

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

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**Abstract:** 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.

## Introduction

South Africa's response to the COVID19 pandemic envisions an eventual focus on longer-term policy reform to ignite inclusive economic growth. While money is tight, it is fairly clear that one element of this longer-term response will be a significant investment in new infrastructure.<sup>1</sup> This paper recommends that a paradigm incorporating a strategic and developmental approach be developed and infused into South Africa's public procurement policy regime and applied specifically in implementing this significant post-COVID19 investment in new infrastructure. Such a strategic and developmental approach to public procurement would represent a major advance beyond the current administration paradigm currently dominating the procurement regime. This paper's focus upon the regulatory framework in terms of which a pipeline of mega-projects can be delivered is crucial. As is broadly admitted across government, it is not the availability of money but the "regulatory and policy environment" that is weak in regards to infrastructure delivery.<sup>2</sup>

We begin in Part One by contextualizing and supporting the strategic and development approach to public procurement with historic experience, economic reasoning and legal analysis. We thus situate our policy proposal within the recent history of the South African public procurement regime,<sup>3</sup> and show the basis of this approach in the evidence marshalled in the recent NPC background paper on infrastructure delivery.<sup>4</sup>

Part One also raises and discusses the significant question of degree to which infrastructure delivery is unlike the procurement of other public goods. In the application of the strategic and developmental approach, we thus aim to develop specific recommendations regarding quality, delegation, and economic impact assessment in the specific field of infrastructure delivery. While these do not cover the field, they are each significant and indeed crucial for infrastructure delivery.

In addition to the substantive procurement evaluation criteria of quality and functionality/eligibility, this paper pays particular attention to two important policy mechanisms: legal and organisational frameworks for the delegation of authority on the client side and the use of economic impact assessment and value-for-money instruments. Regarding the first, delegation is a longstanding topic within the legal academic field of administrative law and, to a lesser extent, in the fields of public administration and construction management. That topic has mostly been conceived as one of lawfulness and authority. This paper not only relates that discussion to a crucial insight from the construction literature – that the involvement from the client side is a key driver to infrastructure success<sup>5</sup> – but also expands beyond legal

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<sup>1</sup> Sasha Planting, "Government Still Has One Lever to Pull: Infrastructure Investment," Daily Maverick, accessed March 23, 2020, <https://www.dailymaverick.co.za/article/2020-03-22-government-still-has-one-lever-to-pull-infrastructure-investment/>.

<sup>2</sup> Sasha Planting, "Infrastructure Projects: Less Talk, More Action," Daily Maverick, June 23, 2020, <https://www.dailymaverick.co.za/article/2020-06-23-infrastructure-projects-less-talk-more-action/>.

<sup>3</sup> Ryan Brunette, Jonathan Klaaren, and Patronella Nqaba, "Reform in the Contract State: Embedded Directions in Public Procurement Regulation in South Africa," *Development Southern Africa* 36, no. 4 (July 4, 2019): 537–54, <https://doi.org/10.1080/0376835X.2019.1599712>.

<sup>4</sup> Ron Watermeyer and Sean Phillips, "Public Infrastructure Delivery and Construction Sector Dynamism in the South African Economy: Background Paper," Background Paper, National Planning Commission Economy Series (National Planning Commission, March 6, 2020).

<sup>5</sup> Ron Watermeyer and Sean Phillips, "Public Infrastructure Delivery and Construction Sector Dynamism in the South African Economy," Final Report (National Planning Commission, April 25, 2020), 13, 60, 64, 99, and 100, <https://www.nationalplanningcommission.org.za/assets/Documents/Public%20infrastructure%20delivery%20>

doctrine to an organisational and regulatory understanding of this issue and its drag within the South African public sector, asking whether efficient delivery is likely to remain exceptional. Regarding the second, over the past 15 years, South Africa has developed a mechanism, the Socio- Economic Impact Assessment (SEIAS) system, for evaluating the costs and benefits of major policy interventions.<sup>6</sup> Within the public infrastructure domain of public procurement, value assessment instruments exist both at contractual and at managerial levels.

These matters are discussed in Part Two, which present a legal and policy (regulatory) account of the key element of quality in the South African regime governing the procurement of infrastructure, distinguishing that concept from the often conflated notions of functionality and value-for-money.

We are using the terms “regulation” and “regulatory”. This is because it is necessary to understand how different texts and implementation decisions and economic scenarios combine to evidence either an administrative approach to infrastructure project procurement or, with more of a strategic and developmental approach, a management or a governance paradigm. Thus, one distinctive element of this policy recommendation is its integration between primary and secondary legislation (including standards), the discretion given management, and the analysis and assessment of the surrounding economic environment.

Our analytical method in Part Three is that of case study analysis. We start by constructing a list of recent infrastructure megaprojects undertaken in South Africa. The majority have experienced serious procurement problems. For instance, in one such list, seven of nine (including Medupi and Kusile) came in over budget and behind time.<sup>7</sup> We specifically consider the 55 shovel-ready projects identified by the Presidency at the June 2020 Sustainable Infrastructure Development Symposium SA as well as other post-Covid19 infrastructure projects. We next embark on case study analysis for the one case study for which we have detailed information. For this, we have selected the delivery of two new universities in the Northern Cape and Mpumalanga provinces. In this Part, our research method is to collect primary documents relating to the case study and to refer to relevant local and international secondary literature. Although our data did not allow us to do so, we had initially intended to select two of these megaprojects for more detailed initial description and analysis, one project with optimal outcomes and one with sub-optimal outcomes.

While there is insufficient research about the effectiveness of public procurement governance as a developmental project, this case study method has been applied to other megaprojects in Southern Africa including the Gautrain.<sup>8</sup> The governance arrangements for the new universities project are included in a publicly assessable website ([www.wits.ac.za/ipdm](http://www.wits.ac.za/ipdm)) in a comprehensive close out report. Case studies on the performance of these projects and their

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and%20construction%20sector%20dynamism%20in%20the%20South%20African%20economy.pdf; Ron Watermeyer, *Client Guide to Improving Infrastructure Project Outcomes* (University of the Witwatersrand, 2018), chap. 4; Ron Watermeyer, “The Critical Role Played by the Client in Delivering Infrastructure Project Outcomes: Infrastructure,” *Civil Engineering = Siviele Ingenieurswese* 2019, no. v27i1 (January 1, 2019): 32–38.

<sup>6</sup> Jonathan Klaaren, “The Development and Operation of SEIAS over the Past 15 Years: Not Your Average RIA.”

<sup>7</sup> Watermeyer and Phillips, “Public Infrastructure Delivery and Construction Sector Dynamism in the South African Economy: Background Paper,” 19–21.

<sup>8</sup> Madeleine C. Fombad, “Governance in Public–Private Partnerships in South Africa: Some Lessons from the Gautrain,” *Journal of Southern African Studies* 41, no. 6 (November 2, 2015): 1199–1217, <https://doi.org/10.1080/03057070.2015.1117240>.

linkages to the governance arrangements are beginning to emerge.<sup>9</sup> This topic is beginning to receive attention internationally. In the UK it is in part being triggered by enquiries into infrastructure project failures and the poor performance of mega projects.<sup>10</sup> Implementing this case study approach should contribute to deepening and augmenting this literature.

Part Four then subjects this large project to a critique from a strategic and development perspective. In the first stage of this critique, we engage in a two track analysis as follows. The first track outlines the choices made in terms of the actual procurement framework over the life of the project. The second track performs the same analysis but assuming the provisions of the current public procurement bill were applicable. It is a counterfactual analysis. The aim of this analysis is to “experiment” on the actual case with at least two different procurement regulatory regimes. This dual-track analysis will allow for further research and work to develop specific regulatory language incorporating a strategic and developmental approach in the procurement and delivery of post-Covid19 infrastructure.

Working from these policy recommendations, Part Five considers and develops two implementation strategies. The first assumes that our specific policy recommendations are taken on board to a fast-moving timeline for the Public Procurement Bill – note that comments on draft legislation released by National Treasury closed on 30 June. Note however that information from National Treasury in a public webinar in October 2020 indicated that the earliest date for consideration and passage of this legislation would be mid to late 2022. The second dispenses with the perhaps unrealistic assumption of a fast-moving timeline and instead outlines both interim and parallel implementation strategies for our specific policy recommendations regarding quality, delegation and economic impact assessments, exploring whether and how our policy recommendations can be adopted within the infrastructure field through bureaucratic and/or private sector action rather than legislative action. This section notes and takes into account that there will be some costs for implementing these policy recommendations – for instance relating to human resources for project delivery through delegation and relating to costs for gathering information and impact analysis. We argue that our recommendations are likely to be financially feasible and may even unlock out-of-sector funding possibilities.

In a final concluding section, we draw the connections between a strategic and development approach to procurement, aiming to deliver a quality-ensured mega-project within budget and on time and the sort of value-for-money needed and essential in the sense of a transformed, resilient, and sustainable post-pandemic South Africa society. While we do not consider the broader public impacts of the infrastructure megaprojects themselves, this section investigates the principle of value-for-money and identifies as beneficiaries the fiscus and the suppliers and contractors interacting with the delivery of the project during its delivery.

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<sup>9</sup> Samuel Laryea, “Procurement Strategy and Outcomes of a New Universities Project in South Africa,” *Engineering, Construction and Architectural Management* 26, no. 9 (January 1, 2019): 2060–83, <https://doi.org/10.1108/ECAM-04-2018-0154>; Samuel Laryea and Ron Watermeyer, “Managing Uncertainty in Fast-Track Construction Projects: Case Study from South Africa,” *Proceedings of the Institution of Civil Engineers - Management, Procurement and Law* 173, no. 2 (April 22, 2020): 49–63, <https://doi.org/10.1680/jmapl.19.00039>.

<sup>10</sup> Watermeyer, “The Critical Role Played by the Client in Delivering Infrastructure Project Outcomes”; Juliano Denicol, Andrew Davies, and Ilias Krystallis, “What Are the Causes and Cures of Poor Megaproject Performance? A Systematic Literature Review and Research Agenda,” *Project Management Journal* 51, no. 3 (June 1, 2020): 328–45, <https://doi.org/10.1177/8756972819896113>.

## Part One: A Strategic and Developmental Approach to Infrastructure Procurement in South Africa

*Historical context.* Since around 1980, South Africa has followed the international trend of an expanding ‘contract state’. Public procurement has become increasingly important to state operational and allocative concerns. This has made attempts to change the form and content of its public procurement regime significant. Since 1994, South Africa’s public procurement regime has become progressively configured into an essentially decentralised organisational form.<sup>11</sup>

However, due to domestic public procurement politics, the further development of this organisational form has been truncated. This has resulted in the establishment of only limited central steering capacity and the elaboration of a regime pursuing procurement through financial management rules. The result – apparent soon after 2010 if not before -- has been a public procurement regulatory regime which is fragmented, incoherent, and formalistic, as a whole contributing to problems of state incapacity and corruption.<sup>12</sup>

In 2013 South Africa’s Minister of Finance announced a major push to reform South Africa’s contract state. The effort aims to better establish, locate and extend public procurement regulatory authority. It has begun to elaborate a centre-led, strategic and increasingly developmental procurement methodology. It is moving towards more flexibility, effectively an attempt to reduce rigidity in rules while building more robust and distributed disciplinary mechanisms, ones which take account of deficits in regulatory capacity and political will.<sup>13</sup> Most recently, National Treasury has published draft legislation (the draft Public Procurement Bill of February 2020) promising to overhaul this regime at the same time as the Presidency has embarked upon its drive to establish a pipeline of shovel-ready fundable infrastructure megaprojects.

*Economic reasoning.* The economic reasoning behind the provision of public infrastructure in a post-pandemic South Africa is fairly straightforward and compelling. The percentage of public infrastructure spending as part of GDP “is well below the target of 10% set in the NDP for public infrastructure investment. Instead of a steady increase in infrastructure investment as envisaged in the NDP, such investment has been in decline in real terms for the last decade. Underspensing has also occurred during this period ...”.<sup>14</sup> Further, “[t]he NDP’s identified need for an increase in gross fixed capital formation to realise a sustained impact on growth and household services remains valid. However, the target for public infrastructure investment at 10 percent of gross domestic product (GDP) has been elusive and current expenditure is less than half of this. Given the current fiscal constraints it is most likely in the short to medium term that such a target will remain elusive for some years to come. An increase in the quality and quantum of public infrastructure is nevertheless required to enable the economy to grow faster and become more productive and in so doing promote inclusive growth and job creation and spatial inclusivity.”<sup>15</sup>

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<sup>11</sup> Brunette, Klaaren, and Nqaba, “Reform in the Contract State.”

<sup>12</sup> Brunette, Klaaren, and Nqaba.

<sup>13</sup> Brunette, Klaaren, and Nqaba.

<sup>14</sup> Watermeyer and Phillips, “Public Infrastructure Delivery and Construction Sector Dynamism in the South African Economy,” 11.

<sup>15</sup> Watermeyer and Phillips, 79.

At least two caveats should be footnoted to the current apparent consensus that an increased focus on public infrastructure procurement can and should be effected in order to pull South African out of its pre and post-pandemic blues. While this paper explores institutional and legal avenues through which the principle of value-for-money may be assured in public infrastructure procurement, there are factors that can interfere with that result. First, it has long been recognized in the field that cost underestimation in megaprojects cannot be explained simply as error and may best be explained as strategic misrepresentation (deception), optimism bias (delusion) and escalating commitment.<sup>16</sup> Second, the value-for-money principle is only one of a number of relevant governance principles, which could additionally include consensus participation, transparency, accountability, risk transfer, political will, sustainability and corporate governance.<sup>17</sup>

*Distinctiveness of infrastructure procurement.* Arguments have long been made for the worth of distinguishing carefully between the public procurement of goods and services on the one hand and the procurement of construction works and infrastructure on the other.<sup>18</sup> A National Treasury standard adopted in 2016 explains the distinctiveness of infrastructure procurement in the following manner: “Public procurement that is unrelated to infrastructure delivery typically relates to goods and services that are standard, well-defined and readily scoped and specified. Once purchased, goods invariably need to be taken into storage prior to being issued for use. Services are most often of a routine and repetitive nature with well understood interim and final deliverables which do not require strategic inputs or require decisions to be made regarding the fitness for purpose of the service outputs. In contrast, procurement relating to the provision of new infrastructure or the rehabilitation, refurbishment or alteration of existing infrastructure covers a wide and diverse range of goods and services, which are required to provide or alter the condition of immovable assets on a site. Accordingly, the procurement process for the delivery of infrastructure involves the initial and subsequent recurring updating of planning processes at a portfolio level flowing out of an assessment of public sector service delivery requirements or business needs. Thereafter it involves planning at a project level, and the procurement and management of a network of suppliers, including subcontractors, to produce a product on a site.”<sup>19</sup> As Watermeyer and Phillips have elaborated, “[i]nfrastructure projects are delivered differently to goods and services for consumption. This is because infrastructure is delivered by a disjointed supply chain, often broadly referred to as the construction industry. The construction industry delivers its products in a uniquely project-specific environment, which on every project involves different combinations of funders, clients and built environment professionals, site conditions, materials and technologies, general contractors, specialist contractors, skills, workforces, client requirements and stakeholders. Client procurement and delivery management practices are central to the performance of the infrastructure supply chain and have a direct impact on project outcomes.”<sup>20</sup>

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<sup>16</sup> Fombad, “Governance in Public–Private Partnerships in South Africa,” 1209; Denicol, Davies, and Krystallis, “What Are the Causes and Cures of Poor Megaproject Performance?”

<sup>17</sup> Fombad, “Governance in Public–Private Partnerships in South Africa,” 1204.

<sup>18</sup> Allison Megan Anthony, “The Legal Regulation of Construction Procurement as a Relational Construct in South Africa” (Thesis, Stellenbosch : Stellenbosch University, 2018), chap. 2, <http://scholar.sun.ac.za/handle/10019.1/103815>.

<sup>19</sup> National Treasury, “Annexure A: Standard for Infrastructure Procurement and Delivery Management” (2015), ii, <http://www.treasury.gov.za/legislation/pfma/TreasuryInstruction/Annexure%20A%20-%20Standard%20for%20Infrastructure%20Procurement%20and%20Delivery%20Management.pdf>.

<sup>20</sup> Watermeyer and Phillips, “Public Infrastructure Delivery and Construction Sector Dynamism in the South African Economy,” 4.

There are many more risks to manage in procuring and delivering construction works and infrastructure projects, due to the occurrence of unforeseen events during implementation. In addition, construction works requirements are often established from a perspective of desired performance, rather than a well-defined specification. A range of different combinations of goods and services with differing characteristics such as initial cost, reliability, life-cycle costs, and operating costs may satisfy the performance requirements. The final contract price is commonly the sum of the initial contract price, price adjustment for inflation and the cost of risk events for which the client is at risk. The budget needs to include contingences to fund price adjustment for inflation (if any) and risk events for which the client is at risk. Purchase order amounts may also need to be adjusted to access contingencies to fund contractual commitments.

Construction works and infrastructure projects are furthermore characterised by multiple contracts which need to be procured and managed in such a way that the anticipated benefits are progressively realised. There are accordingly several interfaces and interdependencies between contracts as works (products) are developed or maintained on a site. A supply chain needs to be contracted and mobilised. Demand is managed through service life plans, based on an assessment of current performance against desired levels of service or functionality and strategic infrastructure plans. Demand also needs to be proactively managed through the delivery process to prevent scope creep. Value for money in this context is the optimal use of resources or the effective, efficient, and economic use of resources to achieve intended project outcomes.<sup>21</sup>

A fundamental finding of this working paper is that public infrastructure is indeed distinctive as a subject/object of the public procurement system from goods and services.<sup>22</sup>

## **Part Two: Quality and Value-For-Money As Threads in A Story of Overlapping and Contested Legal Frameworks**

From 1994, legal frameworks have been significant and even determinative for the articulation and operationalization of the South African public procurement regulatory regime. Both the Constitution and the Public Procurement Preference Framework Act have been crucial at several points in the articulation of this regime at crucial points of development. These two legal instruments are applicable to the entire realm of public procurement, including therefore even the “buying” of public infrastructure mega-projects. Crucial also to the story below are the Public Finance Management Act and the Municipal Finance Management Act.

An important dimension of this regime are the two concepts of quality and value-for-money and their relationship. We trace in the paragraphs which follow these concepts and their inter-relationship within the broader framework of the Constitution and the governing empowering legislation within the courts from 2001 to 2011 and from 2011 to the present,

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<sup>21</sup> Watermeyer, *Client Guide to Improving Infrastructure Project Outcomes*, 24, 25, 73, and 74.

<sup>22</sup> Valid as this assumption is at a general level, there are of course exceptions due to the variety of goods and services procured. For instance, while one portion of the legal services that the South African state procures are of the routine variety alluded to in the text, another portion of legal services are more complex and arguably akin to the sort of site-specific and project-specific combination of goods and services referred to as public infrastructure by Watermeyer and Phillips.



taking into account the 2017 regulations and the differential application of the regime in the construction industry sector.

Indeed, the story below goes beyond regulations to include standards, both construction industry standards and public financial management standards. It is crucial to do so as standards are integral to the success of public infrastructure procurement. Research in this area is increasingly paying attention to the role of standards as is demonstrated by recent research into transparency by the HSRC and the CoST initiative in 2020. Revealingly, that research found “a significant level of lack of awareness, uncertainty and confusion about required information disclosure standards at various stages of the infrastructure procurement cycle. There is also widespread ignorance about what types of information relating to various stages of the procurement cycle can lawfully be proactively disclosed.”<sup>23</sup> The study further noted “there is significant confusion about the legal requirements for infrastructure procurement, a lack of capacity and experience in some procuring entities, and paralysing fear on the part of many officials regarding the potential legal and personal financial consequences if they get it wrong.”<sup>24</sup> The attention to the role of standards and these findings are entirely consistent with the account presented here of the contested role of statutes, regulations, and standards in securing quality and value-for-money in public infrastructure procurement.

Implementing the PPPFA, the 2001 regulations considered “functionality” to be a component of price and thus part of the comparative decision criteria for procurement (along with preference in a points system) in a preference points scoring system and not as other objective criteria in a points scoring system which enables a balance between price, preference and quality to be assessed in line with international practice in support of best value procurement outcomes.<sup>25, 26</sup> However, the term functionality was not defined in the Regulations and is a term that was not found in international literature.<sup>27</sup> Working against a context where the province was already uncertain as to the validity of this approach, a 2010 KZN High Court held that this was incorrect as a matter of the PPPFA since functionality is “entirely distinct” from price as a concept.<sup>28</sup> This court judgement evidently forced a reconsideration of the regulations nationally, e.g. within National Treasury. The replacing 2011 NT regulations then took functionality out of the comparative decision phase of

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<sup>23</sup> “The Potential Added Value of CoST -- The Infrastructure Transparency Initiative in South Africa” (Human Sciences Research Council, August 2020), 8, <http://www.hsrc.ac.za/uploads/pageContent/12377/CoST%20RSA%20Scoping%20Study%20Aug2020.pdf>.

<sup>24</sup> “The Potential Added Value of CoST -- The Infrastructure Transparency Initiative in South Africa,” 8.

<sup>25</sup> See CIDB Best Practice Guideline #A4 Evaluating quality in tender submissions December 2007 Third Edition of CIDB document 1004, which was finalised following a public enquiry process, CIDB Standard for Uniformity in Construction Procurement 2004 (and revision up to 2015) and South African National Standards SANS 294:2004 construction procurement processes, methods and procedures published by the South African Bureau of Standards. These two standards formed the basis for the international standard published by the International Organisation for Standardisation ISO 10845-1:2010 construction procurement processes, methods and procedures, a standard which has been adopted by both developed and developing countries including countries such as Albania, Bosnia and Herzegovina, Czech Republic, Kazakhstan, Mongolia, Netherlands, Russia, South Africa, United Kingdom and Zimbabwe.

<sup>26</sup> Quality is defined in ISO 10845-1 as the “totality of features and characteristics of a product or service that bears on the ability of the product or service to satisfy stated or implied needs”.

<sup>27</sup> R.B. Watermeyer, “Implementing Preferential Procurement Policies in the Public Sector in South Africa : Technical Paper,” *Journal of the South African Institution of Civil Engineering = Joernaal van Die Suid-Afrikaanse Instituut van Siviele Ingenieurswese* 45, no. 3 (January 1, 2003): 11–22.

<sup>28</sup> *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality and Others* (2011 (4) SA 406 (KZP)) [2010] ZAKZPHC 23; 10878/2009 (12 March 2010), accessed October 15, 2020.

procurement and instead increased its use in the screening or qualification phase of procurement.<sup>29</sup>

Understanding the options in front of the drafters of the 2011 regulations is crucial. The route they chose was not the only one available. As Quinot has discussed an entirely different option was legally available to the National Treasury. This was to respect the 2010 judgment by distinguishing between functionality/quality and price but nonetheless using functionality/quality as part of the comparative decision making but in a later separate stage.

There are two main legal arguments underpinning this set of options. The first focuses on the Constitution and the second focuses on the PPPFA. We will not explore the Constitutional one in detail here but it holds that the principles in s 217 essentially require that any implementing procurement legislation and regulations be interpreted (or if necessary be changed) to include quality and functionality as part of comparative decision making. One of the textual pegs for this is the inclusion of the principle of cost-effectiveness in section 217.

The PPPFA argument largely revolves around the term “other objective considerations” in the Act. It is commonly and rightly accepted that functionality/quality fall squarely within this statutory phrase of the PPPFA. There is much less agreement concerning the way in which this phrase (and these considerations) should fit within the rest of the Act and with the institutional scheme of public procurement in South Africa.

This phrase could be interpreted in relation to the phase of comparative decision making (that is to the totalling up of points and selecting the bid with the highest points) in two manners. The first would incorporate functionality/quality directly in a single stage of comparative decision making.<sup>30</sup> The second manner would be to regard the points to be gained by bids with good functionality/quality as a second stage of comparative decision making.

This two-stage structure to the phase of comparative decision making can be easily likened to a first stage of applying a default rule and a second stage of considering whether there are any circumstances to the application of the rule in the first stage that require exceptions to be made. This is of course a hallowed and fundamental doctrine of administrative law. It dates back to the canonical case of *Britten v Pope*, holding that an administrator applying a rule even within its scope retains and must exercise her discretion to determine whether exceptional circumstances demand that the rule not be applied.

But the two stage structure can also be treated conceptually less as an exceptional and discretionary procedure and more as an institutional phase as part of a lengthy complex and technical procurement process. Indeed, this sort of size and shape of procurement process is the norm in the construction industry and for public infrastructure megaprojects.

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<sup>29</sup> “Functionality was defined in the Preferential Procurement regulations 2011 as “the measurement according to predetermined norms, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, among other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer.” This is different to other objective criteria provided for in the Act and Regulations.

<sup>30</sup> G. Quinot, “The Role of Quality in the Adjudication of Public Tenders,” *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 17, no. 3 (September 17, 2014): 1110–36, <https://doi.org/10.4314/pej.v17i3.08>.

The 2001 regulations were effectively silent on the choice of in which manner quality should be used in choosing bids. But the first manner was the one that was apparently most often implemented by the procuring units in this period of procurement from 2001 to 2011. It was the organisational norm within the field of public procurement, extending from the buying of pencils to the building of waste-water treatment plants, to treat the consideration of quality as an exception rather than as an in-built institutional criterion. Nonetheless, the Construction Industry Development Board's Standard for Uniformity in Construction Procurement and best practice guidelines issued in terms of the Construction Industry Development Board Act made provision for the evaluation of quality to be made as a second stage of comparative decision making where justifiable in terms of projected procurement outcomes and enables the most economically advantageous offer to be established. This was effectively the norm within the part of the public procurement field engaged with public infrastructure.

The use of quality for comparative decision making among bids was part of the facts that came before another High Court in 2011 in the *Rainbow Civils* matter, directly after the promulgation of the 2011 regulations. Those regulations had to respond to the 2009 court judgement distinguishing functionality from price. The regulations did so distinguish and provided for a new system with two key and novel (at least at the level of regulations to the Act) features: a main stage of comparative decision making that allowed the use of price and preference only and the use of quality as an eligibility qualification criterion only. Quality was not put into the comparative decision making phase and if it was to figure in procurement, it would presumably be as an objective factor allowed by the Act to be used under exceptional circumstances as part of residual discretion.

In addition to resolving the dispute in front of the court, the *Rainbow Civils* High Court provided two main legal propositions. The first was that the use of quality in the main stage of comparative decision making was contrary to the 2011 regulations. Second, the court did not closely examine or pronounce upon the range of interpretations allowed by the PPPFA but fairly clearly assumed that that Act would allow for either the 2011 approach or for the second manner, the two-phase stage of comparative decision making. The case was resolved and the tender was set aside on the basis that the tender documents were vague and failed the test of fairness and transparency. However, the judgment effectively contained a plea for the continued use of quality in procurement, drawing on arguments of rationality and constitutional principles of s 217. *Rainbow Civils* was never appealed. Its first proposition proved much more impactful than its second.

In a study of the treatment of quality in procurement to 2014, Quinot carefully picked up on the option left open in *Rainbow Civils*.<sup>31</sup> This is the option arguably left open under the PPPFA that quality could be used as a structured second phase to the stage of comparative decision making. Quinot however rejected this option not on the grounds that the PPPFA would not allow it – though he was dubious – nor on Constitutional grounds but rather on the grounds of practicality. As he wrote, it was not really feasible across the entire field of public procurement to have a cumbersome multiple decision making process. Effectively, Quinot was saying that, at least for public procurement as whole, quality could come in as a pre-qualification criteria and as an exceptional circumstances in particular cases but would otherwise not be mainstreamed into procurement processes. However appropriate for the public procurement system as a whole, this stance did not augur well for a quality-based value-for-money approach to public infrastructure procurement.

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<sup>31</sup> Quinot.

Quinot in his analysis did not take account of the specifics of the construction industry which permitted the use of quality as a second stage evaluation process under certain conditions to deal with the specificities of the construction industry where the focus is not always on the lowest price but on the outturn (final) cost where quality has a direct impact on outcomes. This was recognised in the *Rainbow Civils* High Court ruling.

The Common Law of Business Balance, which is widely attributed to John Ruskin (1819-1900), states that “There is hardly anything in the world that someone cannot make a little worse and sell a little cheaper, and the people who consider price alone are that person’s lawful prey. It’s unwise to pay too much, but it’s worse to pay too little. When you pay too much, you lose a little money — that is all. When you pay too little, you sometimes lose everything, because the thing you bought was incapable of doing the thing it was bought to do.” Constructing Excellence warns that “the use of lowest price tendering may seriously damage your financial health and reputation and may have undesirable and unexpected side effects”.<sup>32</sup> The overview to the World Bank’s New Procurement Framework and Regulations for Projects After July 1, 2016 states that “Value for Money has been introduced as a core procurement principle in all procurements financed by the World Bank. This means a shift in focus from the lowest evaluated compliant bid to bids that provide the best overall value for money, taking into account quality, cost, and other factors as needed”.

ISO FDIS 22058:2020<sup>33</sup> sums up the issue by stating that “There is a delicate balance between paying too much for a procurement transaction and paying too little and run the risk of obtaining an inferior procurement outcome or a product that is not capable of performing as intended. There is accordingly a need for a mechanism to differentiate the quality of what is being offered in the tender process. This is necessary to consider matters that form an integral part of the tender offer that cannot be directly expressed in monetary terms alongside the financial offer in order to improve procurement outcomes including outturn or final project costs and to determine the most economically advantageous offer or the offer that represents the best return on the investment to be identified. Such a mechanism needs to provide those tasked with the evaluation of tenders with a means for making a reasoned judgement in this regard in a fair, transparent and accountable manner. “

S 195(1) of the Constitution establishes the principles governing public administration which includes the promotion of the efficient, economic and effective use of resources in an accountable and development-orientated manner. S 195(3) requires National Legislation to promote these values.

This was then the background against which both the 2016 Treasury standard and the 2017 regulations were drafted. And the background against which the draft comprehensive public procurement legislation was initiated, with a direction to include how quality ought to be considered in public procurement. While the draft procurement bill would only see the first light of day in Feb 2020, the Treasury standard and the third wave of PPPFA regulations would have impacts much sooner.

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<sup>32</sup> Constructing Excellence publication, The business case for lowest price tendering? (2011)

<sup>33</sup> ISO CD 22058:2020 Construction procurement – Guidance on strategy and tactics. International Organisation for Standardisation.

The 2017 regulations introduced a subtle but important shift in thinking regarding functionality from its treatment in the 2011 regulations (see above). Functionality is now defined as the “ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents” i.e. it is a prequalifying criteria. It remains the case that nothing prevents the introduction of quality as required by the construction industry as other objective criteria in terms of the PPPFA. Indeed, in a review of the impact of the 2017 regulations and the changes they introduced, Quinot did not even need to discuss the role of quality. The 2017 regulations instead innovated largely by introducing further mechanisms (pre-qualification set-asides and sub-contracting) to increase the role of preferential treatment within South Africa’s public procurement regime.<sup>34</sup>

For present purposes, the most interesting legal instrument initiated in this period is what would become the Standard for Infrastructure Procurement and Delivery Management (SIPDM). This instrument came into effect on 1 July 2016. The legal basis for its introduction was not the PPPFA but rather the general public finance legislation also administered by National Treasury, the Public Finance Management Act (PFMA). The Standard thus came in dual legal channels addressed to both the national/provincial spheres and to the municipal sphere – the National Treasury Instruction Note 4 of 2015/2016 in terms of section 76(4)(c) of the PFMA and Regulation 3(2) of the MFMA SCM Regulations.

This 2016 Treasury standard was acutely mindful of the place of quality in procurement and located it under the PFMA – using and exploiting the remaining interpretive space left from the Rainbow Civils case for infrastructure procurement. The difference between these two statutes as empowering legislation for standards is important. The Preferential Procurement Framework Act provides a framework for the implementation of a preferential procurement policy contemplated in S 217(2) of the Constitution whereas the PFMA permits regulations and instructions to be issued regarding the determination of a framework for an appropriate procurement and provisioning system which is in accordance with S 217(1) of the Constitution. The statutory term of other objective criteria provides a “bridge” between these two Acts.

The SIPDM defines quality as “the totality of features and characteristics of a product or a service that bears on the ability of the product or service to satisfy stated or implied needs”. As National Treasury argued, the standard “permits quality to be evaluated in tender submissions as other objective criteria, as provided for in the PPPFA in accordance with the provisions of SANS 10845-1.”<sup>35</sup> Importantly, this standard required that the evaluation of quality as objective criteria be evaluated by not less than 3 persons registered in a specified professional categories of registration in terms of the Architectural Profession Act, Engineering Profession Act, Landscape Architectural Profession, Project and Construction Management Professions Act or Quantity Surveying Profession Act and who were familiar with the subject matter of the procurement at hand.

Perhaps as important as the substantive position the Standard took regarding quality was its scope and depth of application. The Standard introduced a new term in South African law, infrastructure procurement. Through its public finance legislative origins, this term

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<sup>34</sup> Geo Quinot, “The Third Wave of Preferential Procurement Regulations in South Africa,” *Journal of South African Law / Tydskrif Vir Die Suid-Afrikaanse Reg* 2018, no. 4 (2018): 856–67.

<sup>35</sup> Ron Watermeyer, “Approaches to Dealing with ‘Functionality’ and ‘Quality’ in the Evaluation of Tender Offers,” *Civilution*, February 2016. 82-84

applied not only to the construction industry (e.g. to the Construction discussed further below) but to all infrastructure projects publicly funded and managed. In this cross-sectoral approach, the SIPDM foreshadows the presumptive comprehensive application of the draft public procurement legislation.

Equally – and for some level of projects arguably even more – significantly, the Standard also spread its wings across another piece of legislation, this one also cross-sectoral, the Infrastructure Development Act 23 of 2014. This Act established the Presidential Infrastructure Coordinating Commission (PICC). PICC operates through a secretariat and steering committees, with recognized strategic implementation projects (SIPS) (e.g. megaprojects recognized by the PICC) facilitated by the appropriate steering committee, with the power to collate information and applications and to demand reasons for approvals or exemptions not granted (see section 15).

In its application to the work of the PICC, the SIPDM of 2016 elaborated upon and was aligned with the thrust of the PICC’s empowering legislation. It is helpful here to draw upon terminology used in the SIPDM to understand this alignment. Similarly to the academic literature on procurement, the Standard effectively splits the client function into two parts: sponsorship and implementation. The client function of sponsorship – relating primarily to budget authorization – runs from stages 0 to 4. The client function of implementation runs from stages 5 to 9.<sup>36</sup>

Yet, if the 2016 Standard had a scope widely applicable across several statutes, its operation did not run deep. It was, after all, a standard, not a rule. It did not run deep in two senses – first, while it was consistent with the legislation (the Infrastructure Development Act) reigning in the space of client sponsorship, it was not consistent with the existing regulatory regime (consisting of CIDB regulations as well as of other legal instruments) governing in the space of client implementation. Perhaps because of this particular slice of inconsistency, the standard was indeed destined not to run deep and long at all.

Writing in 2017, Allison Anthony was of the opinion that the coming into effect of the SIPDM meant a significant language change and that construction procurement would from that point be known as infrastructure procurement.<sup>37</sup> Further, Anthony was of the opinion that “the CIDB Act, the Regulations and the CIDB best practice guidelines will have to be amended in order to be aligned with the new standard.”<sup>38</sup> Note that a standard is usually not taken to have binding effect; it is by definition a soft law not a hard law instrument. Anthony’s statement nonetheless perhaps demonstrates the degree to which an authoritative interpretation by National Treasury might have been expected to be deferred to in the construction sector and the degree to which the ultimate legal text holding authority in this area is section 217 of the Constitution.

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<sup>36</sup> National Treasury, Annexure A: Standard for Infrastructure Procurement and Delivery Management, fig. 1.

<sup>37</sup> Allison Anthony, “Best Practice in South African Construction Procurement Law,” in *Global Public Procurement Theories and Practices*, ed. Khi V. Thai, Public Administration, Governance and Globalization (Cham: Springer International Publishing, 2017), 402, [https://doi.org/10.1007/978-3-319-49280-3\\_16](https://doi.org/10.1007/978-3-319-49280-3_16).

<sup>38</sup> Anthony, 403.

The CIDB has no mandate to regulate procurement except where this is granted to the CIDB by National Treasury through the PFMA and MFMA<sup>39</sup>. The CIDB only has a mandate in terms of its Act to publish a code of conduct (S 5(4(a))) and is permitted to publish best practices (S 4c), promote, establish or endorse uniform standards and ethical standards that regulate the actions, practices and procedures of parties engaged in construction contracts (S 4f); initiate, promote and implement national programmes and projects aimed at the standardisation of procurement documentation, practices and procedures (S 5(4)(b)) and within the framework of the procurement policy of Government promote the standardisation of the procurement process with regard to the construction industry (S 5(3)(c)). The SIPDM required that South African National Standards (SANS 10845) for construction procurement be applied and limited the application of the CIDB SFU to the implementation of the CIDB national register of contractors and register of projects through procurement documents (subclauses 14.2.2a and 14.5.1.1).

Anthony's prediction is not what transpired, despite the OCPO's attempt to negotiate with the CIDB. According to Watermeyer and Phillips, "such alignment did not take place due to significant changes in leadership within National Treasury and resistance from the CIDB board who saw themselves as the regulator for construction procurement rather than National Treasury."<sup>40</sup> We do not have available currently a detailed account of this episode of regulatory contestation and politics.<sup>41</sup>

The official account of the shift from the SIPDM to the FIDPM is given in the preface to the latter currently operative standard: "In the process of implementing and institutionalizing the SIPDM, various institutions expressed concerns regarding certain aspects in the SIPDM, which imposed operational challenges. This was further compounded when the Preferential Procurement Regulations, 2017 were promulgated and effected, resulting in conflict between the SIPDM and Regulations. The National Treasury, in consultation with relevant stakeholders, conducted the SIPDM review, which resulted in the Framework for Infrastructure Delivery and Procurement Management (FIDPM). The FIDPM prescribes minimum requirement for effective governance of infrastructure delivery and procurement management."<sup>42</sup>

The SIPDM was withdrawn in April 2019 and was replaced when the new standard, the Framework for Infrastructure Delivery and Procurement Management (FIDPM), was published in May 2019 and authorized to be in effect from 1 October 2019. The underlying driver for introducing the FIDPM was to implement government's Infrastructure Delivery Management System which was initiated in 2002. The Infrastructure Delivery Improvement Programme (IDIP), designed by National Treasury in collaboration with the Departments of Basic Education, Health and Public Works, the Development Bank of Southern Africa (DBSA) and the Construction Industry Development Board (CIDB), was put in place in 2003 to address the communication and co-ordination between user departments and implementing

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<sup>39</sup> Regulation (A16.3) of the PFMA and the FIDPM issued in terms of National Treasury Instruction No 03 of 2019/2020 make reference to the "CIDB prescripts" without defining what these are while the SCM regulations issued in terms of the MFMA refer to the "requirements of the Construction industry Development Board"

<sup>40</sup> Watermeyer and Phillips, "Public Infrastructure Delivery and Construction Sector Dynamism in the South African Economy," 31.

<sup>41</sup> Jonathan Klaaren, "Regulatory Politics in South Africa 25 Years After Apartheid," *Journal of Asian and African Studies*, 2020.

<sup>42</sup> "Annexure A: Framework for Infrastructure Delivery and Procurement Management" (2019), ii, [https://cdn.ymaws.com/www.safcec.org.za/resource/resmgr/construction\\_legislation/fipdm/fipdm\\_2019.pdf](https://cdn.ymaws.com/www.safcec.org.za/resource/resmgr/construction_legislation/fipdm/fipdm_2019.pdf).

agents with different roles and responsibilities and closed out in 2017. Infrastructure Delivery Management Toolkits (2004, 2006 and 2010) were developed through IDIP to provide a documented body of knowledge and a set of processes that was at the time considered to represent generally recognised best practices in the delivery management of infrastructure.<sup>43</sup>

The IDMS system as formulated in the recently published FIDPM and IDM toolkit focusses on the outlining and describing of basic portfolio, programme, operations, maintenance, project and procurement processes and the establishment of minimum requirements relating thereto and the location of control points. However, Watermeyer and Phillips have found no evidence-based research to support that the IDMS programme has brought about any improvement in performance as the issues that it set out to solve remain.<sup>44</sup>

Also effected through legal instruments depending on the PFMA and the MFMA, the Framework takes a very different approach to the SIPDM. It focuses on management of procurement rather than on substantiating or elaborating upon the institutions or substantive decision criteria to be used in the field of public procurement. The FIDPM applies in all departments while only the infrastructure procurement portion of the FIPDM applies to constitutional institutions and public entities listed in Schedules 2 and 3 in the PFMA. A Local Government Framework for Infrastructure Delivery and Procurement Management (LGFIDPM) was issued during October 2020 with an effective date of 1 July 2021 to extend the application of the IDMS system and the Cities Infrastructure Delivery Management Toolkit (CIDMT) to municipalities. The FIDPM and the LGFIDPM effectively reverse the uniformity in infrastructure procurement and delivery management practices embedded in the SIPDM which was designed to be applied by all organs of state in the three spheres of government.

Both the SIPDM and the FIDPM ought to be classified as soft law – neither overrides existing statutory and regulatory law and neither provides rules of law binding upon the government and/or third parties in courts of law. However, there is a large difference in the types of soft law they represent. The SIPDM is a legal standard while the FIDPM is a management framework. Furthermore, they embodied very different approaches to the management of infrastructure procurement, the SIPDM adopting a more flexible and the FIDPM a more rigid approach. In the view of Watermeyer and Phillips, “[t]he FIDPM approach is only appropriate for the delivery of routine new infrastructure projects. It presents challenges in contracts relating to the supply and maintenance, refurbishment or rehabilitation of infrastructure and complex projects.”<sup>45</sup>

The principal aim of the FIDPM is to prescribe minimum requirements for the implementation of the Infrastructure Delivery Management System (IDMS) embedded in the IDMS toolkits. Developed to promote capacity, these toolkits have little reference to supply chain management practices in an infrastructure context.<sup>46</sup> The FIDPM effectively exited the interpretive space left by Rainbow Civils for the place of quality in infrastructure procurement. That legal interpretive gap has thus reappeared – or at the most is addressed by whatever

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<sup>43</sup> Watermeyer and Phillips, “Public Infrastructure Delivery and Construction Sector Dynamism in the South African Economy,” 22–24.

<sup>44</sup> Watermeyer and Phillips, “Public Infrastructure Delivery and Construction Sector Dynamism in the South African Economy,” 45, 46.

<sup>45</sup> Watermeyer and Phillips, “Public Infrastructure Delivery and Construction Sector Dynamism in the South African Economy,” 33.

<sup>46</sup> Watermeyer and Phillips, 25.



discretion managers can exercise with regard to infrastructure procurement within the existing National Treasury Instruction Notes and the FIDPM.

Indeed, the construction industry continues to complain that the currently applicable standard, the FIDPM, neither recognizes the distinctiveness of infrastructure procurement nor does it recognize the regulatory authority of the CIDB.<sup>47</sup> This appears to indicate that the issues faced by the SIPDM remain unresolved.

At the same time as the SIPDM was being devised and then rolled out, another instance of standards politics was moving in the opposite direction. In 2015, the CIDB Standard for Uniformity in Construction Procurement (later renamed CIDB Standard for Uniformity in Engineering and Construction Works Contract) removed certain key tactics applied in the evaluation of tenders to align with practices commonly associated with general goods and services advocated by National Treasury and narrowed the scope of this standard to construction contracts only.<sup>48</sup> In particular, the option to base the award of a tender on the most economically advantageous or best value offer was removed. As a result, tenders adjudicated in terms of this standard could only be evaluated on the basis of lowest price adjusted for a preference.

In fact, the SIPDM was under pressure from quarters beyond the CIDB from soon after its formal implementation in 2016 and its impact during its period of formal validity remains to be fully investigated. As Watermeyer and Phillips note, “[s]oon after the issuing of the SIPDM, National Treasury issued an SCM instruction aimed at measures to prevent and combat abuse in the SCM system. This instruction stipulated that infrastructure contracts may not be varied by more than 20% or R 20 m including VAT., [The instruction note did so] without taking into account the manner in which the SIPDM and standard forms of contract managed compensation for risk events for which an organ of state is contractually responsible. This instruction also prohibited the negotiation of contracts which the SIPDM permitted to secure much needed strategic professional inputs to advance projects and to improve the quality of procurement outcomes. Accordingly, this instruction note undermined the effective implementation of the SIPDM and slowed down infrastructure delivery.”<sup>49</sup> Enshrined in a Treasury Instruction Note, a lack of understanding of the legal doctrine of the standard infrastructure contracts and its relationship to budgeting and contingency practices within the public sector had become a key driver of poor infrastructure delivery.<sup>50</sup>

Standard forms of contract enable tenderers to take into account the allocation of risks embedded in such contracts when preparing tenders for infrastructure projects and enables tenders to be evaluated on a comparative basis. There is also no need for tenderers who are familiar with a particular form of contract to price risks arising from uncertainties as to how particular issues will be viewed or handled in terms of the contract, unless such contracts are substantially amended. Standard forms of contract can be drafted around significantly different objectives and principles e.g. master – servant relationship or collaboration between two experts, risk sharing or risk transfer, independent or integrated design, short term relationships based on one sided gain or long-term relationships focused on maximising efficiency and shared value, etc. Forms of contract may also support open book approaches to the costing of

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<sup>47</sup> “The Potential Added Value of CoST -- The Infrastructure Transparency Initiative in South Africa,” 37.

<sup>48</sup> Watermeyer and Phillips, “Public Infrastructure Delivery and Construction Sector Dynamism in the South African Economy,” 29–30.

<sup>49</sup> Watermeyer and Phillips, 30.

<sup>50</sup> Watermeyer and Phillips, 68–70.

changes due to the occurrence of risk events, foster collaborative working relationships, provide pricing structures that align payments to results and reflect a balanced sharing of performance risk and deal with delays and disruptions efficiently and effectively).<sup>51</sup>

One of the pillars of construction industry procurement reform which emerged through the work of the Interministerial Task Team for Construction Industry Development, which prepared position papers ahead of the establishment of the Construction Industry Development Board, was that public sector contracts for construction works be entered into using a limited range of standard contracts. The CIDB SFU contained lists of approved contracts for construction works, professional services, supplies and terms services and required that such standard forms of contract were used with minimal project specific amendments. It is currently unclear as to which forms of contract are endorsed as FIPDM refers to an “applicable CIDB Standard for Uniformity (SFU).” The CIDB currently has in place two standards for uniformity with overlapping scopes – Standard for Uniformity in Construction Procurement (2015) and Standard for Uniformity in Engineering and Construction Contract (2019).

### **Part Three: Megaprojects in South Africa including the New Universities Project**

Mega projects are subject to definitional debates<sup>52</sup> but may be understood as large public sector infrastructure projects usually taking at least five years to complete.<sup>53</sup> There are several lists containing such projects in South Africa.

One list of megaprojects can be taken from Watermeyer and Phillips’ National Planning Commission Paper.<sup>54</sup> Without attempting to be comprehensive, they identified the following as megaprojects: the Gauteng Freeway Improvement Project, the Gautrain Rapid Rail Link System, the Ingula Pumped Storage Scheme, the King Shaka International Airport, the New Multi-Product Pipeline, the Kusile coal power plants, the Medupi coal power plant, the New Universities Project, and the Renewable Energy Independent Power Producers Procurement Programme (REIPP).

The Annual Budget Reviews contain an annexure listing major infrastructure projects at various stages of consideration but not yet approved for funding. For instance, Table D.2 of the 2020 Annual Budget contains 31 such public infrastructure projects, with cost estimates ranging from R500 million to R 112 billion (Gautrain Rapid Rail potential extension).<sup>55</sup> These projects vary among the stages of pre-feasibility, feasibility, feasibility completed, procurement, and implementation.

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<sup>51</sup> Watermeyer, “Approaches to Dealing with ‘Functionality’ and ‘Quality’ in the Evaluation of Tender Offers,” 69–74.

<sup>52</sup> Philip Parrock, “Mega Project Analysis : A Case Study of the Gauteng Freeway Improvement Project” (Thesis, Stellenbosch : Stellenbosch University, 2015), <https://scholar.sun.ac.za:443/handle/10019.1/97019>.

<sup>53</sup> Watermeyer and Phillips, “Public Infrastructure Delivery and Construction Sector Dynamism in the South African Economy,” 46.

<sup>54</sup> Watermeyer and Phillips, “Public Infrastructure Delivery and Construction Sector Dynamism in the South African Economy.”

<sup>55</sup> National Treasury, “Budget Review 2020,” 2020, <http://www.treasury.gov.za/documents/National%20Budget/2020/review/FullBR.pdf>.

On 24 July 2020, Minister De Lille gazetted a list with 18 new Strategic Integrated Projects.<sup>56</sup> These were numbered 19 to 36 and carried on from an earlier list of 18 SIPs. 6 of these July 2020 SIPs had sub-projects identified (a total of 50 sub-projects). The earlier list included SIP 14 “Higher Education Infrastructure” and SIP 18 “Water and Sanitation Infrastructure Master Plan”.<sup>57</sup>

Undoubtedly, the best-documented public infrastructure project (probably qualifying as a megaproject) in South Africa is the New Universities Project (NUP), a sub-project of SIP 14<sup>58</sup>. Around 2010, the Department of Higher Education and Training (DHET) developed a project to establish two new universities in the Mpumalanga and the Northern Cape Provinces. The project was planned to be fully developed over a period of 15 years, consisting of different phases. Significantly, the DHET decided in 2011 to use Wits University as an implementing agent. A Memorandum of Agreement (MOA) was signed between Wits and DHET, establishing the New Universities Project Management Team (NUPMT). Wits and DHET together formed the client team. The task of NUPMT was to direct academic and institutional preparation, including the setting of a vision, and, for the first phase of the two universities, to plan (decide on what needs to be done, how it is to be resourced and achieved and in what time frames, and set a budget), specify (define the functional and other requirements for the project clearly and precisely), procure (obtain internal and external project resources to execute project activities) and oversee delivery (observe and define the execution of the project to realise the client’s value proposition associated with a business case). There were different teams contracted to provide the works for each university. The project governance was carried out through a Project Steering Committee (PSC) and a Technical Integration Committee (TIC); and each new university had a Project Management team, Design teams, Support Services teams and Supply teams procured and overseen by the NUPMT.<sup>59</sup> The new universities took over the plan, specify, procure and oversee delivery functions of the NUPMT around 2016/2017.

This differed from the usual arrangement in public infrastructure in SA. As described by Laryea (following Laryea and Watermeyer 2017)<sup>60</sup>: “... infrastructure projects in the South African public sector are typically delivered using an implementer such as a National or Provincial Department of Public Works or a state-owned enterprise. Where such delegation or assignment is made, the “sponsor” and the “implementer”, although being different organs of state, collectively function as the “client”. Typically, the “implementer” assumes responsibility for programme management, procurement, payment of contractors and professional service providers, overseeing the administration of contracts and the provision of technical advice and inputs.”<sup>61</sup>

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<sup>56</sup> Presidential Infrastructure Coordinating Commission, “Strategic Integrated Projects, GN 812 in GG 43547” (2020), [https://cisp.cachefly.net/assets/articles/attachments/82784\\_43547gon812.pdf](https://cisp.cachefly.net/assets/articles/attachments/82784_43547gon812.pdf).

<sup>57</sup> “Strategic Integrated Projects’ (SIPs),” accessed October 13, 2020, <http://www.economic.gov.za/picc/sips-chairpersons>.

<sup>58</sup> NUPMT.Ron Watmeyer, “Chapter 9 Procurement Strategy: Close-out Report of the New Universities Project Management Team (NUPMT) on the Development of New Universities in Mpumalanga and the Northern Cape,” 2018. 1 – 6362 [www.wits.ac.za/ipdm/evidence-based-publications/close-out-report/](http://www.wits.ac.za/ipdm/evidence-based-publications/close-out-report/)

<sup>59</sup> Laryea, S and Watermeyer. R (2020). Managing uncertainty in fast-track construction projects: case study from South Africa. *Proceedings of the Institution of Civil Engineers - Management, Procurement and Law*. Volume 173 Issue 2, May 2020, pp. 49-63

<sup>60</sup> Samuel Laryea and Ronald B Watermeyer, “Comparison of Two Infrastructure Project Implementation Models in a Developing Country,” *Proceedings of the Institution of Civil Engineers - Management, Procurement and Law* 171, no. 1 (December 14, 2017): 3–17, <https://doi.org/10.1680/jmapl.16.00029>.

<sup>61</sup> Laryea, “Procurement Strategy and Outcomes of a New Universities Project in South Africa.”

In the implementation of the NUP, it is important to distinguish between the client/sponsor and the client's implementer team.<sup>62</sup> The NUPMT exercised an extraordinary degree of discretion. They could be described as having "single point accountability". Perhaps as importantly, the NUPMT was insulated from direct political interference, both through the top management layer of Wits University and through the Department of Higher Education and Training (DHET).

Three further contextual factors also probably contributed to the undoubted success of this project. It is important to establish these factors in order to determine their degree of contribution – were they essential factors to success? – and to determine whether they could be replicated or not. First, the NUPMT was able to draw on their experience of at least five years of management capital projects within the higher education sector. Second, while governed by a tender committee and a governance scheme, the NUMPT was able to focus on this single project. Third, the NUPMT had a continuity of personnel and a unity of professional ethic during the project and further one which was aligned with the organisation within which it was operating.<sup>63</sup>

Value for money was an important concept in implementing the NUP. The World Bank (2016) suggests that value for money is the "effective, efficient, and economic use of resources"<sup>64</sup>. The UK National Audit Office (2010)<sup>65</sup> and the South African National Treasury (2015)<sup>66</sup> define value for money as "the optimal use of resources to achieve intended outcomes." Accordingly, value for money in a construction context can be regarded as the most desirable possible outcome from the use of resources (finances, people, equipment, plant, materials etc.) that can be drawn upon, given expressed or implied restrictions or constraints such as risks and costs.<sup>67</sup> Value for money can be considered to be achieved if the gap between what is planned and what is delivered is narrow.

In 1996 DHET established a procedure for the setting of a cost norm for buildings within the higher education sector.<sup>68</sup> This norm provides a basis for cost estimation, including feasibility planning, and can be used to establish an order of magnitude cost estimate for a building during the initial planning for a project, to set an early design cost estimate, for cost control during the design phase of a project and to establish if value for money has been achieved in the delivery of a building project. A building which is delivered within these cost norms is deemed to represent value for money.

The cost norm is not based on the gross area of the building. It is based on the assignable square meters (ASM) i.e. floor area available for assignment to an occupant or for specific use without deductions for columns and projections. This encourages the minimisation of the amount of space within a building that is essential to the operation of the building but not

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<sup>62</sup> Laryea, "Procurement Strategy and Outcomes of a New Universities Project in South Africa."

<sup>63</sup> NUPMT r, "Chapter 9 Procurement Strategy: Close-out Report of the New Universities Project Management Team (NUPMT) on the Development of New Universities in Mpumalanga and the Northern Cape."  
[www.wits.ac.za/ipdm/evidence-based-publications/close-out-report/](http://www.wits.ac.za/ipdm/evidence-based-publications/close-out-report/)

<sup>64</sup> World Bank (2016). Procurement Regulations for IFP Borrowers.

<sup>65</sup> National Audit Office (2010). Analytical framework for assessing value for money. National Audit Office (UK)

<sup>66</sup> National Treasury (2015). Standard for Infrastructure Procurement and Delivery Management.

<sup>67</sup> Watermeyer, *Client Guide to Improving Infrastructure Project Outcomes*.

<sup>68</sup> Department of Education's Space and Cost Norms for Buildings and Other Land Improvements at Higher Education Institutions (2009).

assigned directly to people or programmes i.e. the non-Assignable Area which includes circulation areas such as corridors, staircases, stairwells and lobby areas, building service areas (e.g. water heating rooms and Hub/ ICT room) and mechanical areas (e.g. lift shafts). This encourages the minimising of non-assignable areas as such areas do not contribute to the building cost norm.

The feasibility report submitted to National Treasury in September 2012 to secure the necessary funding was based on the ASMs required to support the assumed university activities which was scheduled to commence during February 2014. The financial modelling was based on the number of full time students that were to be enrolled, the ASMs required to support learning and the cost norm associated with the year in which facilities would be completed and allowances for land improvements, bulk services, furniture, fittings and equipment, etc.. The MTEF allocation confirmed by National Treasury (including both Capital and Operational) amounted to R 300 m, R 659 m and R1 166 314 for the 2013/14, and 2015/16 financial years.

Estimating costs is one thing. Delivering construction works and infrastructure within cost estimates and a narrow margin of error is quite another. Buildings were refurbished, repurposed and ready to receive the first start-up intake of students at the start of the 2014 academic year - 127 students at the Sol Plaatje University (SPU) in Kimberley and 169 at the University of Mpumalanga (UMP) in Nelspruit. The second intake in February 2015 increased the total number of student enrolments to 337 at SPU and 828 at UMP. The third intake of 2016 planned to significantly increase the student population to 700 students at SPU and 1255 students at UMP. This increase in student population required new teaching and residence facilities to accommodate the increased enrolments at a cost of approximately R 925 million.

The construction plan envisaged that the delivery management oversight for the buildings associated with the third intake of student would be undertaken by staff at the new universities. It became evident during the latter half of 2014 that the universities lacked the human resources to do so. The NUPMT were accordingly required to step in and oversee the delivery of the construction of these new facilities. The new facilities for the 2016 intake were built over a 14 month period enabling academic activities to commence at the start of the academic year within the cost norms (SPU and UMP approximately 5 and 3,5% below the norm respectively) with very small differences between difference between the estimated cost at the start of construction and the final cost - the SPU and UMP starting control budget of R 726 024 282 and R 331 821 515, respectively, whereas the final account was R 695 763 114 and R 320 468 987, respectively. This was despite 70% of the works not capable of being priced when construction commenced and the extremely short construction period of 14 months which straddled two December industry holiday periods.<sup>69</sup> In the physical construction of the universities, local content was promoted, particularly targeting those previously excluded from working on projects due to the apartheid system while 545 construction staff and workers were given approximately 40,000 hours of structured workplace learning. One of the buildings received a commendation at the World Architectural Festival. All in all, it was an exceptional project outcome.

So, what was exceptional about this project? Firstly, the time taken between the political decision to develop a new university and the receiving of the first intake of student was extremely short – just 28 months. Secondly the necessary academic facilities and residences were delivered at the start of an academic year in a cost-efficient and effective manner, and

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<sup>69</sup> Laryea and Watermeyer, “Managing Uncertainty in Fast-Track Construction Projects.”

they were delivered within the constraints of public sector procurement legislation whilst supporting the development of the surrounding community. “over 143 procurements were undertaken, resulting in 219 appointments[14-10]. Of the R1,62 billion total expenditure, R1,46 billion (90.4%) was procured through public tenders issued by the NUPMT, and all tenders were adjudicated by the Wits Tender Committee. Tenders were generally awarded to the highest points for price, preference and quality. Tenders for professional services were most often awarded at rates lower than those recommended by the relevant professional bodies.”<sup>70</sup>

The delivery of bulk water infrastructure in Giyani, Limpopo, a sub-project within SIP 18 also probably qualifies as a megaproject, though it appears on its way (if it is not there already) of constituting a failed megaproject. In February 2020, members of a parliamentary oversight committee visited Giyani, proclaimed themselves disappointed, questioned the accuracy of a report claiming partial implementation, and promised to hold further oversight hearings.<sup>71</sup> The year before, the implementing agency, Lepelle Northern Water, was reported to be under investigation by the anti-fraud Special Investigating Unit (SIU) and at the centre of a R3 billion scandal.<sup>72</sup>

Another South African megaproject, the Gautrain light rail, has been preliminary assessed from the point of view of governance.<sup>73</sup> The Gautrain Rapid Rail Link was a build-operate-transfer (BOT) type of public-private partnership (PPP) “in terms of which the design, construction, partial financing, operation and maintenance [were] undertaken by the successful private sector bidder” for the public sector client, the Gauteng provincial government (GPG).<sup>74</sup> A feasibility study for the project was conducted in 1999. The inception report was approved by National Treasury in 2001; bids were invited and evaluated and the preferred bidder selected in 2005. The BOT contract was signed in 2006 (for a 20-year term) and construction started in the same year. By 2011, the cost estimate had risen more than six times from USD \$300 million to USD \$2 billion.<sup>75</sup>

A fourth megaproject, the Gauteng Freeway Improvement Project, has been the subject of a case study analysis in postgraduate research.<sup>76</sup> The original feasibility study for this project was commissioned by South Africa’s national roads company (which implemented the project for the government) in 2004 and completed in 2006, finding that the roads in Gauteng were in need of a major upgrade and overhaul in order to support economic growth in the province.<sup>77</sup>

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<sup>70</sup> NUPMT “Chapter 14 Review of Expenditure and Value for Money: Close-out Report of the New Universities Project Management Team,” 2018, 276, <https://www.wits.ac.za/media/wits-university/faculties-and-schools/-engineering-and-the-built-environment/construction-economics-and-management/ipdm/documents/close-out-report/chapters-with-annexures/chapter14.pdf>; Samuel Laryea, Ron Watermeyer, and Neil Govender, “The Influence of Fees on the Quality of Professional Services in South Africa,” *Proceedings of the Institution of Civil Engineers - Management, Procurement and Law*, July 9, 2020, 1–11, <https://doi.org/10.1680/jmapl.20.00022>.

<sup>71</sup> Alex Mitchley, “Giyani Bulk Water Project’s Slow Progress Raises Ire of Portfolio Committee,” *News24*, February 4, 2020, <https://www.news24.com/news24/southafrica/news/giyani-bulk-water-projects-slow-progress-raises-ire-of-portfolio-committee-20200204>.

<sup>72</sup> Russel Molefe, “Giyani Water Project Scandal: Limpopo Water Parastatal Heading for Showdown with SIU,” *News24*, December 3, 2019, <https://www.news24.com/news24/southafrica/news/giyani-water-project-scandal-limpopo-water-parastatal-heading-for-showdown-with-siu-20191203>.

<sup>73</sup> Fombad, “Governance in Public–Private Partnerships in South Africa.”

<sup>74</sup> Fombad, 1200.

<sup>75</sup> Fombad, 1203, 1208.

<sup>76</sup> Parrock, “Mega Project Analysis.”

<sup>77</sup> Parrock, 36, 39.

The initial cost estimate was R6.8 billion and rose to R11.4 billion in 2008.<sup>78</sup> By the time that the project was completed, costs had risen to R 17, 9 billion.<sup>79</sup> The civil society pressure group OUTA acknowledge that there was collusion through the construction companies which led to inflated costs but question “how much would the construction companies been able to convince their customer (SANRAL) to accept, in a collusive environment, before raising alarm bells? 10%? 20%, 50%. This, however, does not answer the question as to the average benchmark overcharge of 321%.” They nevertheless point out that “we cannot overlook the glaring opinion and possibility that a portion of the estimated overcharge (R10,8 billion in OUTA’s opinion), might be attributed to incompetence, maladministration or possibly even corruption within SANRAL and or between them and their suppliers.”

Finally, a fifth mega project deserves to be mentioned, namely ESCOM’s Medupi and Kusile power stations. Watermeyer and Phillips (2020) point out that “in 2007 Eskom approved 13 projects worth more than R200 billion that it said would boost electricity output by 56% by 2017. The flagships were two mammoth coal-fired power stations, Medupi and Kusile, that were both expected to be finished by 2015 at a total cost of R163.2 billion. Instead of resolving the energy shortfall in Africa’s most industrialised nation, the plants have been textbook studies on how not to execute large infrastructure projects. Medupi’s completion date has been pushed out until 2021 and Kusile is scheduled for completion during 2023. The delays have given South Africa months of rolling blackouts, an economy in deep trouble and a huge headache for its political leadership. The anticipated final price tag has ballooned to R451 billion, including the costs of interest during construction and fitting the plants with equipment needed to meet environmental standards.”

Watermeyer and Phillips in their NPC background paper identified a number of contributors to the failure of this project. These included inadequate planning and front-end engineering development, as well as ineffective contracting strategy, execution and oversight. They also point out that contractors who performed poorly incurred limited penalties, while strikes and demonstrations compounded the implementation woes, while the appointment of 11 permanent and acting chief executives since construction began and instructions to “fast track” processes did not help matters. Eskom in addition assumed much of the project risk when it decided to coordinate the projects, rather than appoint an external organisation to oversee engineering, procurement and construction - a common practice in plant development. Eskom had to manage the interfaces between contracts with more than 50 contractors on the Kusile site and hand over completed works to end users with contractors having split responsibilities. As delays crept into the project, the sequence of work backed up, and a number of contractors found themselves unable to access the site on their contractually agreed start dates. Other contributors to project failure were identified as insufficient stakeholder management, a lack of satisfactory project controls, weak delivery management, contract interface dependencies and the extensive and significant modification of standard industry forms of contract which introduced uncertainties into commercial arrangements.

#### **Part Four: Critical Analysis of the Public Infrastructure Regulatory Regime(s)**

This part engages in a critical analysis of the existing regulatory regimes for public infrastructure procurement with specific attention to (a) the criteria of quality and value-for-

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<sup>78</sup> Parrock, 47, 65.

<sup>79</sup> Organisation Undoing Tax Abuse (OUTA) Position paper. Society’s Odious GFIP Debt, courtesy of SANRAL. Unpacking the legacy of Gauteng’s Freeway Upgrade Construction Costs (February 2016)

money discussed above, (b) the case studies discussed above, and (c) the latest publicly available proposed comprehensive legislative reform in the public procurement regulatory space, i.e. the draft Public Procurement legislation released for public comment by the National Treasury in February 2020. This work falls in the tradition of regulatory analysis such as that carried out regarding integrity pacts in February 2012 at the behest of the National Business Initiative.<sup>80</sup>

The initial idea for this working paper was to apply three distinct regulatory frameworks to two case studies and compare the results. The three frameworks were the actual one relevant to the case study, the draft February 2020 legislation, and an ideal framework. Due to the lack of detailed information regarding a second case study, this initial intention needed to be adjusted. This Part will engage in two exercises, a factual and a counterfactual exercise, with the one case study for which we have detailed information, the New Universities Project. The counterfactual assumes that the draft legislation released by the National Treasury in February 2020 is binding and in place. This two-track analysis of a single detailed case study should allow for exploration and demonstration of most of the themes of analysis for this paper.

One important caveat should be noted – that the implementation of the NUP was itself an important influence upon the development of standards at National Treasury over the period from 2012 to 2016.<sup>81</sup>

It will be most helpful to begin with a bottom-up legal analysis, starting thus with the contractual level and progressing through standards, regulations, and statutes before ending with the Constitution.

### **The Factual Legal Analysis**

The contracts used in the NUP were predominantly framework agreements<sup>82</sup> based on the NEC3 family of contract - NEC3 Professional Service Contract (PSC) – Options E and G and NEC3 Engineering and Construction Short Contract, NEC3 Engineering and Construction Contracts (Option C: Target Contract and Option F: Management contract)<sup>83</sup> and NEC3 Supply Short Contracts.<sup>84</sup>

While contractual content and analysis has not been the focus of this paper, we have noted the positive accountability and risk transparency features of framework agreements based on the NEC3 family of contracts. It is also interesting to note that the NUPMT was reported to the Competition Commission for two of its pre-qualification criteria regarding the professional services contracts for quantity surveyors but was able to justify the use of these criteria and the Commission found no grounds to forward the matter for adjudication by the Competition Tribunal.<sup>85</sup>

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<sup>80</sup> Ron Watermeyer, “An Analysis of the Alignment of the Integrity Pact Model with South Africa’s Procurement Legislation and Associated Practices” (National Business Initiative, September 26, 2012).

<sup>81</sup> NUPMT “Chapter 9 Procurement Strategy: Close-out Report of the New Universities Project Management Team (NUPMT) on the Development of New Universities in Mpumalanga and the Northern Cape,” 166.

<sup>82</sup> Watermeyer, R.B. (2013) Unpacking framework agreements for the delivery and maintenance of infrastructure. *Civil Engineering*. January / February.

<sup>83</sup> Watermeyer, “Chapter 9 Procurement Strategy: Close-out Report of the New Universities Project Management Team (NUPMT) on the Development of New Universities in Mpumalanga and the Northern Cape,” 179, 180.

<sup>84</sup> NUPMT, 167, 172.

<sup>85</sup> Watermeyer, 176.



The PFMA standard applicable to these procurement contracts were two draft 2012 NT standards which in turn were based on standards issued in terms of the Western Cape Provincial Treasury Instructions.<sup>86</sup> These standards were effectively the predecessors to the 2016 SIPDM.<sup>87</sup> These standards formed the basis for Wits procurement policies. The Wits procurement policy also referenced the CIDB Standard for Uniformity in Construction Procurement (2010) which was completely aligned with the provisions of the SANS ISO 10845 standards for construction procurement.<sup>88</sup> Taken as a whole, these standards allowed for quality to be included together with preference and price in the evaluation of tenders.

At the statutory level, no definitive interpretation existed that the PPPFA rendered illegal the tender evaluation process followed. As for the PFMA, it was understood to be consistent with the 2011 regulations then in force, regulations which were not inconsistent with the use of quality in tender evaluation.

Needless to say, at the Constitution level during the period of implementation of the NUP, section 217 of the Constitution required procurement to be governed by principles that are fair, equitable, transparent, competitive, and cost-effective. The Constitution also required that in terms of section 195 that resources be used the efficiently, economically and effectively in an accountable and development-orientated manner while administrative action were in terms of section 33 administrative action that is lawful, reasonable and procedurally fair.

#### **The Counterfactual Legal Analysis (assuming 2020 enactment of the draft Public Procurement Bill as released for comment)**

The Constitutional text stays the same. There is now one SCA case that has embarked upon somewhat substantive analysis of s 217 in order to investigate the validity of one aspect of the public procurement regime: *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* (1306/18) [2020] ZASCA 2; [2020] 2 All SA 1 (SCA); 2020 (4) SA 17 (SCA) (31 January 2020). In this case, the SCA held that s 217 and the PPPFA were applicable when organ of state contracts for goods or services even where the organ of state is not incurring an expenditure. But that point does not bear on the issues discussed here.

At the statutory level, if the February 2020 draft Public Procurement Bill were law, it would repeal and replace the PPPFA (Schedule Amendments and Repeals). As noted above, the PPPFA is best interpreted (as in *Rainbow Civils*) to allow for second stage quality criterion use. The question would thus arise whether the Feb 2020 law would allow or prohibit (or remain silent) on the use of quality at a second stage of comparative decision making, in tender evaluation, given that it has a focus on attaining value for money. Our working interpretation is that the Feb 2020 law is either silent or permissive on this question. The silent interpretation notes that procurement methods and processes are set for prescription by the Minister in terms of section 27 and that this matter may not be settled by section 37 on bid evaluation. The permissive interpretation of the Feb 2020 Bill notes that there is an interpretation of proposed section 37 which would allow for the most economically advantageous tender to be accepted.

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<sup>86</sup> See [www.westerncape.gov.za/legislation/provincial-treasury-instructions-supply-chain-management](http://www.westerncape.gov.za/legislation/provincial-treasury-instructions-supply-chain-management)

<sup>87</sup> NUPMT "Chapter 9 Procurement Strategy: Close-out Report of the New Universities Project Management Team (NUPMT) on the Development of New Universities in Mpumalanga and the Northern Cape," 166.

<sup>88</sup> Watermeyer, 187.

If the silent interpretation is adopted, the question would be deferred to the regulations for the Feb 2020 Bill which would be necessary for implementation of that legislation.

At the level of regulations, we have discussed the Feb 2020 regulations above. Regarding the PFMA (and the MFMA), the current Preferential Procurement Regulations regarding procurement are the 2017 regulations. On the question of quality as a second stage of comparative decision making in a tender, they are consistent with the 2011 regulations and are silent on this possibility. These regulations would certainly be redrafted in light of the enactment of comprehensive public procurement legislation.

At the level of standards, the current construction industry and PFMA standards differ significantly from those in force during the NUP. To begin with the Standard for Uniformity in Construction Procurement, it would currently not allow for a tender on the basis of value for money or the most economically advantageous tender. If the Bill is silent on this issue, this current standard would prohibit the NUP's procurement practices. If the Bill were interpreted to allow this procedure, the CIDB would still need to change the standard to allow for the NUP's procedure to proceed. The Feb 2020 Bill proposes no amendment to the empowering law for the CIDB.

As for financial management standards, the Feb 2020 Bill does propose to repeal Chapter 11 of the MFMA and to amend several sections of the PFMA. Assuming only minimum standards, it would not appear that the FIDPM and the NPU procurement practices would come into conflict. However, the current NT instruction note that does not allow for deviations beyond 20% without approval from NT and the negotiation of contracts for professional services where warranted – both features integral to the NUP project, even though only the second would be called into question on the facts of the NUP – would be precluded.

In terms of this counterfactual, three legal/compliance problems emerge and have been identified with a counterfactual present day implementation of a project such as the NUP. First, the interpretation of the Feb 2020 legislation may prevent the consideration of quality. Second, the CIDB Standards for Uniformity currently prohibits the evaluation and award of the economically most advantageous tender. Third, the NT guidance from 2016 limits the NUP practice of contractually managing cost overruns and prohibits the negotiation of the necessary professional services contract for the management of a project such as the NUP. As the NUP transpired, cost escalations were handled within the contractual structure. At the time, there was no rule requiring approval from NT of 20% cost deviations as is currently applicable. In any case, there were on average no cost escalations as projects were delivered within control budgets.

The exploration conducted above in this Part allows for further research and work in developing specific policy recommendations for the elements of quality, delegation, and economic impact assessments.

## **Part Five: Implementation Strategies**

This part lays out three possible strategies to give effect to the analysis articulated in this working paper – effectively a best case strategy, a worst case (failsafe) strategy, and then a pragmatic strategy.

### **A Best-Case Implementation Strategy**

There are at least two possible parts to the best-case implementation strategy. First, National Treasury, coordinating with other line departments, could efficiently draft and Parliament could timeously consider and pass comprehensive public procurement legislation that (a) recognizes the distinctiveness of infrastructure procurement for evaluation institutions and decision criteria; (b) includes quality within the comparative decision making criteria used in infrastructure procurement; (c) demarcates and allocates appropriate ancillary subject matter competence over infrastructure procurement to the CIDB as the regulator for the construction industry; and (d) demarcates and specifies the client manager appointment and delegation of authority options available for infrastructure delivery (taking into account for strategic infrastructure projects the structures and functions of the associated steering committees of the Infrastructure Development Act).

Second, NT on its own initiative could exercise its regulatory authority to reconsider and potentially revise the SIPDM and associated NT Instruction Notes for uniform applicability to public infrastructure. National Treasury appears to have recognized the need for a distinct approach to infrastructure procurement in its draft comprehensive public procurement legislation of February 2020. It has also taken steps as recently as December 2019 to at least scale back the scope of the applicability of the FIPDM.<sup>89</sup> There also are new information disclosure standards put firmly on the table by recent research that need to be considered for adaptation, incorporation, and promulgation (see the 2020 HSRC research project recommendations 2, 3, and 5 calling for the employment of the CoST Infrastructure Data Standard (CoST IDS)).<sup>90</sup> While this transparency standard will not resolve the underlying issues of public infrastructure procurement distinctiveness and the appropriate institutional tendering structure for value-for-money, such a standard would improve the system and go some way towards ensuring integrity in and assisting evaluation of public infrastructure procurement.

### A Failsafe Implementation Strategy

For various reasons, a failsafe implementation strategy with several parts to it is also worth articulating. This strategy may also be seen as supplemental to the legislative and regulatory routes. The failsafe implementation strategy focuses on reform within the field of public infrastructure procurement but can also be understood to be leveraging the reform potential in that area to effect change within the public procurement system as a whole. This strategy assumes little to no assistance from the public sector itself and comprises five parts.

First, a Public Procurement and Public Infrastructure Professional and Academic Team (PPPIPAT) could be convened to draft a set of working principles for infrastructure procurement in the current legislative environment. These working principles would draw on the analysis and statutory language developed above. This set of principles would be published and used for both policy advocacy and advocacy regarding selected public infrastructure projects. This set of principles should be aligned with but not duplicate the principles contained in, for instance, the PARI position paper on public procurement reform. This team should be reconvened at six months' intervals to adjust and revise the principles in light of intervening

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<sup>89</sup> Watermeyer and Phillips, "Public Infrastructure Delivery and Construction Sector Dynamism in the South African Economy."

<sup>90</sup> Gary Pienaar and Michael Cosser, "HSRC Policy Brief 5 - Better Value from Public Infrastructure," February 2020, 4.

regulatory developments. Funding can be sought for this team for a period of three to five years. This team should draw on economists, legal professionals, public administrators, and built-environment professionals.

Second, the continued use of the FIDPM in relation to public infrastructure procurement should be questioned in general policy forums as well as in particular complaints-driven and adjudicative forums on the basis that it is inadequate and incomplete in failing to specify guidelines for the procurement of public infrastructure projects. This would be on the basis of the delegation doctrine and the Dawood doctrine where guidelines are required especially if constitutional rights – such as the socioeconomic rights provided for in the Bill of Rights -- are affected.

Third, PAIA applications for (a) the SEIAS or other appropriate instrument with respect to public infrastructure projects at the sponsorship stage and (b) the overarching fiscal contract should be routinely made. Capacity for initiating and following up such requests might be developed through a university-research-public interest law partnership and be part of a thrust on the economics, efficiencies, and effectiveness of public infrastructure procurement.<sup>91</sup> This recommendation aligns with recommendation 4 of the 2020 HSRC research into information disclosure standards in public infrastructure procurement.<sup>92</sup>

Fourth, the legal case for considering pre-award stages (such as design) of an apparently misguided and costly public infrastructure procurement project as administrative action requiring some degree of public consultation in terms of PAJA s 4 should be further researched.

Fifth, senior counsel's opinion (on a pro or low bono basis) could be sought/commissioned, examining the degree to which the legal interpretation explored in Part Two above and embodied in the SIPDM is defensible and potentially required from the point of view of s 217 and s 195.

Sixth, the organisational and public administration case for the legality in terms of delegation of authority for public infrastructure projects to implementing agents within the bounds of constitutional parameters but outside the ambit of the PFMA and MFMA (such as universities) or alternatively within the scope of a standing specific public infrastructure procurement implementation agent deviation/exception should be researched with the DBSA and/or the DPW.

#### A Short to Medium-Term Implementation Strategy

We argue that an effective implementation strategy – one requiring some assistance from the public sector -- can be charted through attention to existing hard and soft law environment.

The key finding of the 2019 study conducted by the Human Science Research Council (HSRC) was that there are differences in understanding and interpretation of infrastructure

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<sup>91</sup> This may be worth doing in conjunction with a research unit on business and human rights, often focused on the private sector but possessing some relevant skills and knowledge.

<sup>92</sup> Pienaar and Cosser, "HSRC Policy Brief 5 - Better Value from Public Infrastructure."

regulation, policy and practice which undermine the effective and efficient procurement of public infrastructure.<sup>93</sup>

As we have pointed out above, the recently issued FIDPM and LGFIDPM (e.g. the PFMA and MFMA versions) have not reduced the confusion but have added to it. The FIDPM is poorly drafted and misaligned with critical built environment processes and practices. It is furthermore difficult to interpret and impractical to implement. The changes brought about in the CIDB prescripts have undermined the integrity of the standard that evolved since 2004 and are difficult to interpret and implement. For example, the FIDPM makes reference to “applicable CIDB Standards for Uniformity” and “CIDB prescripts”. The Construction Industry Regulations define construction procurement as “procurement in the construction industry, including the invitation, award and management of contracts.” The most recent version of the CIDB Standard for Uniformity in Construction Procurement (2015 edition) deals with professional service, term service, supply and engineering and construction contracts. The CIDB Standard for Uniformity in Engineering and Construction Contract which was issued in 2019 has a narrow scope and only deals with engineering and construction contracts. There is accordingly an overlap between these documents and confusion as to what is applicable.

The recovery from COVID is likely to be very slow under the current procurement regime due to the incoherent and conflicting regulatory instruments and confusing plethora of guidelines and circulars which have been issued to clarify various aspects of the SCM Regulations, instructions and guidelines and the Preferential Procurement Regulations. There is an urgent need to address this unfortunate state of affairs before the finalisation and eventual implementation of the Procurement Bill (unlikely on current trajectory before the end of 2022 on a best case scenario).

The Infrastructure Development Act of 2014 provides an opportunity to address these issues through hard and soft legislative instruments. This Act establishes a Council for the Presidential Infrastructure Co-ordinating Commission comprising the President, the Deputy President, Ministers designated by the President, the Premiers of the Provinces and the Executive Mayors of metropolitan councils as well as the chairperson of the South African Local Government Association. This Council is tasked with amongst other things, the identification of any legislation and other regulatory measures that impede or may impede infrastructure development, and advise the executive authority of the relevant sphere of government. A research group should be tasked by this Council with analysing the text of the FIDPM, CIDB prescripts and Standards for Uniformity, Treasury Instructions and circulars etc. and identify and explain why certain provisions impede the effective implementation of infrastructure procurement and delivery management practices.<sup>94</sup> The task group should propose solutions preferably within the confines of existing legislation and have their proposals presented to the PICC who can then deal with the issues in terms of their founding legislation. This intervention will also inform the finalising the infrastructure aspects of the Procurement Bill and the necessary instructions and other regulatory instruments that need to be put in place to implement the Procurement Act following its adoption by Parliament.

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<sup>93</sup> “The Potential Added Value of CoST -- The Infrastructure Transparency Initiative in South Africa.”

<sup>94</sup> It should be noted that the SIPDM was crafted as soft legislation which did not conflict with the PFMA and MFMA and their associated supply chain management regulations. The conflicts have occurred in instructions, circulars and guidelines that were issued following the issuing of the SIPDM. Watermeyer and Phillip’s paper identifies many of these issues – see 56 -74.

## Conclusion

In a context characterised by the effects of the pandemic and a need for economic recovery, South Africa needs to rethink its regulatory environment for procurement and how to respond to changing circumstances. South Africa is currently faced with two major challenges in moving forward. Firstly, the current plethora of laws dealing with public procurement which have evolved since 1994 has led to uncertainty as to which law is applicable, and inconsistency in interpretations resulting in an inflexible system which hampers development and service delivery and exposes the state to corruption. Secondly, the fiscus has not been able to fund infrastructure at the levels proposed in the National Development Plan (10% of GDP) and significantly less funds are available to fund infrastructure in the wake of COVID-19 which has had a devastating impact on the economy. The demand for infrastructure remains. Accordingly, infrastructure needs to be delivered more efficiently.

Other jurisdictions are also looking at their procurement regimes post-COVID. In particular, the UK currently has the opportunity to reimagine public procurement law after its withdrawal from the European Union. A prominent procurement law and policy academic, Prof Arrowsmith, has recently suggested that a new hard law regime should shift from ensuring open markets as is the current EU requirement to eight key objectives, namely: value for money, integrity, accountability, equal treatment, fair treatment of suppliers; effective implementation of industrial, social and environmental objectives; opening markets; and an efficient procurement process. She then argues that reform should be based on seven principles: an open contracting approach which involves making information publicly available and usable through an electronic system; a single and uniform regime for the Westminster jurisdiction; significant legislative simplification involving a shift from hard to soft law; use of familiar concepts, rules and terminology where appropriate; a rebalancing of interests (away from open market objectives towards value for money, sustainability and reduced procedural costs) and a related shift in regulatory strategy to increase flexibility; a more effective and balanced approach to enforcement; and a common framework across UK jurisdictions.<sup>95</sup>

The South African Constitution of course requires that the procurement system be fair, equitable, transparent, competitive and cost effective, and embrace a procurement policy providing for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. The procurement system also needs to promote the principles governing public administration embedded in the Constitution relating to the efficient, effective and economic use of resources in an accountable and development orientated manner as well as administrative action that is lawful, procedurally fair and reasonable. These Constitutional imperatives resonate with Arrowsmith's eight key objectives.

The Procurement Bill which was published in February 2020 for public comment envisages a single and uniform regime, a common framework and a soft law approach to the regulation of infrastructure procurement and delivery in the form of standards which permits flexibility and provides an opportunity for use of familiar concepts, rules and terminology.

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<sup>95</sup> Sue Arrowsmith, "Reimagining Public Procurement Law After Brexit: Seven Core Principles for Reform and Their Practical Implementation, Part 1," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, January 10, 2020), <https://doi.org/10.2139/ssrn.3523172>.

There are, however, several shortcomings in the Procurement Bill which if not addressed will inevitably undermine the effective implementation of what is intended for infrastructure procurement and delivery management. First, the Bill in several instances perpetuates aspects of the prevailing procurement and supply chain management practices which are designed primarily for general goods and services for consumption and shapes the requirements for infrastructure in numerous sections of the bill rather than consolidating it in one chapter. Second, although the Bill purports to be a framework it contains detail which introduces requirements which are likely to work against requirements for flexibility and differentiation in more complex procurements. Such provisions are better located in Regulations or soft law. Third, although the Bill seeks to create a single regulatory framework for public procurement to eliminate fragmented procurement prescripts, it proposes no amendment to the Construction Industry Development Board Act.. It is not clear if this is an omission or in recognition that the CIDB has no mandate to regulate procurement except where this is granted to the CIDB by National Treasury. This issue needs to be clarified in going forward. Fourth, the definition for infrastructure is inadequate. The definition is not sufficiently broad to cover engineering works including process plant. It also omits ICT networks and the dismantling or demolition of construction works. It also needs to be expanded to cover furniture, fittings and equipment necessary to enable a new or refurbished facility to be delivered as a fully functional entity. The definition also does not expressly cover professional built environment services.

The need to standardise procurement processes, methods and procedures for the procurement and delivery management of infrastructure needs to be done in a generic and flexible manner which supports and does not frustrates infrastructure delivery. This will enable those engaged in a range of infrastructure delivery activities to perform their duties, within the confines of their organisation's procurement policy, in a uniform and generic manner and enables procurement documents to be readily compiled in a uniform and generic manner. It also enables curricula to be developed to capacitate those engaged in a range of infrastructure delivery activities and the public sector to readily develop an internal procurement skills base, which is not lost when members of staff move between different departments or levels of government or public entities.

As the above account of the variable interpretation of the PPPFA demonstrates, there is a need to embed the principles for infrastructure procurement and delivery management in hard law. Such principles can be formulated from the lessons learned from the recent history of standards formulation across the public procurement field and the even more recent history of the delivery of a successful mega project for public infrastructure in South Africa.