

Procurement Watch Report on Procurement Risk Trends



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Abbreviations

BAC	Bid adjudication committee
B-BBEE	Broad-based black economic empowerment
BEC	Bid evaluation committee
CIDB	Construction Industry Development Board
CSD	National central supplier database
DBSA	Development Bank of South Africa
MFMA	Local Government: Municipal Finance Management Act, 56 of 2003
PFMA	Public Finance Management Act, 1 of 1999
POCA	Prevention of Organised Crime Act, 121 of 1998
PPPFA	Preferential Procurement Policy Framework Act, 5 of 2000
Prasa	Passenger Rail Agency of South Africa
PRECCA	Prevention and Combating of Corrupt Activities Act, 12 of 2004
SCM	Supply chain management

1 Introduction

This report presents an analysis of selected forms of procurement data between 2016 and 2020. It specifically focuses on trends in requests to undertake deviations and expand contracts, accompanied by an analysis of restricted suppliers. The data is drawn from reports submitted to National Treasury by all procuring organs of state. The analysis is made possible by Corruption Watch's online tool, Procurement Watch, which aggregates data from the individually published reports. The first report was released in October 2021 and this second version presents updated data.

Making use of deviations and contract expansions can raise red flags and indicate a lack of planning for procurement requirements. However, it is important to note that deviations and contract expansions do not necessarily indicate any abuse of the public procurement system. There may be perfectly valid reasons for deviating from a prescribed procurement procedure or for expanding an existing contract. For example, if an organ of state wishes to acquire a unique piece of scientific equipment that is manufactured by only one supplier, there is no point in inviting public tenders for the supply of such equipment even though the value of the envisaged acquisition may be far above the threshold for the mandatory use of open bidding methods of procurement. Using the open bidding procedure would in fact be a waste of public resources since it would not generate competition among suppliers. Instead, under such circumstances, procurement rules allow the relevant organ of state to deviate from the open bidding procedure and contract directly with the sole supplier of the equipment.

It is accordingly important to approach data on deviations and contract expansions within the context of the relevant rules governing public procurement generally and to keep in mind that these are accepted mechanisms within the procurement system. Each instance of deviation or contract expansion must consequently be carefully considered on its own merits within the regulatory framework to determine whether any abuse of the procurement system is evident.

One particularly useful tool in monitoring responses to abuse of the public procurement system is the restriction of bidders from conducting business with the state, generally called debarment. However, as with deviations and contract extensions, the mere debarment of a supplier does not immediately mean that the supplier abused the procurement system. Suppliers may also be debarred for performance failure, that is, for failing to adequately perform in terms of the procurement contract. Again, care should be taken to fully understand the rules governing debarment of suppliers and to interrogate each debarment on its own terms.

In the following sections, the rules governing public procurement are briefly set out, starting with an overview of the statutory prescripts for public procurement in the ordinary course. Specific attention is consequently paid to the rules governing deviations from normal procurement procedures and expansion of contracts. The general mechanisms available to address abuse of the procurement systems are then briefly set out followed by specific discussion of the rules governing debarment in South African public procurement.

Against the backdrop of this exposition of the regulatory regime governing public procurement in South Africa, data regarding deviations from prescribed procurement procedures, contracts extensions and debarments is presented.

2 The statutory regime for procurement in the ordinary course

Public procurement is a highly regulated aspect of both public administration and economic activity in South Africa. That is, the invitation, adjudication, award and implementation of contracts for the acquisition of goods and services by South African organs of state are governed by detailed legal rules, collectively referred to as public procurement law.

Public procurement law

Public procurement law in South Africa is notable for its explicit basis in the Constitution. Section 217(1) of the Constitution states that “when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective”. The legal principles upon which public procurement is based in South Africa are thus constitutionally guaranteed.

Despite the explicit set of principles contained in the Constitution, there is no coherent, single set of rules governing public procurement across all organs of state in South Africa. Instead, a various statutory instruments apply to different (types of) organs of state.

Procurement by entities at national and provincial government level are for the most part governed by the Public Finance Management Act, 1 of 1999 (PFMA) and the Treasury Regulations, 2005, made under the PFMA. The Treasury Regulations include a single, dedicated regulation (16A) on public procurement that sets out the basic framework for procurement regulation at this level of government. However, Treasury Regulation 16A does not apply to entities listed in Schedules 2, 3B or 3D of the PFMA. The regulation thus applies to national and provincial government departments, constitutional institutions, national public entities and provincial public entities, but not to major public entities, national government business enterprises or provincial government business enterprises. The schedules to the PFMA contain exhaustive lists of all the entities falling within each of these categories.¹

¹ The PFMA can be found at http://www.saflii.org/za/legis/consol_act/pfma1999206/.

Below the level of regulation, the National Treasury has issued a large number of secondary legal instruments, variously termed Instruction Notes, Circulars, Frameworks and Standards, that prescribe further, detailed rules on specific aspects of public procurement.² Many of these, notably the Instruction Notes, are issued in terms of section 76 of the PFMA that grants National Treasury the power to issue binding instructions to entities covered by the PFMA relating to public procurement, among others.

At local government level, procurement is governed by the Local Government: Municipal Finance Management Act, 56 of 2003 (MFMA)³ and the Municipal Supply Chain Management Regulations, 2005 (Municipal SCM Regulations)⁴ made under it. In contrast to the Treasury Regulations under the PFMA, the Municipal SCM Regulations prescribe the legal framework governing public procurement at local government level in much more detail. Also, unlike the PFMA regime, National Treasury has no power to create additional legal instruments, such as instructions, to bind local government procurement. Any additional instruments National Treasury issues are only binding upon an individual municipality if that municipality's council formally adopts such instrument.⁵

Under both the PFMA and MFMA regimes, the basic premise of the regulatory scheme is that a particular organ of state designates its own public procurement system. This system must be set out in its SCM Policy that constitutes the immediate set of rules governing public procurement by that organ of state. The statutes and regulations thus only create the legal framework for an entity's own SCM Policy.

The only cross-cutting legislation governing public procurement specifically is the Preferential Procurement Policy Framework Act, 5 of 2000 (PPPFA),⁶ and the Preferential Procurement Regulations, 2017,⁷ made under it. These enactments provide for the adjudication method in formal quotation and open bidding procurement. Importantly, this includes the system of broad-based black economic empowerment (B-BBEE) in public procurement, which allows for

² Lists of these instruments can be found at http://ocpo.treasury.gov.za/Buyers_Area/Legislation/Pages/default.aspx.

³ The MFMA can be found at <http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation>.

⁴ The Regulations can be found at http://www.saflii.org/za/legis/consol_reg/mscmr435/.

⁵ MFMA section 168(3).

⁶ The Act can be found at <http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation>.

⁷ The Regulations can be accessed at <http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation>.

preferential procurement from certain categories of bidders. The rules under the PPPFA apply alongside those under the PFMA and the MFMA.

Sectoral procurement rules

In addition to the general procurement rules set out in the abovementioned instruments, further rules govern particular types of procurement. The most important is the regulatory regime for construction procurement. While construction procurement is governed by general procurement law, it is additionally governed by rules created under the Construction Industry Development Board Act, 38 of 2000 (CIDB). Most recently, National Treasury has also adopted a set of rules specifically for construction procurement under the PFMA in the form of the Framework for Infrastructure Delivery and Procurement Management 2019. The latter, however, only applies to national and provincial entities and not local government construction procurement. Further sectoral procurement rules, which apply to procurement within the particular sector in addition to general procurement law, include procurement of land transport, governed under the National Land Transport Act, 5 of 2009 and the National Land Transport Regulations on Contracting for Public Transport Services, 2009,⁸ and procurement of information technology, governed by the State Information Technology Agency Act, 88 of 1998 and the Regulations made under that Act.⁹

Procurement methods

The procurement rules set out above allow for three basic procurement methods:

- petty cash purchases for low value transactions
- restricted bidding by way of quotations
- open bidding.

Use of these basic methods is largely determined by the value of the transaction based on set thresholds.¹⁰ At present, the informal, petty cash method is prescribed for all transactions below R2 000 for local government entities and national and provincial entities covered by the PFMA Treasury Regulations. Restricted bidding by way of quotations must be used for all

⁸ Both the Act and the Regulations can be found at <http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation>.

⁹ Both the Act and the Regulations can be found at <http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation>.

¹⁰ National Treasury PFMA SCM Instruction No. 02 of 2021/22; Municipal SCM Regulations 16–18.

transactions above R2 000 and below R1m by national and provincial entities subject to the Treasury Regulations and below R200 000 by local government entities. National and provincial entities subject to the Treasury Regulations must use the open bidding procedure for transactions above R1m and local government entities must use open bidding for all transactions above R200 000.

The restricted bidding procedure requires entities to invite quotations from at least three suppliers that are registered on a supplier database.¹¹ In the case of national and provincial entities, that list is the national central supplier database (CSD) maintained by National Treasury.¹² Local government entities may use the CSD or their own list of suppliers. While entities should endeavour to obtain as many quotations as possible for larger value procurements within this category, there are no legal prescripts regarding how suppliers should be invited to submit quotations. The method of selection must be set out in the entity's SCM Policy.

The most important procurement method is the open bidding procedure. In terms of this procedure, entities are obliged to publish an open invitation to submit bids in prescribed form by a prescribed closing date.¹³ All bids received must be considered by a bid evaluation committee (BEC) to determine whether they are responsive, that is, compliant with all the bid requirements.¹⁴ The BEC makes a recommendation to the bid adjudication committee (BAC) regarding which bids are responsive, including whether they meet the technical specifications of the particular tender (called the functionality criteria).¹⁵ The BAC scores the qualifying bidders on the basis of the price offered and what is called preference points.¹⁶

All procurements above the value of R30 000, whether done by means of quotations or open bidding must be adjudicated in terms of the scoring method set out in the PPPFA and Preferential Procurement Regulations, 2017. The scoring is done on set formulae out of 100 points. For procurements below the value of R50m, 80 points are awarded for price and 20 points for preference. For procurements above R50m, 90 points are awarded for price and 10

¹¹ National Treasury Practice Note No. 8 of 2007/2008.

¹² National Treasury SCM Instruction No. 4A of 2016/2017.

¹³ Treasury Regulations 16A6; Municipal SCM Regulations 22.

¹⁴ Treasury Regulations 16A6; Municipal SCM Regulations 26, 28; read with the PPPFA section 1.

¹⁵ Treasury Regulations 16A6; Municipal SCM Regulations 28; read with the Preferential Procurement Regulations 5.

¹⁶ Preferential Procurement Regulations 6, 7.

for preference. The price points are determined by the following formulae (depending on whether the 80/20 or 90/10 ratio is used):

$$P_s = 80 \left(1 - \frac{P_t - P_{min}}{P_{min}} \right)$$

Where –

P_s = Points scored for price of tender under consideration;

P_t = Price of tender under consideration; and

P_{min} = Price of lowest acceptable tender.

$$P_s = 90 \left(1 - \frac{P_t - P_{min}}{P_{min}} \right)$$

Where –

P_s = Points scored for price of tender under consideration;

P_t = Price of tender under consideration; and

P_{min} = Price of lowest acceptable tender.

The preference points are added to the price points for each bidder . This is simply determined with reference to the bidder’s formal B-BBEE status level of contributor as certified in its B-BBEE certificate or sworn affidavit. The following tables are used to determine the number of preference points for each bidder (again, depending on which points ratio is used):

Table 1: Preference points added to the price points under the 80/20 ratio

B-BBEE status level of contributor	Number of points
1	20
2	18
3	14
4	12
5	8
6	6
7	4
8	2
Non-compliant contributor	0

Table 2: Preference points added to the price points under the 90/10 ratio

B-BBEE Status Level of Contributor	Number of points
1	10
2	9
3	6
4	5
5	4
6	3
7	2
8	1
Non-compliant contributor	0

Once the BAC has determined the individual scores of all qualifying bidders, it is under a general legal duty to award the bid to the highest scoring bidder.¹⁷ There are some exceptions to this rule, where the entity may, at the outset in the tender invitation, indicate that other objective criteria may also be used in combination with the scoring to determine the winning bidder.¹⁸

¹⁷ PPPFA section 2(1)(f).

¹⁸ PPPFA section 2(1)(f) read with Preferential Procurement Regulations 11.

3 About deviations

Public entities are allowed to deviate from the procurement procedures set out above under limited circumstances. Under the PFMA Treasury Regulations, national and provincial entities covered by those regulations may deviate when “it is impractical to invite competitive bids”.¹⁹ National Treasury instruction has severely curtailed this seemingly wide discretion to deviate by limiting deviations to instances of sole suppliers and emergencies.²⁰ The former is only the case where, objectively, “only one supplier possesses the unique and singularly available capacity to meet the requirements”.²¹ An emergency is described as “a serious and unexpected situation that poses an immediate risk to health, life, property or environment which calls an agency to action and there is insufficient time to invite competitive bids”.²²

An accounting officer must approve a deviation prior to the procurement. Entities may also deviate in circumstances other than sole suppliers and emergencies, but only with prior approval from the relevant treasury and only in exceptional circumstances. All deviations above R1m in value must be reported to the relevant treasury and Auditor-General.

Local government entities have more freedom to depart from the prescribed competitive bidding procedure. In terms of the Municipal SCM Regulations, local government entities may also deviate in cases of sole supplier and emergencies, but also in a few additional instances that include “any other exceptional case where it is impractical or impossible to follow the official procurement processes”.²³ Deviations must be reported to the local council.

When the conditions for a deviation are met, the entity may procure by way of any appropriate procedure, including direct contracting. A deviation is accordingly the only way public entities may contract directly with suppliers. When an entity deviates from the prescribed procurement procedures in terms of the rules set out above, it still complies with procurement law. In other words, an entity deviating from the prescribed procedures does not in itself mean something is wrong with the procurement. Deviations are, however, the exception. It follows that they should only be used in exceptional cases where it is truly unfeasible to adhere to normal procurement rules. An entity relying heavily on deviations in

¹⁹ Treasury Regulations 16A6.4.

²⁰ National Treasury SCM Instruction Note 3 of 2016/17.

²¹ National Treasury SCM Instruction Note 3 of 2016/17.

²² National Treasury SCM Instruction Note 3 of 2016/17.

²³ Municipal SCM Regulations 36(1)(a)(v).

its procurement function may raise a red flag. It may signal abuse of the procurement system or that procurement planning is weak within the entity.

4 About expansions

As a rule, the contract concluded and implemented following the tender process should in all material respects reflect the terms and conditions upon which bids were invited and adjudicated. That is, an entity should not invite bids, adjudicate them and award the tender to a supplier and subsequently conclude a contract with that supplier on materially different terms. Similarly, an entity should not, after the contract conclusion allow material changes to the contract terms as doing so would mean the procurement process is no longer fair.

It is, however, inevitable that contracts need to be adjusted from time-to-time. Unexpected conditions may emerge during contract execution that necessitate contract adjustment. For example, a department may procure bottles of water for an event it is planning and discover at the last minute that more attendees will be at the event than it planned for. Under such circumstances, the department may wish to adjust the quantity of bottles to be supplied.

The risks accompanying contract variations are paramount in the case of expansions of contracts. That is, instances where the value of the contract is increased. Such expansions may easily be abused to award a much bigger contract to the supplier than was originally tendered for. The expanded contract will thus not be the product of competitive bidding. It is for this reason that National Treasury has issued an instruction to all national and provincial entities (not only those covered by the Treasury Regulations) under the PFMA to limit contract expansions.²⁴ In terms of this instruction, an entity may not expand a contract beyond 20% or R20m (including VAT) for construction-related procurement, and not beyond 15% or R15m (including VAT) for all other procurements. Any expansion beyond these values must first be approved by the relevant treasury.

At local government level, amendments of contracts are procedurally more restricted. Under the MFMA, a municipality may only amend a contract after “the reasons for the proposed amendment have been table in the council” and “the local community has been given reasonable notice of the intention to amend ... and has been invited to submit representations” on such proposed amendment.²⁵

²⁴ National Treasury SCM Instruction Note 3 of 2016/17.

²⁵ MFMA section 116.

5 Contraventions and remedies

Abuse of the procurement system amounts to offences under different statutes, under which a range of penalties may be imposed.

Procurement-specific offences

The Prevention and Combating of Corrupt Activities Act, 12 of 2004 (PRECCA)²⁶ creates two procurement-specific offences.

- The first relates to “corrupt activities in relation to contracts” and in terms of section 12 includes situations where a person accepts or agrees to accept, offers or agrees to offer, or gives any gratification, for his/her benefit or the benefit of another person to influence in any way the promotion, execution or procurement of a contract with a public entity. This offence is primarily aimed at bribery.
- The second offence is “corrupt activities in the procuring and withdrawal of tenders”. In terms of section 13, this offence involves instances where a person offers, agrees to offer or to accept, or accepts any gratification as an inducement to or to influence another person to award a tender, make a tender or withdraw a tender for a contract.

The Act provides for the specific sanction of debarment in addition to the general sanctions of fines and imprisonment in cases of conviction for these offences. Debarment is considered in the following section.

Collusion

Collusion between an official and supplier to ensure the award a contract to the supplier, whether it amounts to an offence under PRECCA or only more generally contravention of procurement laws, may also amount to an offence under the Prevention of Organised Crime Act 121 of 1998 (POCA).²⁷ Such collusion may, for example, amount to money laundering under section 4; to “assisting another to benefit from proceeds of unlawful activities”, which is an offence in terms of section 5, or “acquisition, possession or use of proceeds of unlawful activities”, an offence in terms of section 6. It is important to note that the unlawful activities that would trigger these offences do not have to be offences (i.e., crimes) themselves. POCA defines “unlawful activities” to include “any conduct...which contravenes any law”. It thus follows that procurement decisions that do not adhere to procurement laws may constitute

²⁶ The Act can be found at <http://www.lawsouthafrica.up.ac.za/index.php/current-legislation>.

²⁷ The Act can be found at <http://www.lawsouthafrica.up.ac.za/index.php/current-legislation>.

such unlawful activities. POCA prescribes fines to a maximum of R100 million or imprisonment to a maximum of 30 years for these offences.

Remedies

Procurement law itself also provides for remedies in case of abuse of the procurement system. The Preferential Procurement Regulations, 2017, under the PPPFA, provide for sanctions where a bidder has submitted false information to secure the tender or where a tenderer has failed to declare any subcontracting arrangements. The sanctions that may be imposed under these Regulations include disqualifying the bidder from the tender process, cancelling a contract, claiming damages, imposing penalties and/or imposing restrictions (as discussed below). Similar remedies are provided for under the Treasury Regulations and instructions issued under the PFMA. These provide for bids to be rejected or contracts to be cancelled where corruption or fraud in the procurement process occurred, as well as for bidders to be debarred (discussed below). The Municipal SCM Regulations provide that municipal SCM Policies must contain similar mechanisms.

Finally, various collusive practices among suppliers may also amount to violations of the Competition Act 89 of 1998,²⁸ especially where such practices have the effect of lessening competition in the public procurement market. This includes price fixing or dividing contract opportunities among competing bidders. Fines may be imposed on such colluding bidders.

6 Debarment of suppliers

There are two mechanisms in South African law for restricting suppliers from doing business with government. Generally, this is referred to as debarment.

Register for Tender Defaulters

One mechanism is created in PRECCA and given further detail in regulations issued under the Act.²⁹ As part of the criminal sanction a court may impose following a finding of guilt in respect of procurement-specific offences under this Act, the court may order that the supplier and a host of related parties (as determined by the court) be listed on the Register for Tender Defaulters. When an entity has been endorsed on the Register, it will be debarred from winning state contracts for a period of between 5 and 10 years. The term of debarment is set

²⁸ The Act can be found at <http://www.lawsouthafrica.up.ac.za/index.php/current-legislation>.

²⁹ The Regulations Regarding the Register for Tender Defaulters, 2005, made under PRECCA can be found at <http://www.lawsouthafrica.up.ac.za/index.php/current-legislation>.

by National Treasury once the court has ordered endorsement. The Register for Tender Defaulters is publicly available.³⁰ An organ of state is prohibited from awarding a contract to an entity endorsed on the Register.

Database of Restricted Suppliers maintained by National Treasury

The second debarment mechanism in South Africa is the Database of Restricted Suppliers that is also maintained by National Treasury.³¹ Listing on this database is done administratively, that is, without a court order. In terms of the PFMA, MFMA and PPPFA, organs of state may identify a supplier for inclusion on the database for a host of reasons. When a supplier is listed, it will be debarred from winning state contracts for the period of listing, which may not exceed 10 years, and organs of state are prohibited from awarding contracts to such suppliers.

The reasons for listing are varied. They include abuse of the SCM system, such as fraud in winning the bid, corruption more generally, failure to perform under a contract or a failure to declare a subcontracting arrangement. Listing of suppliers on the database is done either by the relevant procuring organ of state or National Treasury, depending on the basis for the listing. If the listing is done in terms of the PFMA or MFMA, the relevant organ of state takes the decision to debar. In such a case, the organ of state informs National Treasury of the decision it has taken, and National Treasury simply fulfils the administrative task of adding the supplier to the database. If the listing is done under the PPPFA, however, National Treasury takes the decision to debar. In such a case, the relevant procuring organ of state informs National Treasury of its findings of wrongdoing and National Treasury decides whether to list the supplier on the database.

³⁰ See <http://www.treasury.gov.za/publications/other/Register%20for%20Tender%20Defaulters.pdf>.

³¹ See <http://www.treasury.gov.za/publications/other/Database%20of%20Restricted%20Suppliers.pdf>.

7 Deviations data

Reported deviations 2016–2021

The graph below illustrates the number of deviations from prescribed procurement procedures reported to National Treasury between 2016 and 2021 with National Treasury’s response to the deviations. The proportion of deviations unsupported by National Treasury increased from 2018. The smaller number of deviations reported in 2020 can be ascribed to the emergency rules governing procurement since the declaration of a state of disaster in response to the Covid-19 pandemic in March 2020, which introduced adjusted procedures for procurement and reduced procurement on non-pandemic related goods and services.

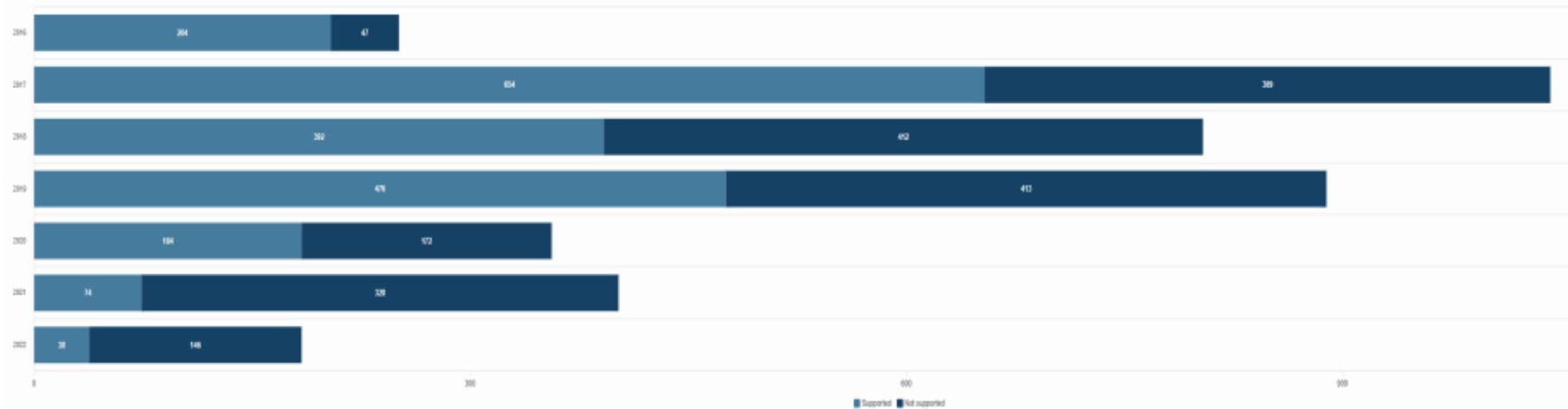


Figure 1: Deviations reported per year (2016–2021), with indication of National Treasury response

10 largest deviations by transaction value from 2016–2021

Table 3 below sets out the 10 largest deviations from prescribed procurement procedures in transaction value between 2016 and 2021. It is of interest to note that half the deviations occurred at Eskom and four of those five deviations involved procurement of coal. The Passenger Rail Agency of South Africa's (Prasa) deviation in relation to the appointment of the DBSA as an implementing agent is also of interest given that this transaction amounts to a contract between two organs of state, i.e., it does not involve a private supplier outside the state. This raises interesting questions about the appropriateness of applying procurement law rules to inter-organ of state contracting.

Table 3: 10 largest deviations per value of deviation requested (2016–2021), with indication of National Treasury support

Entity/Department	Project description	Supplier	Reason for deviation	Value of deviation (R)	Source	Supported
SAA	Request for funding	Various suppliers	Emergency	13,600,000,000,000.00	Q3_2017	Not supported
Eskom	Renegotiation of Coal supply agreement for Procurement of Coal	South32	Cost plus agreement	66,976,000,000.00	Q2_2020	Not supported
Eskom	Maintenance & outage repair services for boiler pressure parts for 13 coal power station	Actom, Babcock, Steinmuller	Sole source	35,659,984,173.00	Q4_2016	Not supported
Eskom	Confined market procurement of coal for various power stations	Limited Bidding	Coal shortfall	14,923,254,720.00	Q3_2018	Conditional support
Eskom	Coal shortfall task1	Hoyoyo Mining and Exxaro Coal central	Urgent Procurement	10,664,176,840.00	Q2_2018	Supported
Passenger Rail Agency of SA (PRASA)	Appointment of DBSA as an Implementing Agent	DBSA	Role played by DBSA infrastructure delivery space	5,446,261,053.00	Q2_2019	Not supported
Department of Health (DoH)	Procurement of vaccines through the Covid-19 Vaccine Global Access (COVAX) Facility	COVAX Facility	Emergency	4,195,524,000.00	Q3_2021	Conditional Support
Transnet Limited	Approved Rail Suppliers	Tata Steel France Rail SAS Guma	Approved bidders	3,806,261,101.00	Q4_2019	Conditional support
Department of Higher Education and Training	Procurement of Laptops for students	Quotation procurement method	Urgency due to COVID-19	3,750,000,000.00	Q1_2020	Not supported
Eskom	Coal supply to Matla Power Stations and other Eskom power stations	Exxaro	Cost Plus Mine tied to Power Station through a conveyor belt	3,500,000,000.00	Q4_2018	Within AA/AO mandate Noting

8 Contract expansions data

Contact expansions reported to National Treasury 2017–2021

Figure 2 below shows the number of contract expansions reported to the National Treasury between 2017 and 2021, and whether National Treasury supported the expansion. The data show a consistent reduction in the number of reported contract expansions year-on-year between 2017 and 2021, but a significant increase in the 2021/22 financial year.

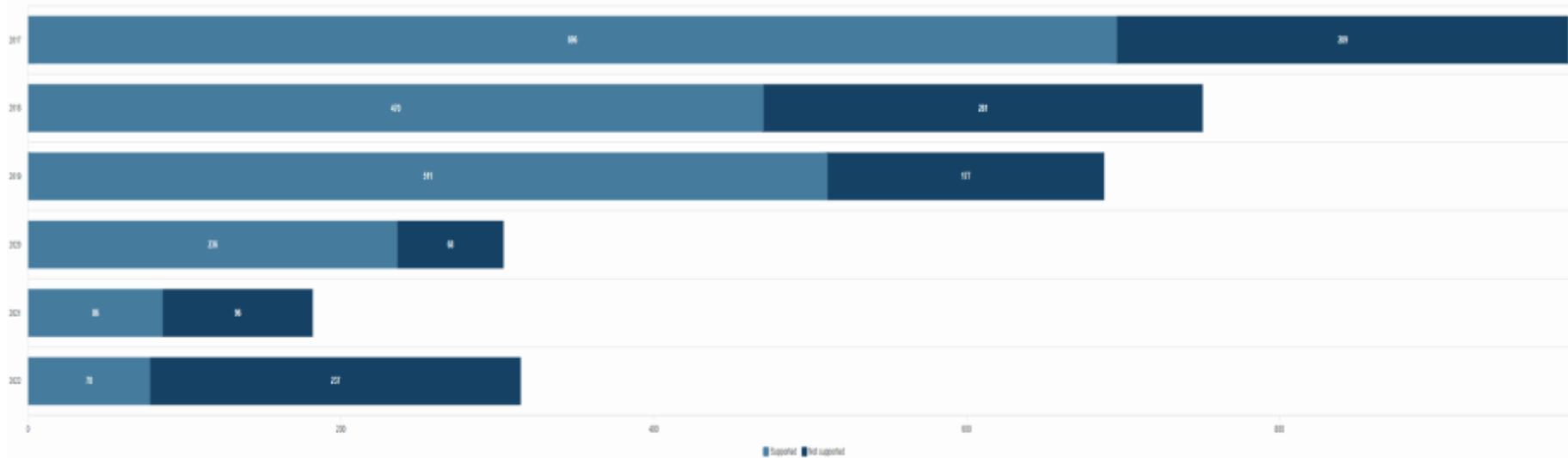


Figure 2: Number of contract expansions reported per year (2017–2021), with indication of National Treasury response

10 largest contract expansions (2017–2021)

Table 4 shows the 10 largest contract expansions reported to National Treasury from 2017 to 2021 with National Treasury’s response. Of particular interest is the massive scope of the expansions.

Table 4: 10 largest contract expansions by value of extension (2017–2021), with indication of National Treasury response

Entity/Department	Project description	Supplier	Reason for extension	Percent extension increase	Original contract value	Value of contract extension	Value of previous extensions	Foreign Original Contract Value	Supported	Source	Date received
Basic Education	Variation in excess of 20% for Professional Services fees on ASIDI projects implemented by the Development Bank of South Africa (DBSA)	Various Suppliers	DBSA encountered challenges in the implementation of ASIDI projects in the Eastern Cape ranging from community disruptions, inclement weather and poor access to sites, which resulted in delays in the delivery of building materials to sites	26815.0 %	124,587,195.00	33,408,577,798.45	25,867,485.00		Not supported	Q4_2019	2020-02-06
Eskom	Maintenance and outage repair services for Boiler Pressure parts and/or the maintenance and outage repair services for High Pressure Pipework	Actom, Babcock and Steinmuller	Conclude a competitive bidding process	1607.0 %	843,600,000.00	13,557,080,416.00	7,378,380,540.00		Not supported	Q4_2017	2018-01-08
Eskom	Turbine Generator at Medupi Power Station	Alstom South Africa	Expansion of scope (time & material)	11509.0 %	116,567,868.00	13,416,641,808.00	2,034,994.00		Conditional support	Q2_2020	2020-07-26
Eskom	Maintenance and outage repair services for boiler pressure parts and or maintenance and outage repair services for high pressure pipework for 13 fossil fired power stations	Actom (Pty) Ltd, Babcock Ntuthuko Engineering (Pty) Ltd and Steinmuller Africa (Pty)	Competitive Bidding process underway	1192.0 %	846,600,000.00	10,098,875,058.00	8,116,218,594.00		Conditional support	Q2_2017	
Eskom	Maintenance and outage repair services	Actom, Babcock and Steinmuller	Continuity of service	1088.0 %	843,600,000.00	9,180,795,507.00	7,378,380,540.00		Supported	Q2_2018	
Eskom	400 MV Switchgear	Actom MV SwitchGear (Pty) Ltd	Funds exhausted	21016.0 %	42,996,622.00	9,036,550,200.00	0.00		Not supported	Q4_2017	2018-01-02
Eskom	Supply, Transportation, Erection and Dismantling of Scaffolding and Insulation Material for Generation Power Stations including Group Capital (Refurbishment Projects)	Southey Contracting (Pty) Ltd, Kaefer Thermal Consulting Services (Pty) Ltd, SGB-Cape a division of WACO Africa & TMS Group Industrial Services (Pty) Ltd	Competitive bidding in progress	1947.0 %	378,499,500.00	7,371,133,022.19	1,102,850,000.00		Conditional support	Q4_2019	2020-02-18
Eskom	Raw water charges	Department of Water and Sanitation	Additional need	188.0 %	3,394,000,000.00	6,400,196,139.00	314,934,632,341.00		Conditional support	Q3_2018	
Special Investigating Unit	Provision of Office Accommodation for SIU Head Office in Pretoria	City Property	Continuity of service	37323.0 %	17,072,312.37	6,371,908,516.00	151,230,997.50		Conditional support	Q1_2020	
Eskom	The supply, transportation, erection and dismantling of scaffolding and insulation material for 15 (FIFTEEN) Generation Power Stations	Southey Contracting (Pty) Ltd, Kaefer Thermal Consulting Services, SGB-Cape and TMS Group Industrial Services (Pty) Ltd	Continuity of service	1738.0 %	329,130,000.00	5,721,605,442.00	3,955,872,671.00		Supported	Q4_2017	2018-01-08

9 Debarred supplier data

Of the two restricted suppliers lists, the Register for Tender Defaulters and the Database of Restricted Suppliers, there are only currently listings on the latter. The Register for Tender Defaulters contains no current listings.

Figure 3 shows the organs of state that have submitted names of suppliers to be included on the Database for Restricted Suppliers and that are currently still restricted. It also includes the number of names submitted by each entity.

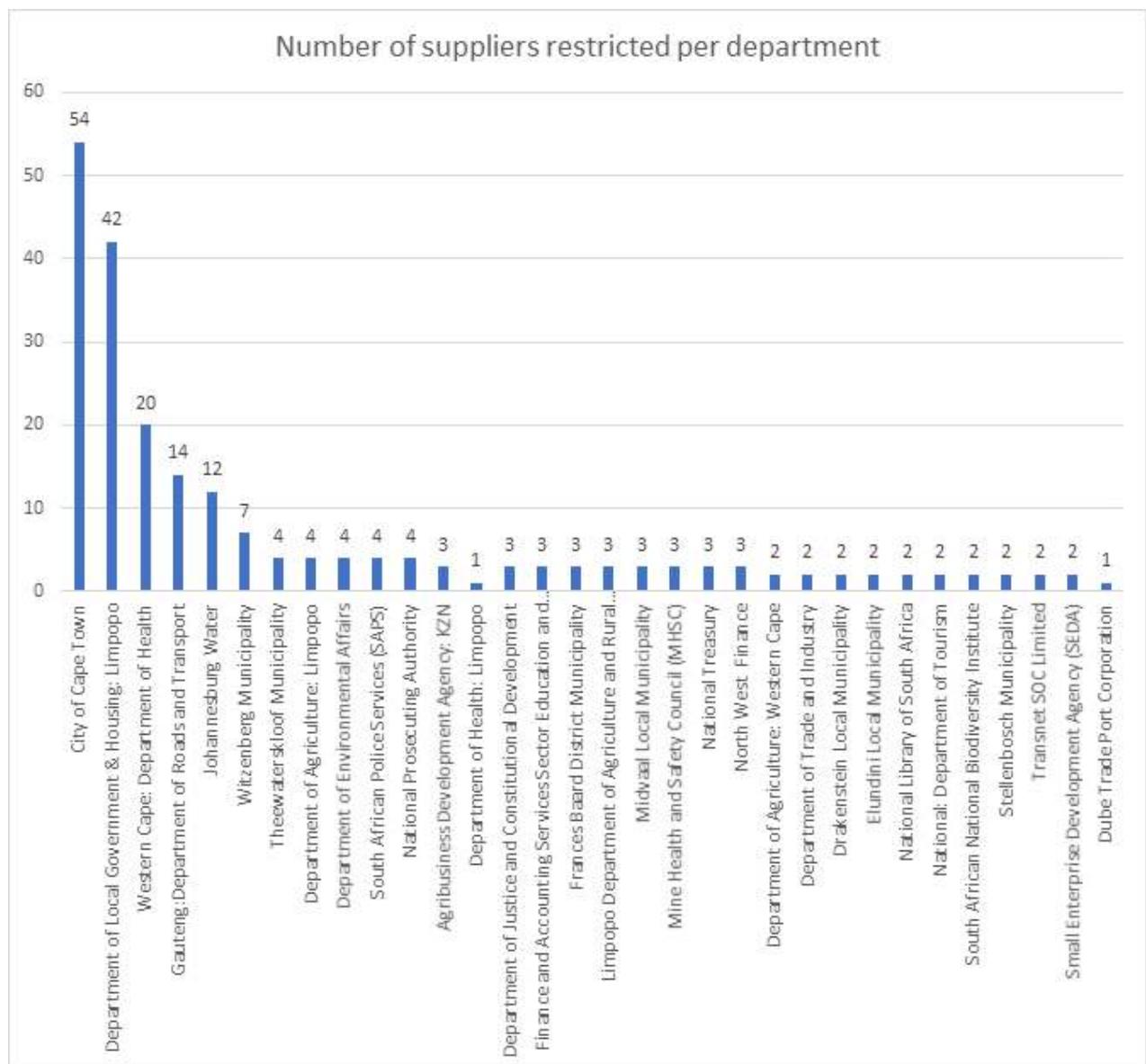


Figure 3: Number of suppliers currently restricted per organ of state on the Database of Restricted Suppliers

Of particular interest is the small number of entities (32) that have submitted names to this list, bearing in mind that there are around 40 national departments, 103 provincial departments, 278 municipalities, 9 constitutional institutions and 154 other public entities listed in schedule 3 of the PFMA – that is at least 584 entities procuring under rules that include debarment on this list (not counting subsidiaries and municipal entities).

It is of further interest to compare this data with other data about procurement failures, such as reports by the Auditor-General. For example, the 2017/18 Auditor-General audit report under the PFMA, contained findings about false declarations by suppliers at 123 auditees, most of which would be grounds for listing on the Database. Similarly, the 2018/19 Auditor-General report under the MFMA identified prohibited award of contracts to employees and councillors at 40 municipalities and awards to other state officials at 141 municipalities. Given that such awards are legally prohibited, they all amount to abuse of the SCM system, which is a ground for debarment. Yet, it is evident from the numbers in Figure 3 that only a small proportion of these instances result in listing on the Database.

Similar examples of under-utilisation of the Database can be found when focusing on more specific instances of abuse of the SCM system. For example, in *Swifambo Rail Leasing (Pty) Ltd v Prasa 2020 (1) SA 76 (SCA)*, the court confirmed the High Court's ruling granting an application brought by Prasa for the review of a tender awarded to Swifambo Rail Leasing, among others, on the basis that Swifambo had abused the SCM system by fronting for another supplier to win the tender. Despite Prasa bringing the application for review and the High Court and SCA granting the application, no listing of Swifambo can be found on the Database even though the Preferential Procurement Regulations, 2017 clearly recognise fronting as a ground for listing.

Another, more recent example and relating to the PPE procurement scandal of 2020, is the judgment by the Special Tribunal in *SIU v Ledla Structural Development (Pty) Ltd and Others* (Case No. GP 07/2020 of 10 December 2020). The Special Tribunal ruled that contracts awarded by the Gauteng Department of Health to Ledla Structural Development were irregular and set them aside. The Tribunal found that Ledla, through various directors and related persons, had defrauded the Department and that the contracts had been obtained in a corrupt manner. Regardless of these findings, none of these parties has been listed on the Database.

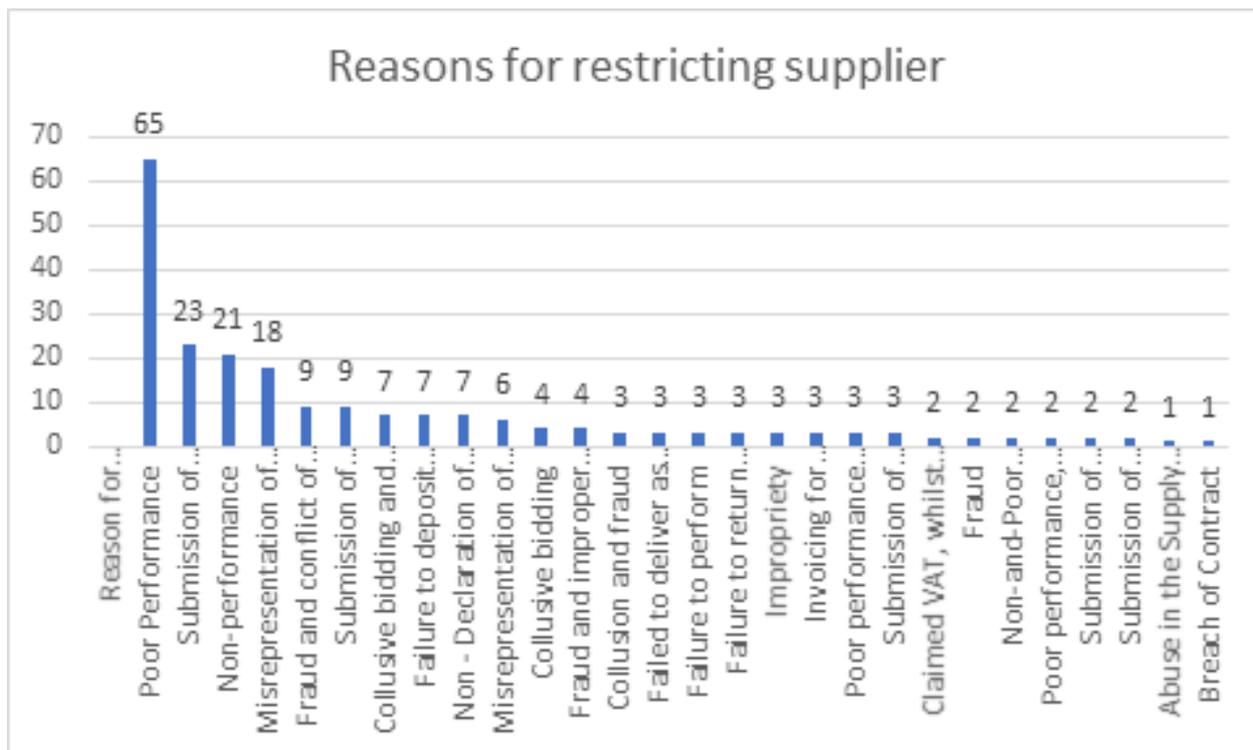


Figure 4: Reasons for the current restrictions of suppliers on the Database of Restricted Suppliers

The analysis in Table 5 shows the reasons for restricting suppliers from doing business with the state.

Table 5: Reasons for restricting suppliers

Reason	Number of restrictions
Poor Performance	65
Submission of fraudulent Tax Clearance Certificate	23
Non-performance	21
Misrepresentation of information	18
Fraud and conflict of interest	9
Submission of fraudulent B-BBEE Certificate	9
Collusive bidding and fronting	7
Failure to deposit proceeds of the auction	7
Non - Declaration of Interest	7
Misrepresentation of facts	6
Collusive bidding	4
Fraud and improper conduct	4
Collusion and fraud	3

Reason	Number of restrictions
Failed to deliver as per the contractual obligations	3
Failure to perform	3
Failure to return undue payment	3
Impropriety	3
Invoicing for construction work not completed	3
Poor performance and conflict of interest	3
Submission of Fraudulent Competency Certificate and Sales Contract of Vehicles	3
Claimed VAT, whilst not a VAT vendor	2
Fraud	2
Non-and-Poor performance	2
Poor performance, overcharging and taking assets of the SEDA: Limpopo	2
Submission of Fraudulent Health Certificate	2
Submission of Fraudulent Invoices for good never received by the department	2
Abuse in the Supply Chain Management System	1
Breach of Contract	1

The reasons given are as indicated by the relevant listing entity. As is evident from the list, there is a fair level of overlap among different listings, e.g., “Poor performance” (65 listings), “Non-performance” (21 listings), “Failed to deliver as per contractual obligations” (3 listings), “Failure to perform” (3 listings), “Poor performance and conflict of interest” (3 listings) and “Non- and Poor performance” (2 listings).

The reasons for listing also clearly indicate that not all listings on the Database relate to fraud or corruption; some relate purely to performance.

10 Methodology

All data was extracted from quarterly procurement reports submitted to National Treasury. These can be accessed at the following links.

The deviations and expansions reports can be obtained here:

http://ocpo.treasury.gov.za/Suppliers_Area/Pages/Deviations-and-Expansions.aspx. The data reported here were abstracted from these submitted reports.

The Database on Restricted Suppliers can be accessed here:

<http://www.treasury.gov.za/publications/other/Database%20of%20Restricted%20Suppliers.pdf>

The Register for Tender Defaulters can be accessed here:

<http://www.treasury.gov.za/publications/other/Register%20for%20Tender%20Defaulters.pdf>.

Data is reported in terms of the financial year under the PFMA, which runs from 1 April to 31 March. Quarterly data thus refers to the quarters of that financial year.

11 Conclusion

Corruption Watch's online tool, Procurement Watch, enables one to identify patterns and trends in public procurement practice in South Africa. It focuses on the high-risk areas of deviations from prescribed procurement procedures and variations of contracts during implementation. Data on these two features of procurement can serve as red flags of failures in supply chain management. Neither of these, however, necessarily imply abuse of the supply chain management system. There may be valid reasons for deviating from the prescribed procurement procedure (e.g. in the case of emergency) or for varying a contract during implementation (e.g. when conditions unexpectedly change). Data on these features thus serve as points of departure for further analysis. Such analysis is greatly enhanced by the aggregation of data in the Procurement Watch tool and its functionality to access the data along different variables, such as value, procuring entity and time.