

Business input into NEDLAC REVISED WORKING DRAFT of the NEDLAC Public Procurement Bill - 30 SEPTEMBER 2022

4 October 2022

The National Infrastructure Plan 2050 (NIP 2050) published in March 2022 for implementation requires government to become a “sophisticated client” in *“its procurement of infrastructure, operating at a global standard commensurate with the significance and complexity required to deliver on South Africa’s long-term economic imperatives.”* This plan in recognising the need to strengthen institutions for delivery has identified amongst others the following conditions to be met to achieve the 2050 vision:

- 1) *The regulatory framework must enable network infrastructure procurement and delivery.*
 - *The regulation of SCM for infrastructure must enable integrated projects (to include demand, acquisition, logistics, disposal and risk management), with built-environment professionals playing a significant role. SCM for infrastructure must be handled as a strategic function, not simply a financial one.*
 - *The procurement of infrastructure must be differentiated from that of other goods and services.*
- 2) *A strategic approach must be taken to infrastructure procurement.*
 - *Value for money must be a focus and prioritised over lowest cost. This must include robust cost-benefit analysis.*
 - *There must be trust and understanding with suppliers.*
 - *IPDM will be de-linked from centralised purchasing and led by a chief procurement officer and/or high-level office specifically mandated and capacitated with built-environment professionals to procure and deliver infrastructure*
- 3) *Infrastructure delivery must be managed as an “enterprise” and not an ad hoc collection of projects.*
 - *Systems of accountability will become aligned with effective infrastructure delivery.*

NIP 2050 calls for the review and modification by 2022/3 of the regulatory and institutional framework for procuring and delivering *to be more enabling, while ensuring good governance.*

The 30 September draft of the PPB falls far short of this. It fails to deal with strategic procurement including that for infrastructure. We agree with the pragmatic way strategic procurement as proposed by the JSR can be accommodated by providing accounting officers / authorities with flexibility to deal with:

- (a) delivering project through contracts where project value is only realised when each contributing contract is successfully completed or new technology is central to a project; and
- (b) risk i.e. exposure to the chance of loss, harm or failure to achieve objectives

We expected that the revised draft would include elements such as the following to enable strategic procurement:

- 1) accounting officers/authorities have freedom to develop implementation frameworks which respond to the specific procuring environments of the procuring institutions that they lead;
- 2) procurement would be located as a strategic function tightly linked to projects;
- 3) professionals in these functions should have the flexibility to develop procurement strategies that tailor processes to the requirements of specific procurements.

What we found was that 30 September draft entrenched the approach which National Treasury has for several years adopted which has:

- 1) supported an administrative approach to procurement; and
- 2) gives National Treasury a licence to develop a plethora of regulations and instructions to fashion whatever procurement system they want via subordinate legislation.

This is really nothing else than a business-as-usual continuation of the status quo. We fail to see how this will bring any meaningful reform to our procurement system. Furthermore, National Treasury has a very poor track record regarding the revision / maintenance of SCM Regulations – the 2005 Regulations have not been amended since their publication. The PPPFA 2001 and 2017 Regulations have been found to be unlawful. Since the establishment of the Office of the Chief Procurement Officer, National Treasury has issued instructions which have been poorly conceived and drafted and have had a devastating on effect on those delivering infrastructure and has resulted in poor project outcomes. These instructions have not been withdrawn or amended despite attention to their harmful effects being highlighted by the National Planning Commission and industry. The current draft is not supported as it will perpetuate the fragmentation that it seeks to address.

We accordingly have in the NEDLAC process two different Bills. National Treasury's version and the JSR version. We have gone back to the drawing board to understand the difference between the two drafting approaches.

The starting point when drafting a Public Procurement Bill is to consider what the Constitution explicitly states regarding procurement, namely:

217. Procurement.-(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent. competitive and cost-effective.

The Constitution frames in the first instance the subject matter for procurement, namely the **contracting** for goods and services. It thereafter establishes parameters within which an organ of state must conduct its procurement.

Government's starting point paradigm for procurement in the NEDLAC version of the Public Procurement Bill is captured in the definition which has been provided in the bill and is centred around **acquiring**, viz:

"procurement" means—
 (a) the acquisition of goods, services or infrastructure;
 (b) the construction, repair or maintenance of infrastructure,
 by a procuring institution;

According to this definition, acquisition can take place outside of devising contracting arrangements. For example, goods, services and infrastructure can be acquired using an organisation's own resources and "taking" an externally-formulated contract of sale (e.g. as with Take-a-lot or Amazon).

From this starting point, government links acquisition to a supply chain management system for procurement and the disposal and letting of assets which is then regulated. Such a system is required to have a procurement policy, institutional and governance arrangements, demand management, procurement planning and budgeting, acquisition management, contract management, risk management, logistics management, asset management, disposal management, monitoring and assessment of procurement performance, and reporting. This system is then regulated through Regulations made by the Minister and instructions issued by the Public Procurement Office or the relevant treasury.

The **acquiring approach** as advocated by government to achieving the above purposes of the Bill through regulating procurement as advocated in the 30 September Bull is as follows:

- 1) Embed basic requirements for a supply chain management system in the Act.
- 2) Require the Minister to make Regulations which may be different for different categories of procuring institutions and different categories of procurement.
- 3) Permit the Public Procurement Office and relevant treasuries to issue instructions and permit the Public Procurement Office to authorise deviations from Regulations or instructions.
- 4) Make the accounting officer / authority responsible for making decisions on behalf of the procuring institution and require the procuring institution to develop and implement an effective and efficient supply chain management system as prescribed.

The JSR's paradigm for procurement is very different and is more closely aligned to the text of s 217(1). The JSR recognise that a system comprises a set of interrelated or interacting elements which include processes which transform inputs into outputs. And it puts contracting at the centre of the procurement system. The JSR's definition for procurement is accordingly:

***"procurement"** means the process which creates, manages and fulfils contracts which are concluded following the application of a selection method in Part 2 of Chapter 5.*

The JSR recognises that in public sector procurement, the individual organ of state is of course required to implement the processes within the parameters established for the procurement system. Such processes need to be implemented within the confines of a regulatory framework embedded in the Act. This framework thus includes requirements for a procuring institution to establish a procurement implementation framework (implementation policy and associated standard operating procedures, governance arrangements, and procurement documents), as well as to work within a menu of selection methods and to engage in disclosure of information on an online portal. The Act details how a procuring institution will procure through the procurement implementation framework, a planning system, and a monitoring/tracking process.

The JSR paradigm is easily able to recognise that projects (including but not limited to public infrastructure projects) are inherently linked to contracts. It requires procuring institutions to appropriately and proactively mitigate risks which threaten project outcomes and provides flexibility and options to do so.

The contracting approach to achieving the above purposes of the Bill through enabling

procuring institutions to adopt a strategic or an administrative (or both) approach to procurement is in four steps as follows:

- 1) First, formulate and embed **in primary legislation rather than in subordinate legislation** the policy principles for procurement and establish checks and balances framed around Section 217 of the Constitution. Having clear procurement principles at the level of statute enables effective and strategic action by procuring institutions as well as facilitating across-government coordination, eliminates reliance on regulations and instructions to interpret and apply the constitutional principles.
- 2) Second, require procuring institutions governed by the statute to:
 - (i) develop and implement their procurement system (policies and associated standard operating procedures) around the purposes of the Act, the principles embedded in the Act, and the decision to select from the range of procurement options given in the Act; and
 - (ii) make data and document disclosures at specified points within the procurement cycle on an open online platform established by the Public Procurement Office as well as to upload on that open platform the procurement implementation policies and associated operating procedures the institutions develop.
- 3) Third, mandate and require the Public Procurement Office to put in place an open contracting system, develop and make available model policies and associated operating procedures and procurement documents for different categories of institutions (especially those with weak capacity or small budgets) and for different categories of procurement, and also to develop objective procuring institution capability and capacity indicators and issue instructions and declare a particular procurement practice to be prohibited should it be necessary to do so.
- 4) Finally, ensure consequences by requiring procuring institutions which fail to meet the objective standards of capability and capacity established by the Public Procurement Office to adopt a suitable model policy and associated standard operating procedures issued by the PPO.

We accordingly propose the attached amendments to the Bill in areas we believe the JSR version addresses more comprehensively and in keeping with eliminating the future criticism we have faced in the past around procurement being the most significant bottleneck to achieving our infrastructure delivery goal not only from the NDP 2030 but also presently in seeking to achieve the goals set out in the NIP 2050.