the tender to somebody other than the highest scoring bidder.<sup>59</sup> 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 on the eTender Publication portal.<sup>60</sup> In addition to publication on the eTender Publication portal, accounting authorities or accounting officers for departments, constitutional institutions, public entities listed, or required to be listed, in Schedules 3A, 3B, 3C and 3D to the PFMA, or any subsidiary of any such public entities, are also required to publish all tender awards in the Government Tender Bulletin and other media by means of which the tender was advertised.<sup>61</sup>

## 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. As is apparent from the newly promulgated 2017 Preferential Procurement Regulations, government is placing far more emphasis on the need to achieve substantial economic transformation in South Africa through preferential procurement; however, there are concerns regarding the lawfulness of the manner in which government is seeking to achieve these objectives.

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.<sup>62</sup> 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.<sup>63</sup>

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57 Section 2(f) of the Preferential Procurement Policy Framework Act 5 of 2000. Regulation 11 of the Preferential Procurement Regulations of 2017 provides for any such objective criteria to be stipulated in the tender.

58 Regulation 10(1) of the Preferential Procurement Regulations of 2017.

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

60 National Treasury Instruction Note 1 of 2015/2016.

61 Regulation 16A.3(b) of the Treasury Regulations of 2005 and National Treasury Instruction Note 1 of 2015/2016.

62 Regulation 8(1) of the Preferential Procurement Regulations of 2017.

63 Regulation 8(3) of the Preferential Procurement Regulations of 2017.

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.<sup>64</sup> 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 are much the same. There are a few bodies and industries with their own specific procurement requirements, but these are by far the exception.

## 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.

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.<sup>65</sup> Entities subject to the PFMA must publish notice of an award on the eTender Publication portal within seven working days of making an award.<sup>66</sup> 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.<sup>67</sup>

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 Act<sup>68</sup> (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

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64 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 National Treasury's 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 Guide is legally binding, and not merely an internal prescript that may be disregarded at a whim.

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

66 National Treasury Instruction Note 1 of 2015/2016.

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

68 Act 2 of 2000.

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.

## IX CHALLENGING AWARDS

Public procurement expenditure continues to account for a particularly high portion of South Africa’s GDP. Increased dependency on public contracts and ongoing irregularity and corruption within the government procurement context have caused challenges of procurement awards to remain commonplace.

Generally speaking, judicial review proceedings 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, interlocutory issues or appeals 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 remedies provided for under any other law.<sup>69</sup>

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.<sup>70</sup> 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.<sup>71</sup> 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. Our courts have also recently confirmed that the 180-day period is equally applicable to organs of state seeking proactively to review and set aside their own procurement decisions.<sup>72</sup>

In the limited instances where government procurement does not constitute administrative action, and it is reviewed on the constitutional principle of legality, common law would apply. Although it does not have the same crisp requirements as regards

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

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

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

72 In *Tasima (Pty) Ltd v. Department of Transport* (2015) ZASCA 200.



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**

The PAJA enumerates various grounds of review that include:

- a* lack of authority;
- b* bias;
- c* non-compliance with a mandatory and material procedure or condition;
- d* procedural unfairness;
- e* material influence by an error of law;
- f* ulterior purpose or motive;
- g* consideration of irrelevant considerations or failure to take relevant considerations into account;
- h* unauthorised or unwarranted influence;
- i* arbitrariness or capriciousness;
- j* unlawfulness;
- k* irrationality;
- l* failure to take a decision; and
- m* unreasonableness.<sup>73</sup>

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 at a rapid pace.

## **iii Remedies**

South African courts are constitutionally obligated to declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of such inconsistency.<sup>74</sup>

Once having made a finding of Constitutional invalidity, South African courts are empowered in terms of the 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.

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

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

Subject to a court's obligation to declare any conduct inconsistent with the Constitution invalid, the courts, in exercising their just and equitable jurisdiction, may either limit the retrospective effect of the declaration of invalidity or suspend the declaration of invalidity for any period and on any conditions.<sup>75</sup>

The Constitutional Court, in *Trencon Construction (Pty) Ltd v. Industrial Development Corporation of South Africa Ltd and Another*,<sup>76</sup> has clarified the test for exceptional circumstances justifying a substitution order in the context of unlawful tender awards. Having regard to the doctrine of separation of powers, the Court held that when determining whether to grant a substitution order, it must be determined whether the court is in as good a position as the administrator to make the decision and whether the decision of the administrator is a foregone conclusion. The Court held that these two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors (such as delay, bias or incompetence of the administrator). The Court concluded that the ultimate consideration is whether a substitution order is just and equitable, which will involve a consideration of fairness to all implicated parties. The Court emphasised that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.

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.<sup>77</sup>

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 the procurement laws will incur liability and sanctions in terms of the governing legislation.<sup>78</sup> The procedure for dealing with dishonest bidders is now also specified in the 2017 Preferential Procurement Regulations.<sup>79</sup> In terms of the 2017 Preferential Procurement Regulations, where a tenderer has submitted false information regarding its B-BEEE status level, local production content, or any other matter required in terms of the regulations that will affect or has affected the evaluation of a tender, or where a tenderer has failed to declare any subcontracting arrangements, the organ of state must allow such tender an opportunity to make representation in response to the allegations. If an organ of

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

76 2015 (5) SA 245 (CC).

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

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

79 Regulation 14 Preferential Procurement Regulations of 2017.

state concludes, after considering the tenderer's representations, that such false information was submitted by the tenderer, it must disqualify the tenderer or terminate the contract in whole or in part; and, if applicable, claim damages from the tenderer, or if the successful tenderer subcontracted a portion of the tender to another person without disclosing, penalise the tenderer up to 10 per cent of the value of the contract. In addition, the organ of state is required to inform National Treasury, in writing, of any actions taken in this regard and provide written submissions as to whether the tenderer should be restricted from conducting business with any organ of state. National Treasury must then determine whether to restrict the tenderer from doing business with any organ of state for a period not exceeding 10 years and maintain and publish on its official website a list of restricted suppliers.

In a recent case of *City of Cape Town v. Aurecon South Africa (Pty) Ltd*, the Constitutional Court declined to declare the awarding of a tender constitutionally invalid on the ground that the application was inexcusably late.<sup>80</sup> The case illustrates that although the courts are obliged to declare any conduct that is inconsistent with the Constitution invalid, they may decline to discharge this obligation where a review application is brought out of time. Litigants therefore may not sit back and do nothing on the mistaken belief that the court cannot close its eyes to constitutionally invalid conduct.

## X OUTLOOK

There has been a notable policy shift towards placing increased reliance on government procurement as a tool for increasing the speed and extent of socio-economic transformation, and we expect to see further developments of this nature in the year ahead. As part of the policy shift, the government has reiterated that it is in the process of reviewing the entire supply chain management legislative framework with a view to developing a single procurement law that, *inter alia*, seeks to improve efficiency in the procurement environment and eliminate corruption.

A draft Public Procurement Bill has been anticipated since the beginning of 2016, and was mentioned by the Finance Minister during his budget speech in May 2016. Although the Public Procurement Bill has not yet been released for comment, it is anticipated that this will take place soon. In a speech delivered by the President in September 2016, he indicated that the draft bill is likely to be tabled in Parliament early in 2017. He commented that the then current procurement legislation has 'failed to substantially re-shape the skewed ownership and control of the South African economy'. The President went on to say that it is the government's ultimate intention to repeal the PPPFA and its associated regulations, and to introduce a more flexible preferential procurement framework that is responsive to government objectives. The President also declared that the 2017 Preferential Procurement Regulations would be introduced as an interim measure to make the PPPFA more responsive to economic transformation imperatives. The stronger emphasis placed on transformation by the new Preferential Procurement Regulations can accordingly be viewed as a precursor to more drastic measures being introduced through the contemplated Public Procurement Bill.

In keeping with its intent to ramp up reliance on public procurement as a lever for socio-economic transformation, and despite strong political opposition, government has forged ahead with its decision to procure the construction of nuclear power plants to generate 9,600MW of electricity per annum. The procurement will carry an estimated cost of between

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80 *City of Cape Town v. Aurecon South Africa (Pty) Ltd* [2017] ZACC 5.

500 billion and 1 trillion rand, making it the country's most expensive procurement to date. As a result of the lack of transparency regarding the procurement process thus far, there is already legitimate concern as to whether a lawful procurement process will be followed going forward. Already the first judicial challenges to the procurement have been initiated, and this looks set to dominate the public procurement landscape for at least the next few years.

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