PAPER 12

THE PUBLIC PROCUREMENT ACT HAS BEEN DECLARED INVALID – WHAT DOES THIS MEAN FOR A JUDICIOUSLY REIMAGINED BLUEPRINT FOR EFFECTIVE PROCUREMENT?

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ABSTRACT

When questioned on the delay in getting a much-needed project off the ground, many a municipal engineer has replied, in exasperation, "It is stuck at Supply Chain!"

I have much sympathy for the colleagues in procurement who face pressures, sometimes intolerable, from all sides. The fact is, though, that there is a perception that Supply Chain (to be called Procurement going forward) is a roadblock in service delivery. In even the best run municipalities, the awarding of tenders can take an inordinate amount of time. The "new" Public Procurement Act, 28 of 2024 (the Act) sought, among other objectives, to "… improve efficiency and effectiveness in procurement by streamlining procurement processes, amongst others, through the use of technology".

One of the key problems facing public procurement practitioners is the fragmentation of the legislative framework governing public procurement. The Act sought to significantly reduce the plethora of laws and quasi-laws that practitioners have to take into account.

The Regulations, which had to be gazetted before the impugned Act could come into effect, had been drafted by National Treasury and, at the time of writing, had been published for public comment in terms of the public participation process. Numerous submissions had been made by the closing date for submission of 15 July 2026. These were to have been considered by National Treasury before being revised and then submitted to the National Assembly for parliamentary scrutiny as required by the Act. Only thereafter could the Regulations be gazetted.

As evident from the timeline shown here, the process was well advanced and the regulations, albeit flawed, were getting close to bringing the Act into effect. The unanimous Constitutional Court judgment handed down on 17 September 2026, has upset the proverbial applecart, leaving the public procurement community, the builders of public infrastructure and all those engaged in service delivery asking, "What now?"

This paper will attempt to answer that question and will propose to municipal engineers an approach to effectively function during this period of uncertainty so that everything does not remain stuck at Supply Chain.

1. INTRODUCTION

In my 2025 paper and presentation to the IMESA conference, I focussed on the Public Procurement Act, 28 of 2024 (the Act), which was, at the time, awaiting the making of the regulations by the Minister of Finance in terms of section 63.(1) of the Act. As pointed out then, the Act was not, and could not, be in effect because it needed the regulations to be made by the Minister of Finance to give it practical effect.

The long process of rationalising, modernising and streamlining South African public procurement, while having some way to go, and being somewhat flawed, was quite far advanced until the 17 September 2026 Constitutional Court judgment invalidating the Act was handed down. The judgment, while crystal clear in its reasoning and wording, has caused considerable uncertainty within the public procurement sector. The court, presumably mindful of the separation of powers between the judicial, legislative and executive arms of government, expressly refrained from ordering a remedy. The Court merely declared the Act, in its entirety, invalid, not on its merits, but for the defective process followed.

This paper will deal with the following aspects:

- A brief overview of the Constitutional Court judgment;
- A brief description of the current status of the legislation;
- The options now open to the legislators;
- An analysis of the draft regulations, some of which can be used under the current legislation, likely to affect the municipal engineers' work;
- The challenges to be addressed during the revision of the Act; and
- Recommendations for the interim period.

For the sake of brevity and clarity, the following terms will be understood to have the meanings set out below unless the context clearly indicates otherwise:

- The "Act" refers to the Public Procurement Act, 28 of 2024 – now invalid;
- The "regulations" refer to the draft General Public Procurement Regulations, 2026; and
- The "Minister" refers to the Minister of Finance of the Republic of South Africa.

For further clarity and in keeping with the context of this paper, I will use the word "municipality" rather than the more cumbersome term "procuring institution" which is used to refer to organs of state in general.

2. A BRIEF OVERVIEW OF THE CONSTITUTIONAL COURT JUDGMENT

There were actually two cases brought before the court. These were *Premier of the Western Cape Government and Another v Speaker of the National Assembly and Others* and *City of Cape Town and Others v Speaker of the National Assembly and Others* but due to the overlap of the two cases they were heard together and a single judgment was handed down.

It must be emphasised that the declaration of invalidity of the Act was not at all on its merits but rather on the public participation process which was defective. One of the contentious parts of the Act was chapter 4 dealing with preferential procurement. Chapter 4 received mention in the judgment but again, not on its merits but rather because it differed materially from the version which had gone through the public participation process – flawed as it was.

One of the key points made by this judgment was that, as in this case, where legislation will have a material impact on the public it is, in the words of the judgment at [77], "crucial that the public be afforded the fullest opportunity to have their voices heard during the legislative process". This right to be heard has been determined by the Constitutional Court in earlier judgments, including *SA Veterinary Association v Speaker of the National Assembly*, to also apply when material amendments are made to Bills which have already been subject to the public participation process. Such amendments require further public participation. It is furthermore clear that the Court requires public participation to be a genuine effort to obtain and consider the views of the public. The public participation process shall be meaningful and may not be merely an exercise in compliance.

This judgment will surely be used as authority in future cases regarding the duty of government to meaningfully consult with its constituents when making laws which impact on them. These laws include not only Acts of parliament and their regulations but also by-laws and other subordinate legislation. The key take-away is that the legislator is not bound to agree with or adopt every, or indeed any, submission made provided that these are at least considered and their merits evaluated. The Constitutional Court has set out clear guidelines on what is acceptable so there is no excuse for government to short-change the public.

3. THE CURRENT STATUS OF THE LEGISLATIVE PROCESS

3.1 Brief overview of the current status of the Act and the regulations

The Act was signed into law by the president on 18 July 2024. There was much fanfare around the Act and great expectations within the public procurement community that at last South African public procurement was on the road to greater efficiency and reduced fragmentation, both of which are objectives of the Act. H owever, at the time of writing more than 2 years later, the Act, imperfect as it may have been, and even before it could come into effect, has been declared invalid by the Constitutional Court. Consequently, the Act's draft regulations, which had been going through their own public participation process, are thus null and void because regulations cannot exist without the primary legislation to which they are subordinate.

3.2 How the legislative framework would have looked under the new Act and its regulations

Although the Act has ceased to exist and the regulations cannot exist without the Act, the framework which the Act sought to establish is briefly described here to give context to the current situation. A knowledge of the provisions of the Act is still relevant and does warrant discussion, as the Minister of Finance has stated that the Act will not be abandoned. In a statement released by National Treasury on 17 September 2026, the Minister and the National Treasury reaffirmed their commitment to achieve a single Act regulating public procurement in South Africa.

The implementation of the Act has thus been delayed, and the practical effect of the court order is that procurement shall proceed under the current legal framework. Furthermore, the final accepted version of the Act and its regulations may differ materially from the Act in its current form. There are positive features of the Act that are unlikely to find serious opposition from those who seek the reform and improvement of public procurement.

The fragmentation of the public procurement legislation has long been a concern as described in the 2025 paper. That concern and the initiatives to rationalise, modernise and streamline the legislation remain valid. For now, these initiatives will have to take place under current legislation as far as this allows. One of the stated objectives of the Act was to reduce the number of pieces of legislation regulating public procurement. The Act sought to repeal several pieces of legislation whose provisions would be consolidated into the Act itself. Examples are the Public Procurement Preference Framework Act, 5 of 2000 and its Preferential Procurement Regulations, 2022, the provisions of which would have been covered under sections 17–23 of the Act and Chapter 5 of the regulations.

As will also be discussed in this paper there are however a few potential disconnects with other legislation including the CIDB Act in respect of infrastructure procurement and the BBBEE Act regarding preferential procurement.

3.3 Current uncertainties

The draft regulations as they stood revealed some uncertainties despite the best efforts of the drafters. A more detailed analysis, including the deliberations of the APLU conference held on 4–5 June 2026 revealed more apparent gaps and uncertainties. Due to lack of space only those that are likely to directly impact on municipal service delivery, particularly the engineering function, will be discussed in Section 4 below.

The declaration of invalidity now gives the legislator the opportunity to rectify these deficiencies. It is hoped that the voluminous submissions made by the procurement community, engineers, legal practitioners, and suppliers will be used to improve the revised Bill to be subjected to a proper consultative process before being sent to parliament. The comments already made and those still to be made will surely be helpful to the drafters of the Bill and the subsequent regulations.

3.4 The options now open to the legislators

When a court reviews and declares invalid an Act it may order, in terms of section 172(1)(b) of the Constitution, a just and equitable remedy. This may include the suspension of the invalidity to give the legislature time to remedy the defects in the Act. In this case the court refrained from framing any remedy. The judgment stated that the Court should "avoid directing Parliament's affairs" and would not instruct Parliament on how to remedy the procedural defects in the enactment of the legislation.

As there is already legislation in place, primarily being the Public Finance Management Act (PFMA), the Municipal Finance Management Act (MFMA) and the Preferential Procurement Policy Framework Act (PPPFA) and their respective regulations and others, public procurement will merely proceed as it does under the current legislation. The Minister may, by way of Treasury Instructions applicable to PFMA entities, and regulations, in the case of MFMA entities, take steps to improve the current procurement legislative framework, during the revision process.

Following the judgment, which did not prescribe a remedy, the Minister is free to do one of the following:

(i) Do nothing and retain the current set of laws with or without amendments and improvements;
(ii) Retain the current version of the Act in its entirety and re-introduce it as a Bill after following a proper public participation process;
(iii) Revise the Act using public and stakeholder input and use that as a draft Bill for the public participation and legislative process; or
(iv) Go right back to the start of the legislative process by drawing up a green paper, followed by a white paper before introducing a Bill to Parliament involving the public, academics, practitioners and other stakeholders throughout the process.

My expectation, based on the Minister's media statement, is that the 3rd option, rather than the 4th option, will be selected due to the shorter time needed. Treasury can now take the opportunity to improve the Act and the subsequent regulations based on the inputs received in order to make it acceptable to the current political dispensation which sees parties which were in the opposition when the Act was enacted in 2024, now participating in the Government of National Unity (GNU). As stated by the internationally regarded law professor from Stellenbosch University and APLU director, Geo Quinot, the Minister will have to revise the Act to get it through the GNU.

4. THE REGULATIONS THAT COULD DIRECTLY IMPACT THE MUNICIPAL ENGINEERING SECTOR

4.1 Overview

At the outset I must point out that every organ of state, be it a large state-owned entity, a national department, a metro or a small rural municipality, would be treated equally and have equal obligations under the regulations. Clearly this one-size-fits-all approach is impractical and would place intolerable burdens on the smaller and less well-resourced municipalities. This point was made by numerous commentators and will surely be taken into account and hopefully catered for in the revised legislation. IMESA is urged, as an organisation and as individuals, to consider this and make the appropriate representations when the time comes.

The regulations which could most directly impact on the municipal engineers are:

- Regulation 4 which sets out in great detail the steps that the municipality must take to develop and implement a procurement system that promotes strategic procurement;
- Regulation 5(4) which requires the municipality to verify the information provided by bidders;
- Regulations 6–22 which describe procurement methods and procedures;
- Regulations 23–25 which deal with the bid evaluation process; and
- Chapter 4 which regulates the procurement of infrastructure and capital assets.

Due to the wide scope and complexity of the regulations, I will provide only a broad overview of those listed above as they were included in the draft regulations, what can be used and what is required to improve them, viewed through the lens of the municipal engineer.

I have, in this paper, drawn heavily on the collective expertise of the public procurement community associated with the African Procurement Law Unit (APLU) of Stellenbosch University headed by Professors Geo Quinot and Sope Willians, the proceedings of the APLU conference held on 4–5 June 2026 and the weekly webinar series hosted by Mr Shaun Scott. Where I draw specifically on individual presentations, these are acknowledged. In many instances I draw on the views expressed by participants which cannot practically be formally referenced but I do acknowledge, with thanks, the contributions by the community.

4.2 Regulation 4 – Promotion of strategic procurement

This regulation requires the municipality to promote strategic procurement. The first problem with this regulation is glaringly obvious – to promote something you need to know exactly what you are promoting. The Act defined the term strategic procurement as "a comprehensive approach to procurement that aligns with the strategies and objectives of a procuring institution, thereby enhancing cost-effectiveness". That definition states policy and provides the platform for the regulation, which is supposed to elaborate, describe and clarify the Act. The draft states, in regulation 4(1), that "[a] procuring institution must develop and implement its procurement system in a structured, systematic and data-driven approach to plan, manage, and develop its supply base in line with its objectives…" This, with respect, is restating policy and not giving detailed instructions or guidelines. This lack of clarity is problematic and needs to be addressed in the new version.

Certainty is one of the cornerstones of good law and good procurement. Having vague legislation will lead to vague bid documents which invite challenges and delays. Froneman J, writing the unanimous Constitutional Court judgment in the case known as *Allpay I*, confirmed that vagueness is a valid ground for review under the Promotion of Administrative Justice Act (PAJA).

Secondly, the regulation places some onerous burdens on the municipality to carry out analyses and market research. Smaller and medium municipalities simply will not have the resources to comply and will be forced to go to consultants thereby diverting funds from essential services. As stated in the overview above, I urge IMESA, whose members will be tasked with implementation, to strongly lobby for a more practical and achievable framework for strategic procurement. It should also be borne in mind that the recently published draft CIDB Draft Standard for Uniformity in Construction Procurement, adopts the same-one-size-fits-all approach and imposes further parallel burdens on the municipality.

4.3 Regulation 5(4) – Prospective supplier database

This is another regulation which will surely survive the revision process. Regulation 5 would require the Public Procurement Office (the PPO) to establish and maintain a central database of suppliers and for suppliers to self-register. This will probably be similar to the current Central Supplier Database (CSD) but with the terminology available by then it will hopefully have increased functionality. This will then allow it to become a powerful tool to establish beneficial ownership, expose fronting and identify operators of debarred entities who simply reappear under the guise of new entities.

The part that could burden municipal procurement is regulation 5(4) which requires the municipality to verify, "against available data sources and databases," the information submitted by bidders to verify that the bidder is eligible to bid, has provided complete information and that the information provided is correct and not false.

For this to be done without adding administrative burdens, an enhanced AI-powered PPO database will be a tool to avoid the municipality having to check, for every single bidder, numerous sources such as the CIPC, the debarred bidders lists, the CIDB register of contractors and SARS, among others.

From a bidder's point of view, it is hoped that this database will be more effective than the CSD in verifying the information rather than having to submit the same information and supporting documentation repeatedly.

Most, if not all municipal engineers, will by now be using artificial intelligence (AI) in some form and will appreciate the power of AI to perform routine tasks when used correctly. A well designed, user-friendly database will go a long way to make the verification process quick, accurate and corruption-resistant.

4.4 Parts 3-8 (Regulations 6-22) – Procurement methods, requirements and procedures

These parts describe the procurement methods and procedure that municipalities are permitted to use, and which include various open competitive methods as well as direct procurement. Many of the methods and procedures will be familiar as they are currently in use, but the regulations do introduce one new method, competitive dialogue, and improves the descriptions of two others viz. direct procurement and frameworks which are also known as panels.

The reset caused by the Constitutional court judgment should be used as an opportunity to address the concerns that we have with the draft regulations which confuse procedures with methods and exclude some useful methods including petty cash procurement and community-based projects. It must also address the provision in regulation 6(2) which was identified during discussions in the APLU webinar series (2026) as a potential loophole that could see any procuring institution by-passing many of the regulations.

Regulation 6(2)(a) states that the listed methods may "be adapted or modified depending on the circumstances or conditions". These adaptations or modifications do not need any approvals or deviations and do not need to be reported anywhere. The implication of this regulation is that the procuring institution can, in their procurement policy completely ignore, for example open bidding, can disregard minimum advertising periods, and can dispense with any of the prescribed evaluation criteria. Even individual bids can be tailored by the Bid Specification Committee to suit their own agenda. At best this can cause chaos with each municipality completely rewriting the requirements and leaving the bidders struggling to comply with a myriad of requirements. At worst it will reopen the door to rampant state capture and corruption.

It is inconceivable that this by-passing mechanism represents the intention of the drafters and will probably not survive the revision and public consultation process.

4.4.1 Petty Cash

A method currently in use is petty cash procurement for the procurement of small items that do not justify using one of the formal methods. However, the draft regulations do not provide for this, which is, I believe, an unfortunate omission. Imagine the situation where a plumber urgently needs a rubber O-ring, which is not available in the municipal stores. Instead of being able to purchase it with petty cash, a procurement process needs to be carried out. This may be an extreme example but not being able to use petty cash purchases will result in plenty of unnecessary administrative work and delays.

4.4.2 Requests for quotations, bids and proposals

Regulations 7–9 regulate these open competitive methods. As will be seen below the requirements to use a specific method allow discretion by the municipality in the choice of the method. The user department will thus have to submit a detailed proposal to the Bid Specification Committee. Discussion of these is limited to a brief description as it is likely that they will be refined during the revision and rerun public participation process.

4.4.2.1 Regulation 7 – Quotations

For procurement of standardised, low risk items where evaluation is primarily based on price and where the value is below a threshold still to be prescribed, written quotations may be requested from at least three bidders listed on the supplier database. It is not a truly open method as it will not be advertised and only those invited will be eligible to bid.

One of the obvious shortcomings with this regulation is that the conditions under which this method is permitted are not clear and will require the exercise of discretion, which many public sector procurement officials and management are reluctant to do – especially after recent judgments that have imposed personal costs orders on officials. Furthermore, there is no clarity on which of the suppliers on the database will be requested to provide quotations. The regulations are silent on whether a rotation basis is acceptable or not.

4.4.2.2 Regulation 8 – Request for bids (RFB)

This open competitive method may be used for procurement of the same nature as that for which the quotation method is permitted but is above the still to be prescribed threshold. The current draft contains an error and a discrepancy so it is not discussed further here as it will need correction during the revision process.

4.4.2.3 Regulation 9 – Request for proposals (RFP)

Regulation 9(2) would allow the municipality to use this open competitive method when:

- the bid is complex; requires specialised expertise; requires performance-based outcomes; or requires innovation;
- the market is competitive;
- the evaluation is not based primarily on price; and
- the bidders have to propose solutions, methodologies, resources or innovative approaches.

4.4.2.4 Practical implications of regulations 7–9 (RFQ, RFB and RFP)

For municipal engineers the RFQ method will not have many implications due to the low value likely to be prescribed but could be used for smaller maintenance items where price should be the determining factor. Items that come to mind are pipe fittings and repair components where the existing pipes are known and thus the specifications are fixed.

The RFB method will be mainly used for construction where the design has been done and the specifications well-defined, either in-house or by a consultant. This method corresponds largely to the request for tenders or request for bids methods currently in use and the evaluation should be on price and preference together with functionality.

The Request for Proposals (RFP) differs from the RFB method in the sense that the specifications are not complete and the bidder has to do a significant amount of design. It can also be used for turnkey projects where the inputs are known e.g. the design and build of a water treatment works where the required volumes are known, the characteristics of the raw water are known to lie between upper and lower parameters and the SANS 241 standard defines the output. In a case like this the bidder will propose the treatment process, design the civil, mechanical, electrical and instrumentation works and tender a cost. This method will require a sophisticated evaluation process to judge whether the proposed solution would work, the practicality of its operations and maintenance and the lifecycle costs to award the most economically advantageous bid which will not necessarily be the one with the lowest price.

Both the RFB and RFP methods could incorporate the two envelope or two-stage bidding methods which are currently also in use, and which are described in regulations 10 and 11.

4.4.3 Regulations 12 and 13 – Competitive dialogue method and competitive negotiation procedure

These methods will be new to South African public procurement. Competitive negotiation is one of the methods contained in the UNCITRAL Model Law, so enjoys international recognition. Dialogue is also recognised by the Model Law as one of the methods for use in public procurement.

Competitive dialogue is described in regulation 12(1) as an "augmented two-stage procedure" and, as its name suggests, contemplates a two-stage process where potential bidders are short-listed in the first phase and additional iterations take place in the second stage.

This is a useful method where the best solution is not immediately apparent, and it allows for the municipality to lawfully engage with suppliers in an open and transparent manner to iteratively arrive at the best solution which is not necessarily the cheapest solution. This is a significant departure from the current situation where contact with potential bidders during the procurement process is frowned upon and can lead to challenges.

It is hoped that these methods remain in the revised Bill as they are potentially useful albeit not without problems in implementation.

4.4.4 Direct procurement (regulation 14) and procuring from a manufacturer (regulation 17)

These are non-competitive methods and procedures which may be used in certain circumstances such as sole supplier, intellectual property rights, emergencies or practicality. There are other reasons for direct procurement stated in the regulations, but these are the ones of interest to the municipal engineer.

These two methods will inevitably spark discussion on the use of original equipment manufacturers (OEM) where the use of OEM equipment can be justified when replacement parts are needed, multiple operating procedures and duplication of spares are to be avoided and replacing or modifying of surrounding infrastructure would be costly and time-consuming.

The regulations do however warn against becoming overly reliant on a specific supplier and seeks to guard against becoming comfortable with a regular supplier. Remember also that section 24(1)(d) of the Act prohibits the use of evaluation criteria which prevent the participation of new entrants.

4.4.5 Framework agreements under regulation 15

This method, currently known as "panels" warrants some discussion due to its usefulness to municipal engineers and because it is currently widely used.

Framework agreements are internationally recognised and are a useful method to use for maintenance of infrastructure where the municipality anticipates that various works will be required but does not know, in advance, exactly what works will be required.

The UNCITRAL Model Law (2011) defines the framework agreement procedure as a two-stage procedure whereby a supplier or a number of suppliers are selected during the first stage to enter a framework agreement with a view to awarding work to one or more framework contractors during the second stage. The description in regulation 15(1) is essentially the same as the UNCITRAL definition; thus, aligning it with international best practice.

The second stage can be with or without competition between the contracted suppliers appointed during the first stage. Frameworks can either be open where additional suppliers can be admitted during the term of the framework or closed whereby no additional contractors are admitted. The open framework means additional administrative work to evaluate new applicants whereas the closed method can be criticised for impeding the progress of new entrants.

The obvious advantage for the municipal engineer needing to appoint a contractor at short notice to, for example, repair or replace a failed pump is that the first phase of the procurement process has already been done and quotations have only to be requested and adjudicated, which is a relatively quick process. A variation of this method is to appoint only two contractors in the first phase, if pricing is also part of the first phase. The two contractors are then ranked as the "winner" who is to be awarded all the work and a "runner-up" or standby supplier. If for some reason the "winner" cannot accept a work package it can be allocated to the standby.

Due to the advantages of the use of panels these have come to be extensively used in recent years. However, on occasion, disputes over panels have ended up in litigation. South African courts have not criticised the use of panels as such but have reviewed a number of awards due to the improper appointment of the suppliers in the first stage and, more often, the unlawful application of the second stage.

To illustrate the potential difficulties, a few cases are mentioned here.

4.4.5.1 The *Tekoa* and *JK Structures* judgments

In *Tekoa*, the court criticised the bid specifications on the grounds of vagueness quoting the Constitutional Court judgment in the 2013 *Allpay* case with approval. This tender was for a panel of turnkey service providers but was ambiguous regarding the requirement for Construction Industry Development Board (CIDB)[1] registration. Note that a judgment of the Constitutional Court is binding on all courts in South Africa in terms of the *stare decisis* principle of South African law.

In *JK Structures* the Municipality declined to appoint JK Structures to the framework agreement due to what it held was an insufficient CIDB grading. The court held that being in the framework was not a construction contract and thus the Municipality had applied a too high CIDB requirement.

These cases illustrate that, even in the first phase, problems can arise. The bid specifications must be carefully and correctly drawn up to avoid problems even before the second phase is embarked on.

4.4.5.2 The Maximum Profit Recovery cases

Maximum Profit Recovery (MPR) have challenged several awards of work packages in the second phase of panel arrangements. In the *Umlalazi* case the award of the work was successfully challenged on several grounds, including the fact that not all panel members were invited to submit quotations in the second phase and that the work package awarded differed from what was specified in the bid documents.

Although MPR's appeal to the Supreme Court of Appeal in the *Naledi* case was dismissed on the grounds of mootness, the court did note with approval the municipality's concession that all the panellists should have been invited to submit quotations for the work package allocated.

4.4.5.3 The correct use of frameworks

From the above discussion the municipality seeking to make use of this useful method, which is permitted under current legislation, should ensure:

- that the bid documents are clear;
- that the functionality requirements are rational;
- that the allocation of work during the second phase is clearly defined in the bid documents; and
- that the procedures are fair and scrupulously followed.

4.4.6 Emergency procurement under regulation 21

This method is also of great interest to municipal engineers as essential infrastructure can and does break down at the most inopportune times. The regulations do make provision for expedited procurement in cases of emergency. There are however checks and balances to ensure effective use of public funds and to avoid abuse of the system.

It should be pointed out that emergency procurement is a valid deviation under the current regulations. Note must be taken of the Auditor-General's aversion to self-created emergencies so good emergency planning must be able to be demonstrated.

4.4.7 Bid evaluation (regulations 23–25)

I emphasised in the discussion of frameworks that the drafting of bid documents must be thorough to avoid challenges to any awards. That is the first step in the journey to good procurement which promotes, rather than hinders, good service delivery.

Good evaluation takes time, but poor evaluation wastes time and costs money so the municipality must ensure that the policy is clear, that the bid specifications are clear and rationally connected to the purpose, that any discretion granted e.g. to request missing documents from a bidder is permitted by the policy and bid documents and is fairly and consistently applied.

The draft regulations on evaluation will however have to be rewritten due to inconsistencies within the regulations and are therefore not discussed further here.

A theme throughout the Act and the regulations is to promote competition. This is anyway a Constitutional imperative and thus the writing and implementation of policies, bid documents and specifications must not have the effect of hindering the entrance into the market of new entrants or emerging suppliers. At the same time the municipality needs to optimally spend scarce resources and requires quality so the promotion of the new entrants and emerging suppliers must be done in a responsible way.

Bid evaluation is not a legal process, despite the number of awards that end up in court, but a practical and logical one, so municipal engineers should be given a central role in the development and implementation of the policy, methods and procedures.

4.5 Infrastructure (regulations 37–50)

In my 2025 paper I stated optimistically that one of the aspects of the Act that would be warmly welcomed by municipal engineers is the increased focus on the procurement of infrastructure and that this would hopefully speed up service delivery.

1 Public infrastructure tenders must comply with CIDB requirements as per the Construction Industry Development Board Act, No. 38 of 2000

Having read the regulations, I am not sure that it will unblock the flow of service delivery in relation to infrastructure. Much of chapter 4 is devoted to infrastructure and, while there are some good and useful provisions, there are many undefined terms and again various plans and studies required. There is very little practical guidance. To make this useful and workable is going to take a lot of work and take up resources that most municipalities do not have in-house. If the Public Procurement Office is not sufficiently resourced, as feared, consultants will inevitably be widely used. The current Auditor- General's report has already expressed alarm at the over-use of consultants.

Of particular concern is the disconnect, identified by Scott and Sanker, of the regulations with the strategic planning already required of the municipality including the IDP, IDP-aligned budgets and the SDBIP. This is a major weakness as the planning done under the procurement function cannot stand alone.

Furthermore, there is little or no alignment with the CIDB which is mandatory for the procurement, creation and maintenance of public infrastructure. A search of both the Act and the regulations reveals that there is only one reference to the CIDB and that is in the Act where it repeals certain sections of the CIDB and writes in other sections which seem to curtail to some extent the powers of the CIDB.

It is hoped and expected that the final regulations will be better in terms of their dealing with this vital topic.

5. THE CHALLENGES TO BE ADDRESSED IN THE REVISION OF THE ACT

Space precludes a full discussion of the challenges to be addressed so only a brief overview is presented here.

5.1 Strengths to be retained

There has been widespread acknowledgement of the efforts of the drafters, and but for the declaration of invalidity, we would now have had a solid foundation on which to build. Some of these are discussed below.

5.1.1 Transparency

As Williams points out, corruption is nothing new. Professor Williams cites procurement shenanigans going back to the American Civil War in the 1800s and notes that asymmetry of information is just one of the factors allowing corruption to take place. Transparency is thus an important prevention mechanism.

The now invalid Act and the draft regulations were replete with requirements for reporting and public participation which, while adding to the administrative burden of the municipality, would be a very positive step and is to be welcomed, especially in light of the rampant corruption exposed by the Zondo Commission and, more recently by the Madlanga Commission. The Zondo Commission report's Recommendation 6 emphasised the need for transparency.

5.1.2 Promotion of planning

The regulations require strategic and operational planning to be done. While this is to be welcomed it does place an additional burden on the local government sector already struggling to comply with the onerous reporting burdens placed on it. It is hoped that the reset allows time to increase the capacity of support bodies such as the PPO to ease the burden on already stressed municipalities.

5.1.3 Upskilling and support

The proposed training of procurement practitioners and bid committee members will help to improve the quality of bid documents and bid evaluation, both of which lead to challenges. Reducing the challenges to procurement decisions will contribute to IMESA's wish for judiciously re-imagined blueprints for effective service delivery. This training does not have to be placed on hold by the delay in the process and the Public Procurement Professional Body Working Group is continuing its efforts to establish a body to improve and regulate the public procurement function. To this end the Working Group has drafted and submitted to National Treasury a chapter for inclusion in the regulations to address the professionalisation of public procurement. If this is accepted, it will go a long way to move the function from a clerical one to a value-adding strategic one.

IMESA is urged to support this initiative and to equip its members with the skills to play a vital role not just in the implementation of projects but also in the procurement stage.

5.2 The Challenges

These are many but again, space precludes anything more than a superficial overview of the most critical ones.

5.2.1 One-size-fits-all

From a municipal perspective this is perhaps the biggest challenge. The draft review of the White Paper on local government notes the variances in capacity within local government and states that a one-size-fits-all approach is ineffective and it notes the need for differentiation. Put more bluntly, a small rural municipality with its meagre resources simply cannot be expected to do the same level of planning, regulation and performance as a metro with significant resources.

The regulations need to either ease the burden on the lower capacity municipalities without creating an environment conducive to poor performance and lack of controls or to provide real support to them without infringing on their autonomy.

5.2.2 Financial implications

Part 5 of the Memorandum on Objects of Public Procurement Bill, 2023 [sic] envisaged no substantial financial implications for the State.

It is however hard to see how the regulations can be implemented without substantial expenditure. There will be significant training costs and there is no indication that the Public Procurement Office will fund the training. The strategic plans and market analyses required by regulation 4 will take considerable work as will the new procurement policies. The preferential procurement requirements of chapter 5, which have not been discussed in this paper, will arguably result in direct premiums being paid by the municipality. While the need for preferences is not questioned, it must be acknowledged that these come at a price.

6. RECOMMENDATIONS ON WHAT TO DO NOW

6.1 Interim period

After the invalidity declaration and the falling away of the draft regulations the preparation for the transition to the new legislative framework has been put on hold and SCM continues as before. Pro-active municipalities will however not be passive but will actively prepare for the delayed transition.

During this time procurement will continue with the current procurement policies in place. The exercise of critically analysing the Act and draft regulations can be a valuable planning tool to incrementally improve municipal procurement.

6.2 Some of the regulations which are valid under current legislation can be phased in

As stated earlier there are a number of provisions which can be phased

in to improve the current SCM performance. These include: training and professionalisation of the SCM practitioners and the integration of trained technical staff into the SCM function, training of Bid Committees, especially the Bid Specification Committee which is the foundation of good procurement, the correct use of framework agreements, tightening up on emergency procurement, development of a strategic procurement plan and start incorporating AI under guidance to avoid spurious results.

6.2 The municipality engineer's role

Almost all the regulations relevant to the practical aspects of public procurement refer to the procurement or require provision to be made in the procurement policy. The procurement function will in most cases be responsible for the drafting of the policy. However, a well drafted policy will have to include the inputs of the user departments as well and one of the main users are the various engineering functions. The draft CIDB regulations should be studied and adopted where appropriate.

To ensure a well-drafted policy is finally adopted the municipal engineers need to make themselves heard and use every avenue to participate in the formulation of the policy to avoid it becoming just another roadblock to service delivery.

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