PAPER 7

SUSTAINABLE ENGINEERING SOLUTIONS NEED AN EFFECTIVE PUBLIC PROCUREMENT SYSTEM – WILL THE NEW PUBLIC PROCUREMENT ACT HAVE A POSITIVE EFFECT ON MUNICIPAL PROCUREMENT?

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ABSTRACT

The blockages in the service delivery pipeline at municipal level are a cause for concern with ineffective procurement being blamed for at least part of the problem.

It is hoped that the "new" Public Procurement Act, 28 of 2024, which will come into effect on a date to be proclaimed once the enabling regulations have been made by the Minister, will greatly assist in the unblocking of the pipeline.

There are a number of positive aspects of the Act, including the efforts to reduce the fragmentation of public procurement legislation, the promotion of technology in the procurement process, the renewed focus on developmental procurement, the efforts to improve the skills of procurement practitioners and the reduction in the time and money spent on disputes around the awarding of tenders. Some of the aspects that have attracted criticism are the centralisation of power and the lack of focus on local government procurement, which is large enough to justify special provisions.

There is an acknowledged lack of capacity in public procurement, currently known as supply chain management (SCM), with procuring institutions struggling to attract and retain sufficient skills to implement effective and compliant procurement. This is particularly difficult in the built environment.

Another problem facing the procurement of infrastructure and specialist technical services is the tension that sometimes occurs between the technical departments and the procurement (SCM) practitioners. The Act, together with various initiatives within the industry, is striving to upskill and professionalise public procurement practitioners. This will help the credibility of procurement practitioners and improve the effectiveness of municipal procurement.

Public procurement is a dynamic and complex field. There are fewer, but still, numerous bits of legislation directly and indirectly impacting on public procurement. There are potential uncertainties which are going to require court judgments to clarify.

The numerous challenges to tender awards, many of which end up in court, hamper service delivery. Significant amounts of time and money is spent to defend awards resulting in delays to the conclusion of the contracts and depletion of budgets. A Tribunal will be established to more speedily and cost-effectively resolve challenges and disputes.

The challenges of procuring goods and services are many and will stretch the resources of even the highest capacity municipalities. These are not insurmountable problems but will take a lot of work, determination and cooperation to overcome.

1 INTRODUCTION

It has been said that municipal engineers have to do with R1 what private sector engineers need R2 to do. In today's environment that is now only partially true. Municipal engineers have to do so much more than merely implementing, operating and maintaining essential infrastructure with severely limited resources. The other objectives to be achieved include promoting local development, developing the previously disadvantaged, managing conflicting objectives and mentoring the next generation of municipal engineers, among others.

In order to do this, municipal engineers rely on the effective and efficient procurement of these goods and services, for the right price, while satisfying the developmental objectives. The procurement function has become increasingly important as the capacity to do work in-house declines.

The procurement function, however, is no easy task. South Africa's public procurement legislative framework has been described as "complex and fragmented" (MAPS 2024: 30). There is a plethora of statutory provisions to be adhered to as well as guidelines, policies and standard procedures to be followed. Any gathering of academics, legal professionals and procurement experts gives rise to vigorous debate and differences of opinion. Little wonder then, that so many public procurement decisions get challenged.

It is clear that public procurement at municipal level is in trouble. Any number of Auditor-General reports detail the problems and the number of awards that end up being judicially reviewed is further evidence of the short-comings. For example, In *S A Post Office v De Lacy* Nugent JA remarked at [1] that "Cases concerning tenders in the public sphere are coming before the courts with disturbing frequency." These challenges, even the unsuccessful ones, delay and even prevent the provision of services.

With much fanfare the "new" Public Procurement Act – Public Procurement Act, 2024 (Act No. 28 of 2024) referred to hereafter as the Act – was signed into law by the President of the Republic of South Africa on 18 July 2024 to come into effect on a date still to be gazetted. The Act is ambitious and wide-ranging in scope. The Act will repeal various other pieces of legislation and seeks, among other things, to reduce the fragmentation, to improve efficiency, to regulate and promote effective preferences, to combat corruption and provide better dispute resolution mechanisms (Section 2).

The purpose of this paper is to analyse and discuss some of the provisions of the Act that impact on service delivery at the local government level.

For ease of reference in this paper, any reference to the Act is a reference to the Public Procurement Act, 28 of 2024 and any reference to the Minister is a reference to the Minister of Finance. The definition section of the Act in fact defines the Minister to be the "Cabinet member responsible for financial matters" which I have assumed to be the Minister of Finance.

2 THE LEGISLATIVE FRAMEWORK

2.1 Brief overview of the current situation

Public procurement legislation, like all legislation, in South Africa, is subject to the Constitution of the Republic of South Africa, 1996, in particular section 217. Section 217.(1) of the Constitution requires public procurement to be conducted according to a system which is fair, equitable, transparent, competitive and cost-effective. Furthermore Section 217.(2) of the Constitution provides for preferences to be granted and finally Section 217.(3) requires legislation to be enacted to implement the preferences.

Various pieces of legislation have been enacted to regulate public procurement including the Municipal Finance Management Act, 2003 (Act No. 56 of 2003) (MFMA), the Public Finance Management Act, 1999 (Act No. 1 of 1999) (PFMA) and the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000) (PPPFA), which gives effect to section 217.(3) being the Acts which directly regulate public procurement. Regulations to flesh out these Acts have been gazetted.

Other pieces of legislation which also affect public procurement in South Africa include, but are not limited to, the Construction Industry Development Board Act, 2000 (Act No. 38 of 2000), the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003), the Promotion of Administrative Justice Act (PAJA) and the Municipal Systems Act, 2000 (Act No. 32 of 2000) as well as a number of sector-specific Acts.

Among the regulations made in terms of their respective Acts are the Supply Chain Management regulations made in terms of the MFMA, the Treasury Regulations made under the PFMA and the Public-Private Partnership Regulations, which were recently amended.

In addition to this are numerous quasi-legal instruments such as National Treasury circulars, guidelines and instructions as well as Auditor-General findings which carry varying weight under law. Volmink (2022), noting that South African public procurement is in an uncertain period, states in his inimitable way that "new rules appear and disappear with alarming frequency. Uncertainty abounds."

Finally, there is a vast body of case law that are the court judgments over the years made in terms of the above-mentioned legislation.

Clearly this complex and fragmented quagmire of law, subordinate law and quasi-law is untenable and unworkable.

2.2 How the legislative framework will look under the new Act

The new Act will indeed tidy up and consolidate a lot of the legislation. The procurement provisions of the MFMA and PFMA will be removed from those Acts and are incorporated into the Act. The PPPFA will be repealed in its entirety, which means that the Preferential Procurement Regulations 2022 will also fall away since the regulations cannot exist without the Act in terms of which they were made. The section 62 appeal under the Municipal Systems Act will be replaced by the non-judicial dispute mechanisms under the Act while codes revised or issued under the BBBEE Act must align with the provisions of the Public Procurement Act.

The main set of statutes with direct effect on public procurement will then be the Constitution, the Public Procurement Act, the regulations made by the Minister under the Act and PAJA.

The new Act requires numerous regulations to be made by the Minister to give effect to the Act. These are currently being drafted before the public participation stage prior to being gazetted.

Section 24.(1) requires that The Minister must prescribe a framework within which a procuring institution must develop and implement its procurement system, referred to in section 8(1)(b).

2.3 Current uncertainties

An issue which remains uncertain is the role which BBBEE ratings will play. Section 18.(1)(b) of the Act makes only one reference to BBBEE and then only in connection with pre-qualification.

One of the criticisms levelled against the new Act is that it imposes obligations on procuring institutions but limits their power and restricts their discretion (APLU 2023, 6).

Not much can be said about the functioning of the Act, chapters 4 and 5 in particular, until the regulations are made available for comment. While hopefully imminent, this had not happened at the time of writing.

The regulations which are required to give practical effect to the Act must be subject to public participation, must be sent to NEDLAC for input and must serve before Parliament for scrutiny. It is thus not anticipated that the Act will be in effect before the first quarter of 2026, at the earliest.

3 THE PUBLIC PROCUREMENT ACT 28 OF 2024

3.1 Overview

The new Act has been long in the making and was finally signed into law by the President on 18 July 2024 after the Bill was debated by NEDLAC, passed through the public participation process and being passed by the National Assembly after accepting some amendments required by the National Council of Provinces.

The Act is wide-ranging and will require regulations for many of its 69 sections to be fully in effect. The Act contains more than thirty references to matters that must be "prescribed" which, per definition means by regulations. In addition, section 63 contains a list of fourteen matters for which the Minister must make regulations and another list of seven matters for which the Minister may make regulations. Owing to the time needed to make all of these regulations it has been suggested that the Act can come into effect in phases requiring then only the regulations for those chapters or sections to be made.

It should also be noted that the implementation of the Act has to be reviewed within 24 months of its publication in the Government Gazette (Notice No. 5051, Government Gazette No. 50967 published on 23 July 2024), which will be 23 July 2026 even though, at the date of writing, it is not in effect yet.

3.2 Chapter 1 – Definitions, objectives and application of the Act

After the Preamble which introduces the Act, the first chapter (Section 1–3) deals with the definition of the key terms of the Act, states the objectives and declares to whom the Act applies.

Section 1 contains the definitions and already introduces some difficulties:

3.2.1 As pointed out in the submission to Parliament's Standing Committee on Finance, by the African Procurement Law Unit which is a unit of Stellenbosch University headed by Professor Geo Quinot, a world authority on public procurement law, the definition of the Act includes non-statutory instruments i.e. "codes of conduct and instructions" (APLU 2023: 3). This could again lead to a proliferation of provisions, in addition to the subordinate legislation necessary to give clarity to public procurement law and again result in the fragmentation of public procurement law.

3.2.2 The vagueness and the wideness of the words "or on an easily accessible central online portal that is publicly available" in the definition of "publish" could open the door for circumvention by publication on an obscure portal known only to a chosen few.

On the positive side, the definition of procurement does confirm that letting and leasing disposal of assets is included in public procurement.

Section 2 contains the objectives of the Act which are, without going into detail here, too wide-ranging and too numerous to be effective.

Section 3 makes the Act applicable to all organs of state including those which were previously exempt from compliance with the public procurement legislation. There are provisions in the Act for organs of state such as Transnet, which compete against private sector operators, to apply for exemption from compliance with the Act. The details, terms and conditions to be granted exemption will become evident when the Minister makes the applicable regulations.

Sub-sections 8.(3) (a) – (c) which extend the reach of the Act to donor funded procurement, suppliers who have been awarded a contract and those procuring on behalf of the organ of state are of importance and are potentially problematic. Just how these will be implemented remains to be seen and will probably play out in the courts. This is because Section 8.3(a) essentially overrides any terms and conditions set by donor and funding agencies which often come with their own sets of terms and conditions.

In the South African legal system, the Constitution is the supreme law with acts of parliament being next in the hierarchy with regulations and other sub-ordinate legislation following. That is why a municipal by-law, policy or procedure cannot override the provisions of an act, as pointed out by Shapiro AJ in *Maximum Profit Recovery (Pty) Ltd v Umkhanyakude District Municipality and Another*.

In theory then all acts are equal and subordinate only to the Constitution but s8.(4) places this Act above the others in the event of a conflict because it reads "in the event of a conflict between a provision of this Act and a provision of any other legislation, the provision of this Act prevails". The problem here is that other Acts have some kind of trumping provisions as well. Notably the BBBEE Act Section 3.(2) is such a provision, albeit it does not conflict with the Public Procurement Act.

3.3 Chapter 2 – Public Procurement Office, Provincial Treasuries and Procuring Institutions

The first part of this chapter, Sections 4 and 5, deal with the establishment of a national Public Procurement Office (PPO) which appears to be a restructuring of the current Office of the Chief Procurement Officer (OCPO). The Office is intended to assist and guide the procuring institutions with their procurement of goods and services.

According to Section 5.(2)(a) the PPO is empowered to issue binding instructions on the PFMA procuring institutions but only non-binding circulars on municipalities and municipal entities, per Section 5.(2)(b). These circulars only become binding if adopted by the municipal council, as per Section 5.(4).

The Office is tasked with wide-ranging powers and duties. Of concern is that the current structure (OCPO) does not have the resources for this greatly expanded role. As noted by Brunette & Klaaren (2020: 9) there is a lack of capacity, not just within the procuring institutions, but also within the regulatory authorities. For the PPO to function effectively it needs to be adequately resourced. This will not take place overnight but certainly needs to be in place by the time that the Act comes into effect.

Provincial Treasuries also have support, monitoring and oversight roles and can also issue binding instructions to PFMA entities and non-binding circulars to the local government sector which can become binding if adopted by the affected council.

Section 7 confirms the current situation which confers on the accounting officer, being the municipal manager at local government level, the duty to make the decisions required in terms of the Act.

Section 8 further imposes duties and obligations on procuring institutions to comply with the Act and to carry out efficient and effective procurement and, in particular, to develop a procurement policy in compliance with the Act. At first glance this appears to mean that municipalities will have the freedom to determine their own procurement methods, preference systems and development policies. However, it comes with a rider that the system, policy etc. must be made within a framework to be prescribed by the Minister. The degree of freedom is thus still to be established.

3.4 Chapter 3 – Procurement Integrity and Debarment

Other than the two remarks made below, due to time and space constraints, I will not deal with this chapter in this paper. These two topics are important enough to warrant a separate study especially in the light of the findings of the Zondo Commission that procurement played a key role in state capture coffers and the looting of state.

The first remark is that section 14 can be read to introduce a type of mandatory and open whistleblowing which, while any anti-corruption measures are to be welcomed, could place procurement practitioners in an intolerable position.

Secondly the debarment measures, which should be rigorously applied, are draconian in nature and potentially violate the *audi* rule. Following of due process is advised to avoid subsequent challenges.

3.5 Chapter 4 – Preferential Procurement

Books and scholarly papers will still be written about chapter 4, which contains far-reaching measures and largely replaces the Preferential Procurement Policy Framework Act together with its Preferential Procurement Regulations, 2022. It seeks to clear up the confusion around preferential procurement and to set clear rules in place. This is one of the parts of the Act that needs extensive regulations to be made.

Briefly, provision is made for a continuum of measures to redress past inequities ranging from complete exclusion (set-asides) through pre-qualification to open competition as the value increases. In addition, provision is made for compulsory subcontracting.

The issue of local content thresholds is being dealt with by the Department of Trade and Industry, the Minister of which must make the necessary regulations. The discussion of local content is outside the scope of this paper but will need to be adhered to once the regulations are promulgated.

Section 69.(2) of the Act makes provision for a phased commencement whereby different parts of the Act can come into effect at different times. Owing to the urgency to implement preferential procurement it has been suggested that chapter 4 be the first part to come into effect and that those regulations be fast-tracked. Due to the need to clarify the preference system as well as the methodology of procurement, it is probably necessary to implement chapters 4 and 5 at the same time.

Three significant aspects of this chapter bear discussion here:

3.5.1 The preference points system

Practitioners and bidders are familiar with the ratio of points for price and points for preference, i.e., the "80/20" and "90/10" systems, which have been in place since the promulgation of the PPPFA and the subsequent sets of regulations. Nowhere does the Act talk about allocation of points, so it remains to be seen if such a points system will be prescribed and what the limits are. There has been speculation that 70/30 and even 50/50 systems could be in the offing, but it must be borne in mind that there is a trade-off between the granting of preferences, permitted by section 217.(2) of the Constitution, and obtaining maximum value for money, as required by section 217.(1) of the Constitution. Thus, it is unlikely that there will be unfettered discretion allowed.

In fact, in the case of set-asides and pre-qualification, it would appear that there need be no preferences granted to any of those eligible to bid unless sets preference measures to be achieved when a contract is granted. Again, this is to be within the conditions set by the regulations. The degree to which the procuring institution has discretion will become clear once the regulations have been published.

Local economic development measures including job creation, development of small business and innovation are provided for under section 22, but again subject to prescription by the Minister.

When the Preferential Procurement Regulations 2022 came into effect, some organs of state retained the allocation of points according to BBBEE level only, while some applied a combination of BBBEE level and locality. Many organs of state dispensed with BBBEE levels and applied methods including ownership, the development of SMMEs and locality. The diversification of scoring methods makes it time-consuming and difficult for bidders who have to prove their entitlement to points under so many different systems. The decision of some organs of state to dispense with BBBEE levels was challenged in court. One of these cases was *H & I Civil & Building (Pty) Ltd and Another v City of Cape Town and Others* where the new scoring system was challenged. The court however, held that the City was entitled to implement their own system. This being a judgment of a full bench of the Western Cape High Court potential challengers seemingly believe that other high courts are unlikely to not follow this approach and the current system proceeds unchallenged until clarity is provided by the new regulations.

3.5.2 The degree to which the allocation of preferences will be prescribed

As shown in 3.5.1, the 2022 regulations still require the 80/20 and 90/10 systems, but the allocation of the 10 or 20 preference points remains at the discretion of the procuring institutions.

The PPPFA, which stipulates the 80/20 and 90/10 requirements, will be repealed in full and be replaced by the provisions of the regulations to be made under the Public Procurement Act. None of the sections of the Act make any mention of a points system. Unless the regulations or the framework contemplated by section 24 do so the method of granting preference will be entirely up to each individual procuring institution.

If this is allowed to happen the sheer range and diversification will make life very difficult for bidders – especially the smaller ones which do not have sophisticated or dedicated tendering departments. This kind of situation will thus hinder the very ones which the Act seeks to promote so it is unlikely that the Minister will let go of the reins completely.

3.5.3 Functionality

A common complaint emanating from technical departments is that "Supply Chain" only looks at the price and then the wrong contractor gets appointed leading to poor quality, time overruns and cost overruns to rectify defects.

The evaluation of the "functionality" of bidders to ensure quality and prevent incompetent bidders getting contracts has become an important part of the bid evaluation process. Getting the right contractor on site is critical to delivering projects on budget and on time.

This use of functionality is open to abuse and technical departments can make themselves guilty of tailoring the functionality requirements to suit a bidder in whom they have confidence or a good, not necessarily fraudulent, relationship. People like to work with people that they know and trust, but space has to be made for new entrants into the market provided reasonable safeguards are in place.

Section 24.(1)(d) provides that the procurement system must provide for evaluation of criteria such as capability, functionality and cost-effectiveness but must, very importantly in my opinion, do so "without limiting new entrants or emerging suppliers or both".

Growing the economy requires making room for new entrants.

3.6 Chapter 5, Part 1 – Procurement system, methods and related matters

Section 24 requires the procuring institution to develop and implement a procurement system within the framework to be prescribed by the Minister. It is this prescription which causes concern that, while the obligations are decentralised to the municipal managers, their discretion may be significantly fettered by the restrictions that may be imposed by the framework.

Volmink (2014, 44–46) warns of the consequences of too rigid a system which overly restricts the discretion of the procuring institution. At the same time, he also warns that too much flexibility or discretion can lead to inconsistency and even fraud. A balance needs to be found between a rigid check-box system which can eliminate competent, cost-effective bidders and a lax system which can be manipulated and which leads to a lack of certainty. It is hoped that the framework achieves that balance.

Section 24.(4) states that the PPO may determine standard bid documents. It must be remembered that PPO instructions are only binding on municipalities if the council adopts the instruction. This does leave the door open to the local government sector to use bid documents tailor-made for their own situation.

Section 25 of the Act does permit the current situation whereby organs of state may contract with each other without going through an open tender process. The language of the section is not peremptory so municipalities will be able to decide whether or not they want to go that route. There are however exceptions to that rule in the case of transversal contracts and certain sector-specific rules such as those imposed by the State Information Technology Act, No. 88 of 1998 (SITA Act).

The procurement must take place via a bid committee system to be prescribed by the Minister. The current bid committee system is tried and tested, and I see no reason why it would be changed.

3.7 Infrastructure

One of the aspects of the Act that will surely be warmly welcomed by municipal engineers is the increased focus on the procurement of infrastructure and indeed, the elevation of infrastructure procurement, by section 24.(1).a.(ii), to strategic status. Infrastructure procurement is arguably the lifeblood of service delivery, especially in local government sphere of government, and thus requires this focus and status.

Section 24.(1)(a)(ii) provides that a separate system may be implemented for the procurement of infrastructure and capital assets. At first glance the technocrats would welcome this as it is often stated that building a freeway is different from buying pens and pencils. While this is certainly true, there are two schools of thought on the matter. One school of thought is that the procurement of infrastructure is so specialised that a unique and separate system is needed. An alternative proposition is that the further fragmentation of public procurement needs to be avoided so a separate system should not be created but appropriate methods, within the system, need to be selected for infrastructure procurement. It should be borne in mind that there are instances where infrastructure and capital asset procurement may overlap with the procurement of the non-capital goods and services required to operate and maintain the works. It would be confusing to have to choose between two systems or, worse, use two different systems. It would, in such cases, be preferable to have one system from which appropriate methods can be selected.

The final say on the systems and methods approved by regulation will lie with the Minister and the regulations which must be published under sections 63.7.(b).(i) and (ii) will clarify and give direction to the procurement of infrastructure.

My closing remark on this matter is to align my views with Anthony (2020, 27), writing on the then Bill, that the definition of "Infrastructure" in the Act should align with the CIDB definition of "Construction Procurement". The Act does repeal certain sections of the CIDB Act but the two Acts will largely co-exist.

3.8 Chapter 5, Parts 2 and 3

These parts deal with the promotion of the use of technology and access to procurement information respectively. In trying to limit the paper to topics of interest to municipal engineers, these sections will not be discussed here. I acknowledge that the use of technology is of interest to engineers, but the sections are still quite vague and not yet clarified by regulations.

3.9 Chapter 6 – Dispute resolution

This is a weighty chapter and introduces some important new concepts and mechanisms not yet used in South African public procurement.

3.9.1 Self-review

As early in the Act as section 8.(2), the procuring institution is granted, as prescribed of course, the authority to correct any decision it made. Furthermore, section 35.(1) grants dissatisfied bidders a genuine appeal mechanism as an internal, non-judicial review. Currently the MFMA envisages only an objection and Section 62 of the Municipal Systems Act grants an appeal only if the contract has not been awarded.

As can be inferred from sections 8.(2) and 35.(8) the award of a contract can be withdrawn at any time.

This right of self-review is welcomed as it can afford a bidder, without the appetite or resources for expensive and time-consuming litigation, a real remedy against an unfair decision. A procuring institution which finds that it has made a mistake or has uncovered fraud within its ranks can do a self-review without having to resort to litigation. Due to the backlogs in the courts the matter may well be moot by the time a court date is obtained, as was the case in *Moseme v King*.

The section does not however, place a time limit on the right to self-review. This can lead to uncertainty as an innocent supplier can never be certain that a fairly won contract will not be reviewed somewhere down the line. Should this happen then the impugned decision would have to be referred to the Tribunal Sections 35.(8), 47.(1) and 52.(1) and the courts should the Tribunal decision be unfavourable.

3.9.2 The Public Procurement Tribunal

This is an entirely new concept on a national level although the Province of Kwa-Zulu Natal did have a functioning provincial tribunal.

The Tribunal provides a non-judicial external dispute process. It is relatively cheap and quick compared to judicial reviews by the courts.

In terms of the Act a party dissatisfied with a decision of a procuring institution, including a decision to debar, may, having exhausted the internal processes, request the Tribunal to review the decision. The timelines imposed are short so as to not delay service delivery or to disrupt contracts which have advanced to a significant extent.

The Tribunal will hear the matter in much the same way as a court would and can make rulings similar to a court, including to dismiss the application, refer the decision back for reconsideration, review the decision and may make cost orders.

This seems to be a positive step in that the Tribunal, if adequately resourced, can make quicker decisions than the overburdened courts can at a lower cost; thus, making administrative justice more readily available. However, I have one serious concern over the provisions of section 52.(1) which states that a person dissatisfied with an order of the Tribunal may take the order on judicial review. This could mean that a party with deep pockets and determined to litigate can merely continue the fight after the Tribunal stage. The Tribunal could thus become just another link in the whole chain and result in the dispute process becoming even longer, more drawn-out and expensive. For a small or medium municipality with limited resources trying desperately to implement a project this additional step could well scupper the project.

3.9.3 The stand still process

The stand still process, used in various jurisdictions around the world including the United Nations Commission on International Trade Law (UNCITRAL) model law Article 65.1, is a new development in South African public procurement law.

Under the current dispute system a procuring institution can, sometimes recklessly, simply continue implementing a contract despite challenges. This can have the effect, that by the time the matter, plus any appeals, is finalised the contract can be substantially, if not fully complete rendering the court proceedings moot. If an aggrieved bidder or other party with standing, wants to halt the execution of the contract they have to request the procuring institution not to proceed. If they do not obtain that agreement they have to approach a high court for an interdict.

The stand still process introduced by Part 4 of Chapter 6 is a very welcome innovation. It prevents the conclusion of the contract, other than in the case of an emergency, during the re-consideration period and, if applicable, until after the review process by the Tribunal has been completed. There is provision in Chapter 6 to prevent spurious or vexatious challenges from holding up the service delivery.

3.10 Chapter 7 – General provisions

This chapter covers a number of aspects, which while of importance, are not of particular interest here.

What needs some attention is the previously mentioned aspects of the issuing of instructions by the PPO and the making of regulations by the Minister as well as the following sections.

3.10.1 Section 58

This section, which absolves persons acting in good faith from civil or criminal liability, will be welcome to those officials who may be alarmed by some recent high court judgments imposing personal cost orders on officials. Fraudulent and corrupt behaviour will be dealt with under the provisions of sections 59 and 60.

3.10.2 Section 65

This section requires all formal communications to be in writing. Note that under South African law an electronic mail (email) is regarded as being in writing.

4 CONCLUSIONS

The "new" Public Procurement Act, many years in the making, was finally assented to by President Ramaphosa and signed into law on 18 July 2024. Almost a year later, at the time of writing, the Act is not yet in effect as it needs extensive regulations to give it practical effect. Public procurement in South Africa is thus somewhat in limbo anxiously awaiting the publication of the regulations which may be done in stages as permitted by the Act.

Responsibility for procurement is decentralised by the Act but the regulations will clarify the extent to which power to determine policies and procedures is centralised.

The Act seeks to reduce the proliferation of legislation and streamline the fragmented public procurement framework into this one act, albeit in concert with other acts such as the CIDB Act and the BBBEE Act and subject to the Constitution.

The Act is applicable to all organs of state including all those entities governed by both the MFMA and PFMA but also extending its reach to private contractors who have been awarded contracts and to those procuring on behalf of organs of state.

Set-asides, prequalification and compulsory subcontracting are among the mechanisms enacted to promote disadvantaged groups and develop under-developed sectors and areas.

A new development is the transferring of duties and powers from the Office of the Chief Procurement Officer to the newly created Public Procurement Office together with extensive new powers and functions. Significant resourcing will be required for this office to function effectively.

Dispute resolution is currently ineffective, time-consuming and expensive. Self-review by procuring institutions has been introduced and a Tribunal created to speed up challenges to decisions and awards and to make effective dispute resolution more accessible. The Tribunal may however, just become another link in the chain as its decisions are subject to judicial review. An important development is the introduction of a stand still period to prevent unlawfully awarded contracts from proceeding while the review process is happening.

The Act is wide-ranging with far-reaching provisions which will take much work to implement. Ultimately the Act should have a positive effect on public procurement but, to achieve continual improvement, is subject to review after two years.

The different groups at the coalface of service delivery, including municipal engineers and the procurement officials, currently known as "Supply Chain" will need to recognise the fact that effective procurement is the lifeblood of local service delivery and will need to work together for the greater good of achieving the sustainable service delivery so desperately needed at local government level.

5 RECOMMENDATIONS

5.1 Preparation

While much has to be done before the "new" Public Procurement Act comes into effect and while there is still considerable uncertainty about exactly how the system will work, I strongly advise the engineers and procurement practitioners alike not to sit back and wait for instructions.

There is a lot to be done now to read and get to know the Act, talk about the ramifications for your municipality, get to know your local needs and resources, do market analysis, read all the articles you can on and determine training needs.

5.2 Teamwork

If unnecessary time and energy is spent in the "us and them" conflict between the technical departments and "Supply Chain" we run the risk of wasting our scarce resources in fruitless gamesmanship which does not advance the critical objective of service delivery.

The Act puts in place the mechanisms to unblock the service delivery pipeline. It is up to the main players to use these mechanisms. The initiatives in the Act to upskill and professionalise the procurement function should be used to build trust between the various players.

Recognising that all parties are there to serve our communities, get to know each other, have understanding for other points of view and, to use an awful cliché, break down those silos which are placing artificial barriers in the way of service delivery.

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