

Rethinking Economic Policy for South Africa in the Age of Covid-19:
Innovative policy responses for the post-lockdown Phase

Rethinking Procurement Rules as Part of Rethinking Economic Policy Post- COVID19

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Executive Summary

This working paper identifies specific problems within the regulatory regime as key factors impeding the procurement and delivery of public infrastructure in South Africa and proposes a specific strategy to address those problems. In its three main arguments, the paper then presents a regulatory account of the existing public infrastructure regime, overviews current megaprojects in South Africa and presents a detailed case study of a successful one (the procurement and delivery of the public infrastructure for two new South African universities), and finally uses a factual and a counterfactual analysis to identify and demonstrate several of the current regulatory weaknesses in the procurement and delivery of public infrastructure projects. The paper's regulatory account focuses on the key element of quality in the South African public procurement regime, distinguishing that concept from the often conflated notions of functionality and value-for-money. This account turns on two key distinctions: (a) between procurement of goods and services and the procurement of infrastructure and (b) between hard (constitutional, statutory and court-made) law and soft law (standards, guidance, and instruction notes). It finds there is a lack of understanding and appreciation of the first distinction within the existing regime and finds there are both considerable interpretative gaps and ambiguities within the existing hard law instruments and confusion and conflict within the existing soft law instruments.

The paper's second main argument classifies the R2b New Universities Project (NUP) as a megaproject and further identifies the structural and project-specific institutions and factors that contributed to its success. While most mega projects in South Africa are either over estimated cost or subject to long delays or (most often) both over-budget and late, the NUP shows the opposite -- successful delivery of public infrastructure on-time and on-budget.

In its third main argument, the paper performs a legal experiment, assuming the provisions of the current proposed but not enacted draft public procurement bill of February 2020 were applicable to the successful NUP megaproject. Through this method, the paper identifies several significant regulatory problems (mostly at the level of soft law) arising in this counterfactual analysis. In its final substantive section, the paper surveys a range of implementation strategies that could be implemented to solve these problems prior to the finalization of the Public Procurement Bill (currently expected only end 2022). The paper proposes the immediate establishment, under the mandate of the Council of the Presidential Infrastructure Coordinating Commission (PICC), of a research task team to identify and motivate for specific changes to the existing confusing and conflicting soft law regulatory instruments, thereby eliminating some of the significant existing regulatory impediments to the successful procurement and delivery of public infrastructure.