

## Public procurement in South Africa: overview

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A Q&A guide to public procurement law in South Africa.

The country-specific Q&A gives a high level overview of applicable legislation, scope of rules, procurement procedures and enforcement, recent trends and proposals for reform. In particular, it examines entities and contracts covered, concessions, privatisations and PPPs, contract award criteria, alternative bids, and changes to an existing contract.

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## Legislative framework

### 1. What is the principal legislation that regulates public procurement? What regulatory authorities are responsible for public procurement enforcement?

#### Regulatory framework

The principal piece of legislation that regulates public procurements is the Constitution of the Republic of South Africa 1996 (Constitution). Section 217 of the Constitution requires that when an organ of state contracts for goods and services, it must do so in accordance with principles of fairness, equitability, transparency, competitiveness and cost-effectiveness. This constitutional requirement is echoed in section 51 (1)(a) of the Public Finance Management Act 1 of 1999 (PFMA), which states that an accounting authority for, among others, a national or provincial department or public entity must ensure that the particular department or entity has and maintains an appropriate procurement and provisioning system which is:

- Fair.
- Equitable.
- Transparent.
- Competitive.
- Cost-effective.

The PFMA is implemented through the regulations published under it, namely the National Treasury Regulations (Treasury Regulations).

The Constitution permits organs of state (such as departments of government and public entities) to implement a preferential procurement policy that advances persons previously disadvantaged by unfair discrimination. Section 217(3) provides for legislation that will prescribe a framework within which the policy must be implemented to be enacted. Thus, the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) and the regulations published under it in 2011 (PPPFA Regulations), prescribe requirements regarding black economic empowerment (BEE) considerations for state tenders.

The Local Government: Municipal Systems Act 32 of 2000 and the Municipal Finance Management Act 56 of 2003 (MFMA) regulate, among others, the manner in which municipal powers and functions are exercised and performed and the management of the financial affairs of municipalities and other institutions in the local sphere of government. These require that the entities to which they apply adhere to the PPPFA.

South Africa is a founding member of the WTO and is classified as a developed country in the WTO. However, South Africa has been able to negotiate favourable conditions and extended implementation periods for some of its sensitive economic sectors in the General Agreement on Tariffs and Trade (GATT). South Africa is a signatory to the WTO Agreement on Government Procurement (GPA).

South Africa's use of procurement as a policy tool does not appear to hinder it from concluding free trade agreements. South Africa concluded various international trade agreements including the Trade, Development and Cooperation Agreement with the European Union.

#### Regulatory authorities

There is no specific regulatory authority in respect of public procurement. In general, many government departments or public entities determine and regulate their procurement system internally in accordance with the regulatory requirements for such a system. However, at provincial level there are buying offices in operation in certain areas.

Public procurement is governed by the principles of administrative justice and an unfair decision can be taken on review to the High Court (*see Question 17*).

## **2. What are the overriding principles of the legislation listed in Question 1?**

The overriding principles of the regulatory framework are the constitutional requirements of:

- Fairness.
- Equitability.
- Transparency.
- Competitiveness.
- Cost-effectiveness.

These five principles are the standards against which all procurement by an organ of state is measured.

Fairness and equitability require that a procurement process be procedurally fair and are concerned with the manner in which process is conducted. For example, all participants must be given the same information and opportunities.

Transparency requires openness and accountability. This means that the process must be conducted publicly and not behind closed doors. It means procurement information must be generally available, procurement rules and practices should be standardised and made known, and information regarding government contracts and their award should be accessible.

Competitiveness and cost-effectiveness revolve around cost. An organ of state must, while taking into account the other principles, try to procure goods or services at the lowest possible cost and get value for money.

While not inherently contradictory, there is a tension between the five principles and there may be circumstances where the achievement of one principle is not possible unless another is sacrificed. Therefore when evaluating whether there has been compliance with section 217 of the Constitution, the five principles must be looked at as a whole rather than separately, in an effort to resolve the tension between them.

## **Regulation of specific industries**

### **3. Are any industries subject to specific regulation?**

There is no industry specific regulation under the legislative regime outlined above. However, there are some government policies relating to procurement within certain industries. For example, the Defence Industrial Participation (DIP) policy is mandatory for the Department of Defence and parastatal organisations in the defence industry. This policy uses purchases and leases by organs of states in the defence industry as a

leverage to oblige a foreign seller of defence commodities or services to do defence-related business in South Africa. This is done on a reciprocal basis in order to advance military strategic and defence-related industrial imperatives. The policy applies to all foreign defence purchase and lease contracts above US\$2 million.

The DIP is a variation of the National Industrial Participation Programme (NIPP), which applies to all purchase or lease contracts by state organs and parastatal organisations that have an imported content of US\$10 million or above, focusing on the defence industry.

## Recent trends

### 4. What are the recent trends in the public procurement sector?

Recent trends in public procurement include:

- Employment creation for previously disadvantaged members of society.
- Increased focus on local content.
- Increased focus on corruption in the tender process.
- The development of small, medium and micro enterprises as this sector is globally recognised as the driving force for economic development and job creation.

The preferential points system under the PPPFA allows the organs of state to set specific goals to address the socio-economic issues that South Africa faces due to its past (*see Question 15*).

The focus on local content has seen the signing of the Local Procurement Accord on 31 October 2011 under the New Growth Path adopted by the government. The Accord is targeting 75% of public and private procurement to accelerate job creation and the attaining of the goals of the Industrial Policy Action Plan.

Increased public awareness of corruption in the area of public procurement has resulted in anti-corruption initiatives being launched by the government and civil society. The National Anti-Corruption Hotline and Corruption Watch are prominent examples.

## Scope of rules

### Entities covered

#### 5. Which entities must comply with the procurement rules? Are there any exemptions?

### Entities covered

Section 217 of the Constitution applies to all organs of state in the national, provincial and local sphere of government or any institution identified in national legislation. On the national level the PFMA applies to specific institutions including:

- National and provincial state departments as defined in the Public Service Act 103 of 1994.
- Listed major public entities, national government business enterprises and other public entities.

- Listed constitutional institutions.
- Provincial legislatures.

At the local level the MFMA applies to:

- All municipalities.
- All municipal entities.
- National and provincial organs of state to the extent of their financial dealings with municipalities.

The PPPFA Regulations are applicable to organs of state defined as including:

- National and provincial departments.
- Municipalities.
- Constitutional institutions.
- Parliament.
- Provincial legislators.
- Other organs of state that are included in section 239 of the Constitution and are recognised by the Minister of Finance as institutions to which the PPPFA applies.

The PPPFA also applies to the specific public entities listed in the PFMA.

## **Exemptions**

There are no particular exemptions from procurement rules but there is a measure of flexibility. For example an organ of state may request exemption from any of the provisions of the PPPFA for reasons including that tenderers are likely to be international suppliers, among others. This exemption provision is designed to work on a case-by-case basis and exempts the organ of state from provisions of the PPPFA in respect of a specific tender. Many of the public entities listed in the PFMA have specifically been exempted from the provisions of the PPPFA until 7 December 2012.

Section 92 of the PFMA allows the Minister to exempt entities from specific provisions of the Act or the Treasury Regulations.

## **Contracts covered**

### **6. What contracts do procurement rules cover? Are there any exemptions?**

## **Contracts covered**

Public procurement rules apply to commercial contracts by organs of state, as defined, for the:

- Acquisition of goods and services.

- Disposal and letting of state assets, including the disposal of goods no longer required.
- Conclusion of public private partnerships (PPPs).

## Exemptions

There are no particular exemptions from procurement rules but there is a measure of flexibility. For example, an organ of state can request exemption from any of the provisions of the PPPFA for reasons including that tenderers are likely to be international suppliers, among other things. This exemption provision is designed to work on a case-by-case basis and exempts the organ of state from provisions of the PPPFA in respect of a specific tender. In addition, the procurement rules do not prescribe the format for procurement, for example, if there are compelling reasons not to conduct the process through open tendering this process is not required.

**7. Are there specific thresholds to determine if a contract is subject to the public procurement regime? Are there any aggregation/anti-avoidance rules?**

## Thresholds

There are no specific thresholds to determine whether a contract is subject to the public procurement regime or not, but each entity has its own internal policy that determines thresholds for the approvals required for various types of transactions.

## Aggregation/anti-avoidance rules

Not applicable (*see above, Thresholds*).

## Concessions

**8. Does the procurement regime apply to concession contracts? If not, how is the award of concession contracts regulated?**

Access to state regulated assets is regulated through PPP agreements or through the regulations which are applicable in the specific sector. For example, in the minerals and petroleum sector applications to exploit such assets are governed by sector specific legislation.

## Privatisations and PPPs

**9. Are privatisations and PPPs subject to the procurement regime? If not, what are the relevant legal rules?**

## Privatisations

There are various provisions across public procurement legislation detailing how organs of state must dispose of public assets to private entities. The National Treasury must make regulations relating to the alienation, letting or other disposal of state assets (*section 76(1)(k), PFMA*). Regulation 16A7 of the Treasury

Regulations states that disposal of assets must be at a market-related value and can be done by quotations, competitive bids or auction; whichever is the most advantageous for the state. Disposal of assets must be approved by the relevant treasury in accordance with Regulation 19.6.

The Municipal Asset Transfer Regulations, published under the MFMA, regulate how municipalities and municipal entities must dispose of state assets. A public participation process is required where the assets are high value, to allow the municipal council to make determinations. The municipal council must approve the disposal of the asset. In reaching the decision to approve the disposal of an asset, the municipal council must take into account a considerable number of factors listed in Regulation 7, including:

- The risks and rewards associated with operation or control of the asset.
- The views and recommendations of National and Provincial Treasury.
- The interests of any affected organs and the local community.
- Compliance with the legislative regime that applies to the disposal.

## **PPPs**

In the context of national or provincial government departments, PPPs are regulated by Regulation 16 of the Treasury Regulations which states that PPP agreements must be procured in accordance with applicable procurement legislation.

These Regulations deal with how PPPs must be implemented and set out detailed steps to be followed. Principles set out under section 217 of the Constitution would apply to PPPs when they perform a public function on behalf of an organ of state in terms of a PPP agreement. Regulation 16 provides for strict national or provincial treasury supervision of PPP transactions. These take the form of approvals, based on listed criteria that must be obtained from the National and Provincial Treasury.

PPPs entered into by municipalities are regulated by section 120 of the MFMA and its Public-Private Partnership Regulations. They provide for how municipalities must go about concluding PPPs. This involves:

- Conducting feasibility studies.
- Soliciting the views and recommendations of the National and Provincial Treasury regarding the PPP.
- Complying with sections 33 and 120(6) of the MFMA.

## **Shared services and "in-house" arrangements**

### **10. Do shared services projects and "in-house" arrangements trigger the application of the public procurement requirements? Are there any exemptions?**

Shared services projects and "in-house" arrangements do trigger the application of public procurement requirements.

There are generally no exemptions to this, but the criteria applicable would depend on the contracting authority in question.

## Procurement procedures

**11. What procedures do regulated entities use when carrying out procurements? Can regulated entities freely choose between the procedures? When is it appropriate to use each procedure?**

### Available procedures

Although there are no prescribed procedures in this respect, various methods of carrying out procurements are available to organs of state. This includes quotations or bidding procedures.

The Treasury Regulations allow regulated entities to procure goods and services by other means in a specific case where it may be impractical to invite competitive bids and subject to certain conditions.

### Freedom of choice

The legislative regime allows for a degree of flexibility and allows each regulated entity the freedom to select their own procurement procedures according to their unique requirements and within the broad constitutional requirements.

### Suitability

A competitive tender process that is most likely to meet the requirements of the Constitution is preferred, but, depending on the circumstances, it is not required by law. The Supreme Court of Appeal has stated that fairness is inherent in an open competitive tender procedure, the very purpose of which is to ensure cost-effectiveness and competitiveness in a transparent manner. It is for this reason that a tender process is generally considered to be the most suitable method, as the constitutional requirements permeate the entire procedure for awarding or refusing tenders.

### Key features

**12. What are the key features of each procedure? What are the applicable time limits?**

It is not possible to set out the key features of each procedure as there are no prescribed procedures (*see Question 11, Available procedures*). There is a degree of flexibility as public entities are able to determine their own procedures that best suit their specific requirements. The fundamental requirement is that selected procedures adhere to the constitutional principles of fairness, equitability, transparency, competitiveness and cost-effectiveness.

### Technical specifications

**13. Are there any requirements concerning technical specifications of tenders?**

The evaluation criteria for measuring technical specifications of tenders, referred to as "functionality" in the PPPFA Regulations, must be objective and must be specified clearly in any invitation to submit tenders (*see Question 15*).

A minimum qualifying score for functionality must be indicated and a tender is regarded as unacceptable if this score is not achieved. Tenders that have achieved this minimum score are then evaluated further on other grounds such as BEE and price competitiveness scores.

### Alternative bids



**14. Are there specific rules in relation to alternative bids?**

There are no specific rules in relation to alternative bids.

**Contract award criteria****15. What are the requirements relating to contract award criteria?**

Where the PPPFA applies, contracts are awarded based on a preferential points system. Under the PPPFA, when organs of state assess contracts, they must take into account the preferential points system which prescribes functionality, price and other specific goals such as:

- Contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability.
- The implementation of the reconstruction and development programmes.

These specific goals purport to address the socio-economic issues that South Africa faces due to its past (see *Question 4*).

Under the preferential points system, points are allocated as follows:

- Contracts below ZAR1 million: 80 points are allocated for price and functionality and the remaining 20 points for other specified goals.
- Contracts above ZAR1 million: 90 points are allocated for price and functionality and 10 points for other specific goals.

The PPPFA has been aligned with the Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE Act), so that a tenderer that has achieved level 1 status in terms of the BBBEE Act can earn the maximum points for specified goals under the preference point system.

A tender is awarded to the overall highest point scorer unless there are objective criteria that justify the award to another tenderer. Where two tenders have equal scores, the one with the highest BEE rating must be awarded the contract and where the BEE ratings are also equal, the one with the highest functionality points must be awarded the contract.

The Minister of Finance can exempt certain organs of state from the provisions of the PPPFA on request. Major public entities, provincial public entities and national government business enterprises listed in the schedules to the PFMA have been exempted from the provisions of the PPPFA until 7 December 2012. Further exemptions may be granted beyond this date.

**Changes to an existing contract****16. Does an extension or amendment of an existing contract require a new procurement procedure?**

There are no specific rules governing the extension or amendment of contracts in the applicable legislation. An extension or an amendment of an existing contract may require a new procurement procedure depending on, among others:

- The terms of the original agreement.
- The extent of the extension or amendment.
- The consequences for the contractor.

Recently the local courts have held that where a public procurement agreement has a provision for renewal, the contract can be extended on the same terms without the need for a new procurement procedure.

Where an amendment or extension of a procurement contract departs from what was originally put out to tender to the extent that the contractor benefits significantly or other tenderers may have tendered differently, a new procurement procedure may be required.

## Enforcement

**17. Who can bring a claim for non-compliance with procurement legislation? What are the available review procedures? Are there any associated statutes of limitation?**

### Right to bring a claim

The decision to award a contract to a particular party will, in most circumstances, constitute administrative action on the part of the organ of state. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) has broad rules and effectively allows any person to institute proceedings before the High Court for the review of administrative action.

The court cannot review an administrative decision until all internal remedies provided for under the applicable legislation have been exhausted. The regulated authority concerned will have to be a party to the litigation.

### Enforcement procedures

There are no special authorities that review claims of non-compliance with procurement legislation. The regulated authority in question may have an internal appeal procedure, but once this is exhausted, the state courts are the only other avenue to have the claim heard.

A party can apply for and be granted an injunction (interdict) to stop the organ of state from contracting with another party or to prevent the implementation of the contract, pending the review of the decision to grant the contract. To succeed, such action must be launched without any delay. One of the factors the court will consider is whether there is a *prima facie* basis for the reviewing party to succeed on review. In most circumstances, if it is found that there has been non-compliance with procurement legislation, the court is likely to set the contract aside and may refer the procurement decision back to the regulated authority to re-open the procurement procedure. The review of tender can take on average from six months to two years.

### Statutes of limitation

Any application for judicial review brought in terms of PAJA must be made as soon as possible and at most within 180 days from the date the person was informed of the decision, or the date on which any internal procedures are concluded (the 180-day limit may be extended).

## Reform

### 18. Are there any proposals for reform of the procurement legislation? If so, when are they likely to be implemented?

There are currently no proposals for reform of the procurement legislation outlined above. The PPPFA Regulations were published in 2011 and they implement current reform aspirations such as the preferential point system, alignment with the BBBEE Act and an increased focus on local content.

As set out above, some entities are still exempted from the provisions of the PPPFA but apply their own internal requirements regarding local content and black economic empowerment.

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- Advising Eskom Holdings SOC Ltd (the state electricity provider) on all aspects of the development, construction and procurement processes for the Medupi (6000MW) and Kusile (6000MW) coal fired power stations.

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