



MAPS

Methodology for Assessing
Procurement Systems

ASSESSMENT OF SOUTH AFRICA PUBLIC PROCUREMENT SYSTEM

2024





MAPS

Methodology for Assessing
Procurement Systems

Assessment of South Africa's National Procurement System

2024





MAPS

Methodology for Assessing
Procurement Systems

South Africa

Assessment of the national public procurement system

August 2024



national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA



Intellectual property disclaimers

This work is published under the responsibility of the Secretary-General of the OECD. The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Member countries of the OECD.

This document, as well as any data and map included herein, are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

The use of this work, whether digital or print, is governed by the Terms and Conditions to be found at <https://www.oecd.org/termsandconditions/>



Table of Contents

Intellectual property disclaimers	2
Acronyms	5
Executive summary	8
Overview of compliance	15
1. Introduction	18
2. Analysis of Country Context.....	19
2.1. Political, economic and geostrategic situation of the country	19
Political context.....	19
Economic context.....	20
Geostrategic context.....	21
2.2. The public procurement system and its links with public finance management and public governance systems.....	21
Nature and scope of public procurement.....	21
Key institutions	22
Key external stakeholders.....	23
2.3. National policy objectives and sustainable development goals.....	23
National policy objectives	23
Public financial management.....	23
Sustainable Development Goals	24
2.4. Public procurement reform	25
General overview	25
Legal developments	26
3. Assessment	30
3.1. Pillar I - Legal, Regulatory and Policy Framework.....	30
Indicator 1. The public procurement legal framework achieves the agreed principles and complies with applicable obligations	30
Indicator 2. Implementing regulations and tools support the legal framework	52
Indicator 3. The legal and policy frameworks support the sustainable development of the country and the implementation of international obligations	56
3.2. Pillar II - Institutional framework and management capacity	60



Indicator 4. The public procurement system is mainstreamed and well-integrated with the public financial management system	60
Indicator 5. The country has an institution in charge of the normative/ regulatory function	66
Indicator 6. Procuring entities and their mandates are clearly defined	77
Indicator 7. Public procurement is embedded in an effective information system	81
Indicator 8. The public procurement system has a strong capacity to develop and improve	91
3.3. Pillar III - Public procurement operations and market practices	96
Indicator 9. Public procurement practices achieve stated objectives	96
Indicator 10. The public procurement market is fully functional	108
3.4. Pillar IV - Accountability, integrity and transparency of the public procurement system.....	113
Indicator 11. Transparency and civil society engagement strengthen integrity in public procurement	114
Indicator 12. The country has effective control and audit systems.....	119
Indicator 13. Procurement appeals mechanisms are effective and efficient	138
Indicator 14. The country has ethics and anti-corruption measures in place	141
4. Consolidated recommendations.....	163
Legal framework	163
Transparency.....	164
Governance.....	166
Digitalisation	167
Professionalisation.....	168
Guidance	168
5. Strategic planning	169
6. Validation	172
Annexes/Appendices	173



Acronyms

AA/AO	Accounting officers/accounting authorities
AC	Audit committee
ACTT	Anti-Corruption Task Team
AfDB	African Development Bank
AGSA	Auditor General of South Africa
AO	Accounting officer
BAC	Bid adjudication committees
BAS	Basic Accounting System
B-BBEE	Broad-Based Black Economic Empowerment
B-BBEEA	Broad-Based Black Economic Empowerment Act
BI	Beneficial interest
CAE	Chief Audit Executive
CFFM	Competency Framework for Financial Management
CIDB	Construction Industry Development Board
CIPC	Companies and Intellectual Property Commission
CPB	Central Purchasing Body
CSD	Central Supplier Database
CSO	Civil Society Organisation
DPCI	Directorate for Priority Crime Investigation
DPSA	Department of Public Service and Administration
DPWI	Department of Public Works and Infrastructure
DTIC	Department of Trade, Industry and Competition
EDP	Executive and Leadership Development Programme
e-GP	e-Government Procurement
EME	Exempted Micro Enterprise
ETD	Education, Training and Development
FATF	The Financial Action Task Force
FIC	Financial Intelligence Centre
FIDPM	Framework for Infrastructure Delivery and Procurement Management
G20	Group of 20
GCC	General Conditions of Contract
GPA	Agreement on Government Procurement
GTAC	Government Technical Advisory Centre
HODs	Heads of Departments
ICT	Information communication technology
ID	Investigative Directorate
IDAC	Investigating Directorate against Corruption
IFMS	Integrated financial management system
IIA	Institute of Internal Auditors



IRBA	Independent Regulatory Board for Auditors
ISA	International Standards on Auditing
ISPPIA	Institute of Internal Auditors
LDP	Leadership Development Programme
LTSM	Learning and Teaching Support Material
MAPS	Methodology for Assessing Procurement Systems
MFMA	Municipal Finance Management Act
MI	Material irregularity
MLC	Master Learning Curriculum
MTEF	Medium-Term Expenditure Framework
NACH	National Anti-Corruption Hotline
NAM	Non-aligned movement
NCOP	National Council of Provinces
NDP	National Development Plan
NGO	Non-governmental organisation
NPA	National Prosecuting Authority
NQF	National Qualification Framework
NRF	National Revenue Fund
NSG	National School of Government
NT	National Treasury
OAG	Office of the Accountant -General
OCDS	Open Contracting Data Standard
OCPO	Office of the Chief Procurement Officer
OECD	Organisation for Economic Co-operation and Development
OUTA	Organization Undoing Tax Abuse
PAA	Public Audit Act
PAIA	Promotion of Access to Information Act
PFMA	Public Finance Management Act
PMG	Parliamentary Monitoring Group
PPPFA	Preferential Procurement Policy Framework Act
PPPs	Public-private partnerships
PRECCA	Prevention and Combating of Corrupt Activities Act
PSC	Public Service Commission
QSE	Qualifying Small Enterprise
R&D	Research and development
RDPF	Reconstruction and Development Programme Fund
RFQ	Requests for Quotations
SA	South Africa
SAA	South African Airways
SADC	Southern African Development Community
SAICA	South African Institute of Chartered Accountants
SAQA	South African Qualifications Authority
SBD	Standard bidding document



SCM	Supply chain management
SCOAG	Standing Committee on the Auditor General
SCOPA	Standing Committee on Public Accounts
SFU	Standard for Uniformity
SIPDM	Standard for Infrastructure Procurement and Delivery Management
SITA	State Information Technology Agency
SIU	Special Investigating Unit
SMMEs	Small, Micro or Medium-sized Enterprises
SOEs	State-owned entities
SPP	Sustainable public procurement
TR	Treasury Regulation
UNCAC	United Nations Convention Against Corruption
UNCITRAL	United Nations Commission on International Trade Law
UNODC	United Nations Office on Drugs and Crime
WB	World Bank
WTO	World Trade Organisation



Executive summary

This report presents the results of an assessment of South Africa’s public procurement system based on the application of the Methodology for Assessing Procurement Systems (MAPS). The assessment was conducted by the Organisation for Economic Co-operation and Development (OECD), the World Bank and the African Development Bank in co-operation with the National Treasury of the Republic of South Africa.

The primary objective of this assessment is to provide an evidence-based evaluation of progress achieved throughout successive procurement reforms while identifying opportunities to further strengthen the South African public procurement system across all four pillars of the MAPS.

The public procurement ecosystem in South Africa responds to the constitutional imperative that “when an organ of state contracts for goods and services, it must do so in accordance with principles of fairness, equitability, transparency, competitiveness and cost-effectiveness” (Section 217(1) of the Constitution of 1996). The following Section 217(2) indicates that these principles do not prevent organs of state from developing procurement policies which would give preference to or protect persons or categories of persons disadvantaged by unfair discrimination. These principles apply to all three spheres of government (national, provincial and local) which frame the overall governance model in South Africa.

To implement these guiding principles, legislation and regulations have been developed. The Public Finance Management Act, 1999 (PFMA) is the primary legislative source for procurement conducted by national and provincial spheres of government and the Municipal Finance Management Act, 2003 (MFMA) is applicable to all municipalities and municipal entities. The Preferential Procurement Policy Framework Act, 2000 (PPPFA) provides details for the implementation of the preferential procurement policy contemplated in Section 217(2) of the Constitution.

To address shortfalls in procurement practices, National Treasury introduced in 2003 the concept of supply chain management (SCM) functions to integrate procurement processes in financial management and replace outdated practices across government institutions. Treasury Regulation 16A Supply Chain Management (TR 16A SCM) sets out a high-level framework for the acquisition of goods and services, with Supply Chain Management Instructions (“SCM Instruction”) published in support. Overall, the South African public procurement system features a hybrid model where procurement legislation is developed and maintained at a central level within National Treasury and implemented at a decentralised level in individual procuring institutions. However, to steer and try to harmonise practices, a dedicated office, the Office of the Chief Procurement Officer (OCPO), was created in 2013 in National Treasury and is responsible for the public procurement regulatory framework and policies in South Africa.

Despite these reforms and multiple amendments to secondary regulations, the SCM system in South Africa exhibits systemic signs of corruption and political interference. The Judicial Commission of Inquiry into Allegations of State Capture (also called the Zondo Commission) devoted a full chapter to public procurement in its final report released at the end of 2021 (Part 1, Volume 1, Chapter 4) in which it was confirmed that significant corruption and abuse systematically occurred, including in major state-owned companies (SOCs) in the past 10 years.

While some progress has been achieved in the past decade, the South African public procurement system still shows significant potential for improvements across several dimensions of the MAPS assessment tool.



The legal framework is extensive, complex but also overly fragmented. The institutional system would benefit from additional clarity in terms of roles and mandates of multiple institutions. Significant improvements are required particularly regarding the scope, coverage and integration of the e-procurement system as well as a reinforcement of the professionalisation of the SCM function. Procurement practices highlight several deficiencies related to conducting efficient procedures, including lack of compliance with procurement rules in terms of transparency, and limited visibility and oversight on contract execution. With respect to integrity, procurement practices are characterized by limited transparency and the oversight function is compromised by a systemic lack of enforcement and “consequence management”: this signifies that structural issues are not resolved.

During the execution of this project, a public procurement bill was submitted to Parliament in June 2023 with the objective of completely overhauling the system. Indeed, the bill aims to consolidate and simplify regulation on public procurement across all levels of government and public entities. While the present report assesses the current legal public procurement framework, Annex A analyses the version of the public procurement bill (B18B-2023) that was approved by the first House (National Assembly) before it went to the second House (National Council of Provinces) and assesses whether the proposed bill addresses identified gaps or not.

The findings and recommendations of this assessment are summarised per pillar as follows.

Pillar I:

Pillar I assesses the existing legal, regulatory and policy framework for public procurement. It identifies the formal rules and procedures governing public procurement and evaluates how they compare to international standards. Pillar I also considers international obligations and national policy objectives to ensure that public procurement lives up to its important strategic role and contributes to sustainability.

South Africa’s current legal and regulatory framework for public procurement is extensive, complex and fragmented. In acknowledgement of the problems of the current framework in ensuring that the public procurement system is fair, equitable, transparent, competitive and cost-effective, the Government of South Africa is in the process of adopting a new Procurement Act. Current laws, regulations and policies are published and available online. Procuring entities (organs of state) to whom various aspects of the procurement legal framework apply are identified in legislation. Underpinning principles derived from the Constitution requires the system to be “fair, equitable, transparent, competitive and cost-effective”, including in relation to participation. There is a range of procurement methods available with a requirement for public advertising of procurement opportunities for competitive tenders. Evaluation criteria must be specified in advance in the procurement documents so that the award decision is made on the basis of prescribed criteria – this includes both functionality evaluation criteria and application of a preference points system for identified goals. Procedures for receipt and opening of tenders, and record-keeping are described with provisions requiring confidentiality to be respected. Rights to challenge procurement decisions made by organs of state and grounds for challenge are based on administrative and common law rights and principles, using judicial review in the High Court. Construction-related procurement is covered by an additional statutory regime under the auspices of the Construction Industry Development Board (CIDB). The State Information Technology Agency (SITA) undertakes procurement of information technology systems and services on behalf of departments and organs of state. Procurement



of Public-Private Partnerships (PPPs) is governed by Treasury Regulations (TR16 Public-private partnerships), guiding procurement principles and specific legal provisions. There is significant emphasis in South Africa on the use of procurement to promote economic and social benefits, improvements and growth.

However, several areas for improvement are highlighted below:

There is no single, clear and unambiguous list or definitions of available procurement methods with associated conditions for use applicable to the procurement of goods, services, consulting services and construction-related procurement (works and works-related). This reduces the overall coherence of the system and increases the likelihood of inconsistent application, which is not in the overall interest of achieving an efficient and effective procurement regime.

No minimum timeframes for the submission of bids are specified for procurement methods other than open competitive bidding, again opening up the possibilities of inconsistency in application. There is no provision specifically requiring the 21-day period for open competitive bidding to be extended when international competition is solicited. This potentially negatively impacts procurement outcomes in markets where foreign participation may prove to be beneficial.

Accounting officers/accounting authorities (AOs/AAs) have a high level of discretion in deciding whether to debar a supplier from doing business with the government by inclusion in the Restricted Supplier List. This raises serious concerns in that there are risks of inconsistency and/or bias in the application of grounds for restrictions on participation.

The procurement regime applying to goods and services does not clearly provide for the use of price and non-price attributes and/or consideration of life cycle cost or total cost of ownership. Where functionality criteria are used, the prescribed methodology means that the value-for-money assessment will not always fully reflect the full value of the qualitative aspects of tenders.

There is no comprehensive list of procurement records required to be retained at the operational level by organs of state. This potentially affects the ability to look at implementation performance, which is important information for the functioning of both internal and external control systems.

Standard contract conditions are not suitable for all types of purchasing and have not been updated recently. The General Conditions of Contract (GCC) for goods and services is not well suited for purchase of stand-alone services or consultancy services and has not been updated for some years to ensure it remains fit for purpose.

There is no comprehensive, up-to-date user's guide or procurement manual for organs of state detailing all procedures for the correct implementation of procurement regulations and laws. This should both explain, in an easily understandable way, the legal and regulatory requirements together with information on how these requirements are implemented in practice, including reference to relevant standard documents and templates. Lack of a comprehensive user manual is likely to reduce overall consistency of application within the procurement system.

There is no single sustainable public procurement policy (SPP)/strategy and implementation plan to draw together and address all aspects of sustainable public procurement – economic, social and environmental – as a coherent whole and in line with national priorities and policy objectives.



A critical review of the effectiveness of current measures for empowerment, and economic and industrial growth through public procurement should be conducted as part of the SPP strategy development process. This should include assessment of whether the range of current measures, including local preference (local production and local content), enhance or hinder domestic and international competition, achieve stated aims and contribute effectively to Sustainable Development Goals. To support this process, South Africa could consider using the MAPS Supplementary module on sustainability.

Pillar II:

Pillar II assesses how the procurement system defined by the legal and regulatory framework in a country operates in practice through the institutions and management systems that make up overall governance in its public sector.

The South African public procurement system provides for the necessary public procurement functions and institutions covered in this pillar. Organs of state, the normative function, and central procurement bodies are defined. The existence of a dedicated procurement function in organs of state is enshrined in regulations. Furthermore, e-procurement systems have been introduced and several initiatives have been taken in the field of professionalisation.

However, several areas for improvements are highlighted below:

Recent rules and ongoing practices could put at risk the attractiveness of competitive tenders in South Africa. National Treasury recently loosened rules around availability of funds before issuing competitive procurement procedures. This introduces a significant risk that procurement procedures carried out will not translate into a signed contract because of the absence of funding. Depriving bidders of budget certainty and legal security would negatively impact their interest in participating in competitive processes. In addition, the issue of late payment of invoices seems excessively widespread. The exact extent of invoices not paid on time remains unknown; however, estimates suggest it could be as high as 18,5% of the total amount of invoices.

The reinforcement of the authoritative standing of the regulatory function can only be addressed with sufficient human resources. The mere structure of the South African public procurement system already brings challenges to the authoritative standing of the regulatory role of OCPO since other entities, such as CIDB, also have a regulatory function. This confronts the system with risks of duplication or inconsistency. Its exposure to severe human resources gaps further adds difficulties. Of the 140 approved positions, only 80 positions are filled and 60 positions remain vacant, showing a vacancy rate of 43%, almost three times National Treasury's average. Considering the various mandates of the OCPO, from policy making to monitoring and managing the e-procurement system, the institution cannot effectively function without the necessary human resources.

The absence of vertical integration with other e-government systems and minimal horizontal integration contribute to a very fragmented e-procurement landscape. The current systems only cover the tendering phase of the procurement cycle and leave out critical information both upstream and



downstream. This is partly explained by the fact that financial management and information management are supported by disparate core systems due to a longstanding failure to implement an integrated financial management system in public administration. Moreover, the e-procurement systems in place only cover competitive bidding, excluding information on exceptions, which defeats the objectives of transparency and accountability.

Extremely limited insights on procurement activity are caused by the very low compliance of organs of state with mandatory publication requirements and hinder adequate monitoring of the performance of the public procurement system. Despite transparency initiatives such as procurement information displayed in open data format, technical flaws often prevent users from accessing corresponding datasets. But an even more worrying situation is the level of compliance of organs of state with publication requirements. Only 12% of organs of state registered on eTenders uploaded procurement plans in the financial year 2023-2024 while 73% of organs of state published tenders. Only 3% of these institutions published related contract notices. These practices *de facto* prevent any meaningful monitoring of the performance of the public procurement system.

The professionalisation of the supply chain management function remains limited and principally lacks stewardship. The Interim Supply Chain Management Council, which was created in 2018 to steer the professionalisation of public procurement officials, has not been active since its inception. Further, the existing training requirements do not apply to supply chain management professionals in entities listed in Schedule 2 and 3B of the PFMA, which include state-owned companies. These constitute a significant share of procurement spend and systemic weakness, according to investigation findings.

Pillar III:

Pillar III looks at the operational efficiency, transparency and effectiveness of the procurement system at the level of the implementing entity responsible for managing individual procurements (organs of state). In addition, it looks at the market as a means of judging the quality and effectiveness of the system in putting procurement procedures into practice. This pillar focuses on how the procurement system in a country operates and performs in practice.

The assessment provides a comprehensive analysis of the procurement system, based on the review of 166 contracts, randomly sampled with a reasonable mix of different procurement categories and methods from 13 representative organs of state. The assessment also leverages a private sector survey, capturing insights from 366 suppliers, which further strengthens the findings and informs the recommendations. The evaluation identifies both commendable practices and notable gaps across the procurement landscape and practices.

There is a positive emphasis on aligning procurement activities with national policies and defining clear requirements. The selection and contracting process benefits from well-defined documents and structured bid submission procedures enhancing clarity and fairness. This can be further improved by using standardised procurement documents for consistency and predictability in alignment with good practices. Finally, efforts to foster public-private dialogue are evident.

However, several areas for improvements are highlighted below:



Gaps in market research and environmental considerations indicate a need for a more robust approach to initial procurement stages. Enhanced procurement planning through the utilisation of advanced analytical tools and the development of green public procurement guidelines to ensure sustainability is recommended.

Challenges in confidentiality, insufficient bid preparation time, and transparency in the evaluation process suggest areas for significant improvement. It is recommended to adopt e-procurement solutions with standardised forms and encrypted tender submissions to secure confidentiality and bolster transparency.

Weaknesses in contract execution, including frequent delays and limited information transparency, underscore the urgency for better contract delivery monitoring and stakeholder engagement. The implementation of comprehensive monitoring mechanisms and adherence to payment terms in contract management can promote timely delivery and accountability.

Persistent transparency issues and insufficient capacity building for the private sector highlight critical gaps in stakeholder inclusivity. Strengthening stakeholder relations through proactive outreach and training programmes aimed at boosting engagement and comprehension of procurement processes is recommended.

Pillar IV:

Pillar IV looks at elements that are considered necessary for a system to operate with integrity. These include appropriate controls that support the implementation of the system in accordance with the legal and regulatory framework, and that have appropriate measures in place to address the potential for corruption in the system. It also covers important aspects of the procurement system, which include stakeholders, including civil society, as part of the control system.

Overall, South Africa has a framework for control and audit shaped by the institutional framework set out in the PFMA and is overseen through external audit by the Auditor General of South Africa (AGSA). The country also presents multiple institutions with a mandate to deal with anti-corruption. The National Anti-Corruption Strategy 2020-2030 provides a framework for efforts to tackle anti-corruption. Civil society is actively engaged in consultation processes around public procurement reforms. The review of procurement procedures happens through the court system.

However, several areas for improvements are highlighted below:

Limited transparency of the procurement system hampers civil society's role in providing effective oversight. The lack of transparency can be traced back largely to limited digitalisation of public procurement transactions and a poor track record in the use of the e-procurement system. This does not allow for comprehensive data analytics of procurement transactions. Direct participation of civil society in public procurement activities is very limited and would strengthen integrity if institutionalised. Civil society is active in consultations regarding the new regulatory framework but considers that authorities do not sufficiently take into account their inputs.

There are systemic weaknesses in the control system. Important responsibilities are placed on accounting officers/accounting authorities but there are shortcomings in their execution of control



functions (e.g. follow-up on audit findings). Furthermore, the control environment, in particular, regarding external audit, is considered as burdensome yet ineffective by stakeholders. At the same time, audit findings point to a lack of consequence management, i.e. unresponsiveness to identified audit recommendations. Growing levels of irregular expenditure¹ over the past decade are an indication of a complex regulatory framework and limited capacity among internal control functions. In fact, several systemic weaknesses have also been observed with the performance of internal control and internal audit functions, including limited capacity. SCM practitioners are not supported with practical hands-on manuals for the implementation of the Internal Audit Framework.

Rights to challenge and grounds for challenge are based on administrative and common law rights and principles submitted by means of applications for judicial review applications to the relevant division of the High Court. The available procedures and related time scales do not guarantee an effective and efficient process meeting the practical and commercial imperatives of procurement-related complaints. Furthermore, there is lack of trust in the system and limited transparency about the publication of decisions.

The anti-corruption system is inadequate to face the challenges it is confronted with. First and foremost, South Africa lacks a single body with the primary responsibility of preventing corruption. Instead, it is governed by a fragmented “multi-agency” approach, which proved ineffective during the state-capture years. Furthermore, law enforcement and prosecution authorities have been severely weakened during state capture and have not yet fully recovered their standing in terms of skills and institutional set-up. This contributes to an environment of impunity, which is underscored by the private sector’s perception (50% of respondents) that anti-corruption measures are not effective.

There are limited mechanisms to detect and prevent corruption risks in public procurement. In addition to gaps in the overall anti-corruption framework, South Africa presents gaps in effective mechanisms to prevent and detect red flags, which is connected to low levels of digitalisation and use of analytics; weak internal control and internal audit capacity; and lack of clarity in the system of reporting allegations.

Procurement stakeholders fear whistleblowing, given credible threats to the lives of those who have come forward with allegations.

Financial disclosure rules are not sufficiently comprehensive as they only target senior civil servants and do not cover family interests. Combined with a narrow definition of conflict of interest, this anti-corruption tool appears underused in practice. Similarly, the code of conduct is not presented in a user-friendly format and no mandatory training is conducted for civil servants.

¹ As per Public Financial Management Act (PFMA, 1999) irregular expenditure is defined “expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including (a) this act; or (b) the State Tender Board Act, 1968 (Act No. 86 of 1968), or any regulations made in terms of that Act; or; (c) any provincial legislation providing for procurement procedures in that provincial government.”



Overview of compliance

The following table provides an overview of the findings of the assessment on the level of sub-indicators. Each sub-indicator is identified depending on the findings (full compliance / gaps identified / substantive gaps identified). This table also shows the red flags identified.

PILLAR I		Full compliance	Gaps identified	Substantive gaps identified	Red flags
1. The public procurement legal framework achieves the agreed principles and complies with applicable obligations.	1(a) – Scope of application and coverage of the legal and regulatory framework			x	x
	1(b) – Procurement methods			x	
	1(c) – Advertising rules and time limits			x	
	1(d) – Rules on participation			x	
	1(e) – Procurement documentation and technical specifications			x	
	1(f) – Evaluation and award criteria			x	
	1(g) – Submission, receipt, and opening of tenders			x	
	1(h) – Right to challenge and appeal			x	x
	1(i) – Contract management	x			
	1(j) – Electronic procurement (e-procurement)			x	
	1(k) – Norms for safekeeping of records, documents and electronic data			x	
	1(l) – Public procurement principles in specialised legislation	x			
2. Implementing regulations and tools support the legal framework.	2(a) – Implementing regulations to define processes and procedures			x	x
	2(b) – Model procurement documents for goods, works, and services	x			
	2(c) – Standard contract conditions			x	
	2(d) – User’s guide or manual for procuring entities			x	
3. The legal framework reflects the country’s secondary policy objectives and international obligations.	3(a) – Sustainable Public Procurement (SPP)			x	x
	3(b) – Obligations deriving from international agreements Not applicable				



PILLAR II		Full compliance	Gaps identified	Substantive gaps identified	Red flags
4. The public procurement system is mainstreamed and well integrated with the public financial management system.	4(a) – Procurement planning and the budget cycle			x	
	4(b) – Financial procedures and the procurement cycle			x	x
5. The country has an institution in charge of the normative/regulatory function.	5(a) – Status and legal basis of the normative/regulatory function		x		
	5(b) – Responsibilities of the normative/regulatory function			x	
	5(c) – Organisation, funding, staffing, and level of independence and authority			x	x
	5(d) – Avoiding conflict of interest			x	x
6. Procuring entities and their mandates are clearly defined.	6(a) – Definition, responsibilities and formal powers of procuring entities		x		
	6(b) – Centralised procurement body			x	
7. Public procurement is embedded in an effective information system.	7(a) – Publication of public procurement information supported by information technology			x	x
	7(b) – Use of e-procurement			x	x
	7(c) – Strategies to manage procurement data			x	x
8. The public procurement system has a strong capacity to develop and improve.	8(a) – Training, advice and assistance			x	x
	8(b) – Recognition of procurement as a profession			x	
	8(c) – Monitoring performance to improve the system			x	x

PILLAR III		Full compliance	Gaps identified	Substantive gaps identified	Red flags
9. Public procurement practices achieve stated objectives.	9(a) – Planning			x	
	9(b) – Selection and contracting			x	x
	9(c) – Contract management in practice			x	x



PILLAR III		Full compliance	Gaps identified	Substantive gaps identified	Red flags
10. The public procurement market is fully functional.	10(a) – Dialogue and partnerships between public and private sector			X	
	10(b) – Private sector’s organisation and access to the public procurement market			X	
	10(c) – Key sectors and sector strategies	X			

PILLAR IV		Full compliance	Gaps identified	Substantive gaps identified	Red flags
11. Transparency and civil society engagement strengthen integrity in public procurement.	11(a) – An enabling environment for public consultation and monitoring			X	
	11(b) – Adequate and timely access to information by the public			X	
	11(c) – Direct engagement of civil society			X	
12. The country has effective control and audit systems.	12(a) – Legal framework, organisation and procedures of the control system			X	X
	12(b) – Co-ordination of controls and audits of public procurement			X	X
	12(c) – Enforcement and follow-up on findings and recommendations			X	X
	12(d) – Qualification and training to conduct procurement audits			X	
13. Procurement appeals mechanisms are effective and efficient.	13(a) – Process for challenges and appeals			X	X
	13(b) – Independence and capacity of the appeals body	<i>Not all criteria assessed. No gaps identified in respect of criteria which were assessed.</i>			
	13(c) – Decisions of the appeals body			X	X



PILLAR IV		Full compliance	Gaps identified	Substantive gaps identified	Red flags
14. The country has ethics and anti-corruption measures in place.	14(a) – Legal definition of prohibited practices, conflicts of interest, and associated responsibilities, accountabilities and penalties			x	
	14(b) – Provisions on prohibited practices in procurement documents			x	
	14(c) – Effective sanctions and enforcement systems			x	x
	14(d) – Anti-corruption framework and integrity training			x	x
	14(e) – Stakeholder support to strengthen integrity in procurement			x	
	14(f) – Secure mechanisms for reporting prohibited practices or unethical behaviour			x	x
	14(g) – Codes of conduct/codes of ethics and financial disclosure rules			x	

1. Introduction

This report details the results of an assessment of South Africa’s public procurement system based on the application of the Methodology for Assessing Procurement Systems (MAPS). The assessment was conducted over the period July 2023 to April 2024 by the Organisation for Economic Co-operation and Development (OECD), African Development Bank (AfDB) and World Bank (WB) in co-operation with South Africa’s National Treasury (NT).

The objective was to assess South Africa’s public procurement system using an international standard and universal tool, namely, MAPS II. Since an evaluation in 2001 by the National Treasury and the World Bank, there has not been any comprehensive, up-to-date assessment of the public procurement system carried out for grounding the procurement reform efforts in a strategic manner, hence the willingness to conduct such an assessment using the methodology provided by MAPS. The assessment identified strengths, weaknesses and gaps in South Africa’s public procurement system based on the benchmark provided by the tool. The goal was to assist the Government of South Africa to develop a reform plan for its public procurement system with a focus on the core principles of transparency, accountability, and value for money.

Specifically, the assessment has:

1. Developed a shared understanding of the current state of South Africa's public procurement system among all stakeholders to strategise future reform efforts to achieve a modern, transparent, accountable and harmonised procurement system.



2. Identified the strengths and weaknesses of the public procurement system in core domains and suggest appropriate improvement measures for greater transparency, accountability and value for money.

The MAPS assessment covers national government procurement, wherein a selected number of government spending agencies, including state-owned entities (SOEs),² act as a proxy for government procurement spending. While the focus is on national government, the assessment of procurement practices also comprises some provincial departments to represent geographical spread and different levels of spending.

This assessment was conducted by a MAPS assessment team led by the OECD, AfBD and WB in close coordination with members of National Treasury.

Officials and practitioners in the South African public administration, public institutions, oversight agencies, as well as representatives of business associations, and private-sector stakeholders were open and frank interview partners in this assessment.

2. Analysis of Country Context

2.1. Political, economic and geostrategic situation of the country

Political context

South Africa, which became a republic in 1961 and transitioned to a constitutional democracy in 1994, is a middle-income, emerging market. South Africa has the most industrialised, technologically advanced, and diversified economy in Africa. But levels of unemployment, poverty and inequality are among the highest in the world. The country covers an area of 1 221 000 km² and a population of about 60 million people according to the latest official data in 2021. The population grew by 0.8% in 2022, a slowdown compared to pre-pandemic population growth (1.2%).³ Life expectancy also slightly improved in 2022, rising to 61,7 years in 2021 to 62,8 years.

The political system is organised as a constitutional democracy with a three-tier system of government and an independent judiciary. Specifically, the country is organised with national, provincial and local levels of government that all have constitutionally defined legislative and executive authority. In fact, the various levels of government are not organised hierarchically but defined in the constitution as distinctive, interrelated and interdependent. The president of South Africa, acting both as the head of state and the head of government, is elected by the National Assembly, i.e. the lower house of South Africa's parliament.

² For the purposes of the MAPS Assessment the term “state-owned enterprises” is used to refer collectively to Major Public Entities (Sched 2) and Public Entities (3A and C), as defined by the PFMA.

³ <https://data.worldbank.org/indicator/SP.POP.GROW?locations=ZA>



South Africa's current democratic political system stems from a democratic transition that took place in the 1990s. Prior to its current government form, South Africa was ruled for a period of 40 years by a white minority government that imposed the policy of apartheid, a system of institutionalised racial segregation. The principles of racial equality, majority democracy and minority rights the transition established were translated into the final Constitution of South Africa that was adopted in 1996 and which remains in force.

In recent years, South Africa's political system has suffered from high-level corruption defined as state capture, whereby politically connected individuals were placed in significant centres of state power (in government, SOEs and the bureaucracy) to make key decisions to enrich political elites and their cronies, including through public procurement contracts.

Economic context

The coronavirus crisis has weakened South Africa's already fragile economy, which has underperformed over the past decade. Gross domestic product (GDP) per capita was lower in 2019 than in 2008 and GDP growth averaged only 1.7% over the period 2009–2019, mostly due to low investment.

Government debt reached 70% of GDP in 2022, increased to 72.3% in 2023, and is expected to go up to 74% in 2024, according to the International Monetary Fund (IMF) estimates. Reflecting worsening trends in the global economic outlook, South Africa's unemployment rate increased to 33.5% in 2022 due to the negative economic impact of the COVID-19 pandemic. According to the IMF, the rate increased to 34.7% in 2023. Moreover, unemployment rates are much higher among young people and the black majority of South Africans, further increasing inequality in a country considered to be one of the most unequal in the world, where nearly half the adult population lives in poverty.

Over the last decade, declining productivity weighed on economic growth due to deteriorating public infrastructure, weak telecommunication networks, and low research and development (R&D) investment. Failing electricity generation is the main bottleneck to production and concern for investors. Skills shortages remain a constraint in several sectors. The economy remains highly energy-intensive and dependent on coal as the main source for electricity. Moreover, weak competition in many key sectors and a lack of openness to trade increase the cost of doing business and inhibit the entry of new firms and growth of small and medium-sized enterprises (SMEs). Considerable fiscal space will be needed in the years ahead to finance health, infrastructure (in particular considering the National Infrastructure Plan 2050)⁴, and larger education gaps, which are key to raising growth and well-being. South Africa's fiscal situation was deteriorating already before the COVID-19 pandemic, with the debt ratio steadily increasing over the past decade and the crisis only worsening the situation. More efficient spending and revenue collection are necessary to improve fiscal sustainability.

Furthermore, tackling climate change is a pressing challenge. CO₂ emissions per unit of GDP are high, reflecting in part the high-energy intensity of the economy. Coal remains the main source of energy. The USD 8.5 billion Just Energy Transition Partnership between South Africa, France, Germany, the United Kingdom and the European Union (EU) offers an opportunity to finance the transition to renewable energy.

⁴ South Africa's National Infrastructure Plan 2050, https://www.gov.za/sites/default/files/gcis_document/202203/46033gon1874.pdf



Growth prospects are influenced by a weakening outlook of the global economy. Economic challenges are compounded by global inflation, high cost of borrowing, as well as prolonged power failures. The stagnation of the economy, exacerbated by the COVID-19 crisis, has also led to decreases in gross fixed capital formation and low levels of capacity utilisation in the various sectors of the South African economy. The government and social partners agree on the need for structural reforms to improve the economic outlook of the country and stimulate equitable and inclusive growth.

Geostrategic context

Since the historic elections of 1994, South Africa has enjoyed significant status and moral authority on the world stage. This has brought about significant international relations achievements, such as accession to the “Group of 20” finance ministers and central bank governors (G20). These memberships have cemented South Africa’s role in international financial and political economic governance. South Africa was frequently invited to take part in Group of Seven (G7) meetings as well. Since the ‘golden decade’ of South African diplomacy from 1998 to 2008, South Africa’s standing on the world stage has declined, in particular regarding global competitiveness and business confidence⁵.

Since 2010, South Africa has been a member of the BRICS group, the intergovernmental organisation that comprises Brazil, Russia, India, China, South Africa, and since 2024, Egypt, Ethiopia, Iran and the United Arab Emirates. The unique position of South Africa on the African continent gives it a prominent role among representatives of the Global South, despite the smaller size of its economy compared to original BRICS members.

South Africa’s National Development Plan 2030 recognises South Africa’s need to align foreign policy with domestic concerns and socio-economic demands around poverty eradication and reduction of inequalities, including through better inclusion of societal actors in the making of foreign policy.

South Africa has been part of the non-aligned movement (NAM) since its democratic election of 1994. Core tenets of its foreign policy positions include support for peaceful resolution of disputes as well as the need for a fair and consistent multilateral system⁶.

2.2. The public procurement system and its links with public finance management and public governance systems

Nature and scope of public procurement

At around ZAR 931.5 billion⁷ in 2021-22, public procurement accounts for approximately 15% of South Africa’s GDP. Public procurement is not only critical for the functioning of the South African government

⁵ South African Government (2012), National Development Plan 2030, https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf

⁶ Elizabeth Sidiropoulos, Brookings (2022), <https://www.brookings.edu/articles/how-do-global-south-politics-of-non-alignment-and-solidarity-explain-south-africas-position-on-ukraine/>

⁷ Approximately EUR 47.26 billion or USD 53.4 billion (conversion date 21 May 2024)



and its ability to deliver goods and services to citizens but has a much broader and significant economic, developmental and transformational impact on the South African economy and its people.

In 2021-22, 2.94 million transactions were recorded with 76 270 suppliers receiving orders from national and provincial departments. Out of these suppliers, 83% were small, micro- or medium-sized enterprises (SMMEs)⁸ and exempted micro enterprise (EME)⁹ suppliers with an annual turnover of less than ZAR 10 million, and 14.77% of the monetary value of payments was made to 5 758 qualifying small enterprise (QSE)¹⁰ suppliers with an annual turnover of between ZAR 10 million and ZAR 50 million.

Key institutions

The governance framework in South Africa places shared responsibility between national, provincial and local governments. Section 6 of the Public Finance Management Act (Act No. 1 of 1999) (PFMA) gives National Treasury the mandate to regulate financial management in national and provincial governments to ensure that all revenue, expenditure, assets and liabilities are managed efficiently and effectively. Similarly, the Municipal Finance Management Act (Act 56 of 2003) (MFMA), ensures sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government.

Created in 2013, the Office of the Chief Procurement Officer (OCPO) within the National Treasury is responsible for the public procurement regulatory framework and policies in South Africa. Starting in 1995, public procurement reform initiatives focused on addressing two main aspects, firstly the “promotion of the principles of good governance”, and secondly, the introduction of a “preference system to address specific socio-economic objectives”. The OCPO is a division within the National Treasury and, therefore, reports to the Director-General of the National Treasury.

The Office of the Chief Procurement Officer (OCPO), working with all government institutions, was established to modernise and oversee the South African public sector SCM system to ensure that the procurement of goods, services and construction works are fair, equitable, transparent, competitive and cost-effective, in line with the Constitution and all relevant legislation.

Other relevant institutions in the procurement context include the Auditor General of South Africa, which has the constitutional mandate to act as the external auditor of all national, provincial and local

⁸ It is a term used to refer to businesses that fall within a certain size classification based on factors such as annual turnover, number of employees, and assets. **Small Enterprises:** These are businesses that employ between 6 and 50 employees and have an annual turnover or total annual receipts between a specified range. The turnover threshold for small enterprises may differ based on the industry. **Medium Enterprises:** These are businesses that employ between 51 and 200 employees and have an annual turnover or total annual receipts within a specified range. Again, the turnover threshold for medium enterprises may vary across industries. **Micro Enterprises:** These are the smallest businesses in the SMME category, typically operated by a small number of people or even a single individual. Micro enterprises generally have fewer than 5 employees and low annual turnover or total annual receipts.

⁹ To qualify as an **Exempted Micro Enterprise**, a business must have an Annual Turnover of less than or equal to R10 million; at least 51% of the business must be owned by black South African individuals or entities; Black individuals that have operational control and management of the business.

¹⁰ To qualify as a **Qualifying Small Enterprise (QSE)**, a business must have an Annual Turnover between R10 million and R50 million; at least 51% of the business must be owned by black South African individuals or entities; Black individuals must have operational control and management of the business.



government institutions. The Office of the Accountant General (OAG) within National Treasury also plays a role by supporting internal audit function as well as capacity-building. Training is carried out by the National School of Government (NSG) and private training providers accredited by the OAG.

Key external stakeholders

South Africa is a member of the World Trade Organisation (WTO) but not a signatory to the Agreement on Government Procurement (GPA). It has concluded a number of free trade agreements, but they do not include detailed public procurement specific chapters or annexes. It is member of several anti-corruption fora, such as the United Nations Convention Against Corruption (UNCAC) as well as the OECD Anti-Bribery Convention.

2.3. National policy objectives and sustainable development goals

National policy objectives

South Africa's National Development Plan (NDP) 2030 provides the overarching vision for the country's future as set out in the Constitution, which states: "we must build a united and democratic South Africa, able to take its rightful place as a sovereign state in the family of nations".¹¹

The NDP includes ambitious goals for 2030, which include:

- uniting the country around a programme for eliminating poverty and reducing inequalities
- encouraging democratic participation of citizens, including in holding the government accountable
- increased economic growth
- focusing on capabilities of people and the country around skills, infrastructure, social security, institutions and partnerships with international partners
- building a capable and developmental state
- promoting leadership throughout society able to solve the country's challenges.

Public financial management

Public financial management is a systemic challenge at all levels of government. Local government in South Africa is the primary vehicle for the delivery of basic services and socio-economic rights in terms of the Constitution and relevant legislation and policy since 1994. So far, notable progress has been made in delivering basic services such as housing, water, and sanitation to the population. Nevertheless, various studies show that financial management at all three levels of government – local, provincial and national – is weak. This is especially true at local government level, leading to institutional inefficiencies that result in high levels of unauthorised and wasteful expenditure, therefore impacting negatively on the ability of municipalities to deliver on their constitutional and legislative mandates.

¹¹ [National Development Plan \(nationalplanningcommission.org.za\)](http://nationalplanningcommission.org.za)



While South Africa's National Treasury has taken steps to address this issue, Provincial Treasuries have limited capacity to adequately assist municipalities to better manage public funds. At the same time, there is insufficient community participation in setting or monitoring budgets and performances at local government level. Much more needs to be done to improve public financial management in all three spheres of government to create safe, healthy and economically sustainable areas in order to achieve the government's transformation agenda.

Sustainable Development Goals

The National Development Plan 2030 provides the blueprint through which South Africa hopes to achieve its development objectives, with the goal of eliminating poverty and reducing inequalities. Concretely these goals involve reducing the proportion of households with a monthly income below ZAR 419 per person (in 2009 prices) from 39% to zero and ensuring that the Gini coefficient falls from 0.69 to 0.6.

The critical action of the plan involves the following:

1. A social compact to reduce poverty and inequality and raise employment and investment
2. A strategy to address poverty and its impacts by broadening access to employment, strengthening the social wage, improving public transport, and raising rural incomes
3. Steps by the state to professionalise the public service, strengthen accountability, improve co-ordination, and prosecute corruption
4. Boost private investment in labour-intensive areas, competitiveness and exports, with adjustments to lower the risk of hiring younger workers
5. An education accountability chain, with lines of responsibility from state to classroom
6. Phase-in national health insurance, with a focus on upgrading public health facilities, producing more health professionals and reducing the relative cost of private health care
7. Public infrastructure investment at 10% of GDP, financed through tariffs, public-private partnerships, taxes and loans, and focused on transport, energy and water
8. Interventions to ensure environmental sustainability and resilience to future shocks
9. New spatial norms and standards – densifying cities, improving transport, locating jobs where people live, upgrading informal settlements and fixing housing market gaps
10. Reduce crime by strengthening criminal justice and improving community environments¹²

¹² Executive Summary, National Development Plan 2030 – Our future-make it work (2012)
<https://www.gov.za/sites/default/files/Executive%20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf>



2.4. Public procurement reform

General overview

Historically, South Africa's public procurement system was heavily centralised. It was organised around large central tender boards, established at national, provincial and, sometimes, local level (for large municipalities), which had purchasing functions for departments and units. The advent of the Public Finance Management Act of 1999 (PFMA) and the Municipal Finance Management Act of 2003 (MFMA) brought about an overhaul of public finance management, including public procurement. Namely, the PFMA introduced the paradigm of decentralised procurement, departing from a previous system that relied on heavy centralisation. Procurement responsibilities were devolved to accounting officers and accounting authorities of all state organisations¹³.

The principal piece of legislation that regulates public procurement is the Constitution of the Republic of South Africa promulgated in 1996. Section 217(1) of the Constitution requires that when an organ of state contracts for goods and services, it must do so in accordance with principles of fairness, equitability, transparency, competitiveness, and cost-effectiveness. Section 217(2) further states that subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. Section 217(3) states that national legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

The Preferential Procurement Policy Framework Act (Act No. 5 of 2000) (PPPFA) was promulgated to give effect to Section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in Section 217(2) of the Constitution and to provide for matters connected therewith.

Section 2(1) of the PPPFA states that an organ of state must determine its preferential procurement policy and implement it within the following framework:

- A preference point system must be followed;
- For contracts with a rand value above/below a prescribed amount a maximum of 10-20 points may be allocated for specific goals provided that the lowest acceptable tender scores 90-80 points for price;
- Any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;
- The specific goals may include:
 - Contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

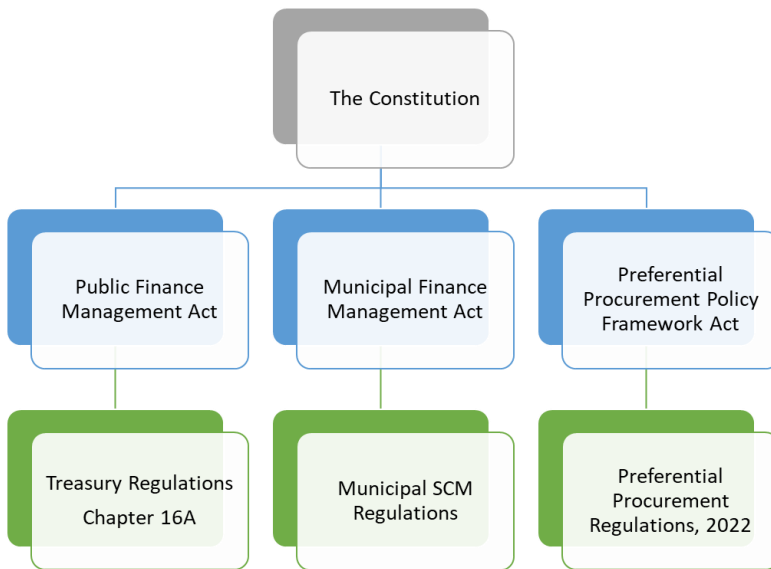
¹³ Public Affairs Research Institute (2022), A Strategic Public Procurement Paradigm for South Africa: Reflections on The Development of the Public Procurement Bill, Concept Note 6: Concept note on Centralisation versus Decentralisation of Public Procurement



- Implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994.

The governance framework in South Africa places shared responsibility between national, provincial and local government. Section 6 of the Public Finance Management Act (Act No. 1 of 1999) (PFMA) gives National Treasury the mandate to regulate financial management in national and provincial governments to ensure that all revenue, expenditure, assets and liabilities are managed efficiently and effectively. Similarly, the Municipal Finance Management Act (Act 56 of 2003) (MFMA) ensures sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government.

The constitutional requirement is echoed in Section 38(1)(a) (for departments and constitutional institutions) and Section 51(1)(a) (for public entities listed in schedules 2 and 3 of the PFMA), which states that an accounting officer/authority must ensure that they have and maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. The PFMA is implemented through the regulations published under it, namely the National Treasury Regulations (Treasury Regulations).



The South African procurement system is a hybrid system, which means that procurement legislation is developed and maintained at a central level (National Treasury) and implemented at a decentralised level (procuring institutions).

Legal developments

Procurement reforms have been underpinned by the introduction of various legislative measures, such as the Public Financial Management Act 1 of 1999 (PFMA), the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) and the Municipal Financial Management Act 56 of 2003. In support of the PFMA, the National Treasury issued the General Procurement Guidelines to encourage the procurement system towards the development of sustainable small, medium and micro businesses.



However, as noted by the National Treasury, the practice prior to 2004 needed to be strengthened in that procurement and provisioning (the regulatory framework distinguished these two activities and defined different rules for each) activities were rules-driven. Value-for-money, a core principle of the procurement system, was almost always equated to the lowest price tendered; procurement and provisioning activities were not linked to budgetary planning; the bid documentation was not uniform, causing uncertainty for bidders and practitioners. This led to a reform that introduced the concept of supply chain management (SCM) functions that integrate financial management in procurement processes to replace the outdated procurement and provisioning practices across government institutions.

The 2003 National Treasury Framework for Supply Chain Management (SCM) and other National Treasury Regulations of 2005 strengthening the provisions of the PFMA and MFMA confirmed the decentralised implementation of the SCM function to the accounting officers and accounting authorities and institutionalised the integration of various functionalities into a single SCM function. In doing so, the South African procurement process transitioned from a “rules-based system” run by the State Tender Board to a more flexible and decentralised process. An important element of this is the introduction of the notion of “accounting officers and accounting authorities”, which implies that heads of government institutions are provided with substantial independence within a regulatory framework.

A specific feature of the South African public procurement framework lies in the constitutional imperative of public procurement being employed as a means of addressing discriminatory policies and practices of the past. The Preferential Procurement Policy Framework Act, Act 5 of 2000 (PPPFA) prescribes the framework within which preferential procurement policies may be implemented. This framework indicates that preference points may be allocated for specific goals, such as contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability; and implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994. Aside from limited exceptions¹⁴, all government procurement in South Africa takes place within this framework.

In 2011, the Broad-Based Black Economic Empowerment Act (B-BBEEA) of 2003 became the basis of allocating points towards specific goals in the preference point system to protect or advance certain groups as provided for in the Constitution. This legislation established a framework for the promotion of black economic empowerment. It provided for “codes of good practice” that were *de facto* regulations. Preferential procurement is developed under the PPPFA which gives effect to Section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in Section 217(2) of the Constitution. According to the PPPFA, bidders must push their broad-based black economic empowerment (B-BBEE) status level as high as possible to earn more preference points. The B-BBEE status level is the sole basis for the allocation of preference points towards specific goals and is the result of the measurement of a company's contribution to broad-based black economic empowerment. A company's contribution is measured by means of a scorecard.

Recent policy developments reveal a growing dependence on public procurement for “achieving economic transformation and addressing socio-economic imbalances” originating from South Africa’s pre-

¹⁴ Exceptions pertain to organs of state that have been exempted from the PPPFA and to those institutions that are defined as organs of state in terms of section 239 of the Constitution, but which have not been brought within the ambit of the act in terms of the definition of organ of state in the PPPFA, and who have not been include by Gazette by the Minister of Finance as an organ of state under the application of the Act.



1994 discriminatory history. An example which illustrates this trend is the 2017 Preferential Procurement Regulations, which was passed into law on 20 January 2017, replacing the Preferential Procurement Regulations of 2011. These regulations allowed organs of state to apply pre-qualification criterion that required all tenderers to have a minimum B-BBEE status level. When organs of state decided to implement this framework in individual tenders, this disqualified certain bidders at tender level notwithstanding the possible functionality and cost-effectiveness such bidders might be able to offer.

This system has been severely impacted by a Constitutional Court judgment on 16 February 2022. The Court suspended the application of the 2017 regulations. The judgment ruled that the Minister of Finance exceeded his powers in prescribing the 2017 regulations. This decision and the absence of a clear statement on when these regulations would become invalid impacted all ongoing public tenders and caused uncertainty about the publication of tenders. Finally, according to the Constitutional Court confirmation, the 2017 regulations remained in force until 15 January 2023. With this deadline in mind, the National Treasury published draft Preferential Procurement Regulations in March 2022 for public comment that served as a lawful plan for how public procurement is to be undertaken in the period between the invalidity of the 2017 Regulations and the new public procurement bill replacing the PPPFA and the Preferential Procurement Regulations. While the public procurement bill was being finalised, the Minister of Finance promulgated the 2022 Preferential Procurement Regulations and repealed the 2017 Preferential Procurement Regulations. The 2022 Preferential Procurement Regulations came into effect on 16 January 2023. In essence, the 2022 regulations were a placeholder while the public procurement bill was being finalised.

The public procurement bill (B18-2023) was introduced in Parliament on 30 June 2023 and was open for public comments until 11 September 2023. Public hearings were held on 12-13 September 2023. From 17 November 2023 to 4 December 2023 various sessions were held to deliberate on the bill in the Finance Standing Committee with relevant stakeholders. On 6 December 2023, the bill was passed by the National Assembly and transmitted to the National Council of Provinces (NCOP) for concurrence. On 6 February 2024, the National Treasury briefed the NCOP after which public hearings were held on 23 February 2024. Between 14 March 2024 and 7 May 2024 various sessions were held to deliberate on the bill in the NCOP Finance with relevant stakeholders. On 9 May 2024, the bill was passed with amendments by the NCPO and returned to the National Assembly for concurrence. On 10 and 13 May 2024, the National Assembly considered the amendments proposed by the NCOP. On 16 May 2024, the bill was passed by both Houses of Parliament and sent to the President for assent.

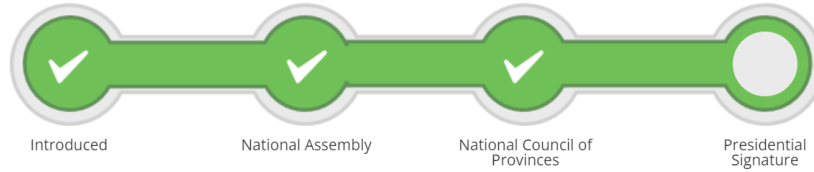


Public Procurement Bill (B18-2023)

Section 76: Ordinary Bills affecting the provinces





Share this page: [f](#) [t](#) [in](#) [e](#)



Bill versions: [B18B-2023](#) [B18A-2023](#) [SEIAS Report](#) [B18-2023](#)





Approved by Parliament. Waiting to be signed into law.

Bill history

NATIONAL ASSEMBLY	
	<p>Finance Standing Committee 23 May 2023 Public Procurement Bill: National Treasury briefing</p>
	<p>Minister of Finance 30 June 2023 Bill introduced</p>
	<p>Finance Standing Committee 05 September 2023 Public Procurement Bill: National Treasury briefing 12 September 2023 Public Procurement Bill: public hearings day 1 public participation 13 September 2023 Public Procurement Bill: public hearings day 2 public participation 17 November 2023 Public Procurement Bill: National Treasury response to public submissions & stakeholder input 24 November 2023 Public Procurement Bill: National Treasury response to public submissions & stakeholder input 28 November 2023 Public Procurement Bill: deliberations 29 November 2023 Public Procurement Bill: deliberation and adoption of proposed amendments 01 December 2023 Public Procurement Bill: motion of desirability & adoption 04 December 2023 Public Procurement Bill: Committee Report; Revenue Laws A/B: implementation date of two-pot system</p>
	<p>National Assembly 06 December 2023 Bill passed by the National Assembly and transmitted to the NCOP for concurrence</p>

NATIONAL COUNCIL OF PROVINCES	
	<p>NCOP Finance 06 February 2024 Public Procurement Bill: National Treasury briefing 23 February 2024 Public Procurement Bill: public hearings public participation 14 March 2024 Postponed: Response by National Treasury on the submissions to the Public Procurement Bill 19 March 2024 Public Procurement Bill: Treasury response to public submissions 17 April 2024 Public Procurement Bill: Treasury report-back on stakeholder consultation 23 April 2024 Public Procurement Bill: Civil Society concerns & constitutional matters 25 April 2024 Public Procurement Bill: National Treasury response to public submissions 26 April 2024 Public Procurement Bill: National Treasury response to public submissions; Procurement & B-BBEE Statistics briefing 30 April 2024 Public Procurement Bill: Negotiating Mandates & National Treasury response 02 May 2024 Public Procurement Bill: Proposed amendments & deliberations 07 May 2024 Public Procurement Bill: NT response to additional public input & Final Mandates</p>
	<p>National Council of Provinces 09 May 2024 Bill passed and amended by the NCOP and returned to the National Assembly for concurrence</p>



NATIONAL ASSEMBLY	
	Finance Standing Committee 10 May 2024 13 May 2024
	Pension Funds A/B & Public Procurement Bill: NCOP Amendments Pension Funds A/B & Public Procurement Bill: NCOP Amendments adopted
	National Assembly 16 May 2024
	Bill passed by both Houses and sent to President for assent

3. Assessment

3.1. Pillar I - Legal, Regulatory and Policy Framework

Pillar I assesses the existing legal, regulatory and policy framework for public procurement. It identifies the formal rules and procedures governing public procurement and evaluates how they compare to international standards. The practical implementation and operation of this framework is the subject of Pillars II and III. The indicators within Pillar I embrace recent developments and innovations that have been increasingly employed to make public procurement more efficient. Pillar I also considers international obligations and national policy objectives to ensure that public procurement lives up to its important strategic role and contributes to sustainability.

The procurement legal framework assessed under Pillar I is the framework in force as of 30 April 2024, (the close of the MAPS data collection period) as summarised below and described in more detail in the Matrix.

Annex A to this report presents the substantive gaps on which recommendations for legislative change were made with notes on relevant provisions in the public procurement bill and comments on the extent to which gaps are addressed by these relevant provisions.

Indicator 1. The public procurement legal framework achieves the agreed principles and complies with applicable obligations

The indicator covers the different legal and regulatory instruments established at varying levels from the highest level (national law, act, regulation, decree, etc.) to detailed regulation, procedures and bidding documents formally in use.

- **Synthesis of the indicator**

South Africa’s current legal and regulatory framework for public procurement is extensive, complex and fragmented. In acknowledgement of the problems which the current framework presents to ensuring that the public procurement system is fair, equitable, transparent, competitive and cost-effective, the Government of South Africa is in the process of adopting a new Procurement Act.



The Public Finance Management Act, 1999 (PFMA) is the primary legislative source for procurement conducted by national and provincial spheres of government. Treasury Regulation 16A Supply Chain Management sets out a high-level framework for the acquisition of goods and services. Construction works-related procurement (including construction-related goods and services) is subject to an additional, detailed statutory regime issued by the Construction Industry Development Board. The Preferential Procurement Policy Framework Act, 2000 (PPPFA) establishing a preference point system applied to tender evaluation and the Broad-Based Black Economic Empowerment Act, 2003 (B-BBEE Act) are of general application. There is also specialised, sector-focussed primary legislation and PPP-specific Treasury Regulations.

There is a range of procurement methods and threshold levels for procurement and the possibility of two-stage and multi-stage bidding where appropriate. There is, however, no single clear and unambiguous list of available procurement methods with associated conditions. The terminology used to describe procurement methods and procedures in the PFMA regime and CIDB regime is not consistent. E-procurement is addressed in a piecemeal manner. The legal framework allows or mandates e-procurement solutions for certain aspects of the procurement cycle, including publication of opportunities.

Possible barriers to participation which should be further reviewed to establish their market impact, include charging fees for procurement documents and CIDB registration requirements. There are legal provisions relating to eligibility and exclusions but the overall picture is highly fragmented. In practice, registration on the Central Supplier Database and CIDB registration establishes general baseline eligibility requirements. Debarment on conviction for corruption-related offences is subject to due process of the courts and should be noted on the Register of Tender Defaulters. The CIDB operates as a well-defined complaints investigation system, which may result in a sanction or prohibition. Suppliers may also be debarred due to inclusion in the Restricted Supplier List at the discretion of the Accounting Officer/Accounting Authority (AO/AA), which raises risks of inconsistency and/or bias.

Minimum content of procurement documents is prescribed in the standard bidding documents issued by OCPO and, in the case of construction-related procurement, CIDB. Unlike the CIDB regime, the PFMA regime does not contain specific provisions requiring use of neutral specifications, international norms or the principle of equivalence. Bidders may seek clarification of bidding documents. Evaluation criteria must be specified in advance in the procurement documents but the PFMA regime does not clearly provide for the use of price and non-price attributes and/or consideration of life cycle cost or total cost of ownership. Procedures for receipt and opening of tenders, record-keeping and bid confidentiality are described.

Rights and grounds for challenge are based on administrative and common law rights and principles using applications for judicial review submitted direct to the relevant Division of the High Court. The rules for submission of challenges; timelines; process to be followed; submission and consideration of evidence; and decision making are thus governed by the statutory provisions applying to the right to apply for judicial review and rules of the court. The High Court issues final and enforceable decisions. Decisions of the High Court can be appealed to a higher court. Because supplier confidence in the review system is limited, the new Procurement Act provides for the establishment of a specialist procurement tribunal.

Functions for contract management are prescribed at a high level in Treasury Regulations with more detail found in guides. Conditions for contract amendments are defined in SCM Instructions. Dispute resolution is addressed in contract terms. There is no comprehensive list of procurement records and documents to



be retained for use by organs of state at an operational level and it is recommended that this be prepared and shared.

- **Findings**

Legal and regulatory framework (sub-indicator 1 (a))

South Africa's current legal and regulatory framework for public procurement is extensive, complex and fragmented. In acknowledgement of the problems which the current framework presents to ensuring that the public procurement system is fair, equitable, transparent, competitive and cost-effective, the Government of South Africa is in the process of adopting a new Procurement Act.¹⁵

The starting point for understanding the legal and regulatory framework, and institutional arrangements for public procurement is the Constitution of the Republic of South Africa¹⁶ ("the Constitution"). Section 216 of the Constitution provides that national legislation must establish a national treasury and "prescribe measures to ensure both transparency and expenditure control in each sphere of government [...]". Section 217(1) of the Constitution, titled "Procurement" requires 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." In recognition of South Africa's history of discriminatory policies and practices, Section 217 (2) and (3) of the Constitution makes provision for organs of state to use procurement for empowerment purposes. Section 40 of the Constitution provides that "In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated." The unitary but decentralised state structure, with three spheres of government – national, provincial and local – and respective responsibilities, contributes to the complexity of the legal, regulatory and institutional framework for public procurement.

The Public Finance Management Act, 1999 (PFMA)¹⁷ is the primary legislative source for procurement conducted by national and provincial spheres of government.¹⁸ Treasury Regulations (TR) for departments, trading entities, constitutional institutions and public entities have been issued by the National Treasury, pursuant to powers under Section 76 of the PFMA.¹⁹

Treasury Regulation 16A Supply Chain Management (TR 16A SCM) establishes a high-level framework for supply chain management for the acquisition of goods and services, as well as the disposal and letting of state assets. National Treasury issues legally binding Instructions ("NT Instruction") and Supply Chain Management Instructions ("SCM Instruction") to support and clarify application of Treasury Regulations.

¹⁵ As at 16 May 2024, the Procurement Bill was passed by both Houses (National Assembly and National Council of Provinces) and sent to the President for assent.

¹⁶ Constitution of the Republic of South Africa Act No.108 of 1996 (as amended).

¹⁷ Public Finance Management Act, 1999 (Act No.1 of 1999) (as amended).

¹⁸ For the local government (municipal) sphere the key legislation from the perspective of public procurement is the Local Government: Municipal Finance Management Act, 2003 (Act No.56 of 2003) (as amended) (MFMA). Procurement by local government is not covered by this MAPS Assessment.

¹⁹ Treasury Regulations for departments, trading entities, constitutional institutions and public entities. National Treasury, Republic of South Africa [May 2002] March 2005 (as amended).



Construction (works)-related procurement (including construction-related goods and services) by organs of state falling within the scope of this MAPS Assessment are also covered by an additional, more detailed statutory regime aligned with the PFMA regime. Construction-related procurement is subject to provisions of the Construction Industry Development Board Act, 2000 (CIDB Act),²⁰ and legally binding CIDB implementing regulations and precepts, including the Code of Conduct and Standard for Uniformity (SFU).²¹

There are two Acts of importance in the context of the procurement legal framework, which are of general application to all spheres of government. They underpin the use of procurement for empowerment purposes, namely the Preferential Procurement Policy Framework Act, 2000 (PPPFA)²², which establishes a preference point system applied to the evaluation of tenders²³ and the Broad-Based Black Economic Empowerment Act, 2003 (B-BBEE Act).²⁴

There is also specialised, sector-focussed primary legislation relating to procurement. Of particular note for the purposes of this MAPS Assessment is the State Information Technology Agency (SITA) Act, 1998.²⁵ In some sectors, there are legislative provisions which reference procurement and which need to be aligned with the PFMA regime.

The PFMA regime does not contain provisions specifically addressing the issue of whether or to what extent it applies to contracts arising from international agreements, international treaty or which are concluded under provision financed by multilateral financing institutions.

The legal and regulatory framework covers goods, works (construction), and services, including consulting services for procurement by organs of state using public funds, falling within the scope of this MAPS assessment.

PPPs are regulated by Treasury Regulation 16 Public Private Partnerships, plus relevant sector-specific legislation.

Current laws, regulations and policies are published and easily accessible to the public at no cost from the NT/OCPO website, with additional documents applicable to construction-related procurement available from the CIDB website.

Procurement methods (sub-indicator 1(b))

There is a range of procurement methods and threshold levels for procurement, which means that simpler approaches are adopted for lower value procurements (petty cash and price quotations) with competitive bidding mandates as the default method for higher value procurements. There is also the possibility for use of two-stage and multi-stage bidding where the nature of the procurement means that those approaches are appropriate. There is, however, no single clear and unambiguous guidance document that lists available procurement methods with associated conditions for the procurement of goods and services. The potentially wide discretion at the procuring entity level to define and use procurement “by other means” opens up the possibility of inappropriate use of less or non-competitive procedures. In the case of construction-related procurement there is a list of standard procurement procedures. The

²⁰ Construction Industry Development Board Act, 2000 (Act No. 38 of 2000) (as amended).

²¹ CIDB Standard for Uniformity in Engineering and Construction Works Contracts, August 2019.

²² Preferential Procurement Policy Framework Act, 2000 (Act No.5 of 2000) (as amended).

²³ Which can include local preference (local production and local content) – see analysis in Matrix at 1(a)(a).

²⁴ Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003) (as amended).

²⁵ State Information Technology Agency Act, 1998 (Act No.88 of 1998) (as amended).



terminology used to describe procurement methods and procedures in the PFMA regime and CIDB regime is not consistent.

Advertising rules and time limits (sub-indicator 1(c))

The legal framework requires all procurement opportunities for competitive tenders to be publicly advertised on the eTenders portal, which is easily accessible online. Opportunities for construction-related procurement must also be advertised on the CIDB website. There is no automatic link between the eTenders portal and the CIDB website, which builds inefficiency into the system. The content published on both the eTenders portal and the CIDB website is sufficient for bidders to determine whether they are able and interested in submitting a bid. A minimum timeframe of 21 days is specified for open competitive bidding. No minimum timeframes are specified for other procurement methods. There is no provision specifically requiring the 21-day period to be extended when international competition is solicited.

Charging refundable or non-refundable fees for procurement documents is permitted and is at the discretion of the AO/AA. Fees charged must be reasonable and reflect only the cost of printing and delivery and not be so high as to discourage bidders. In practice, there is a mixed picture in terms of whether or not fees are charged as well as the basis and sum charged.

Rules on participation (sub-indicator 1(d))

Underlying principles for SCM require the system and, thus, the process for qualification to be “fair, equitable, transparent, competitive and cost-effective”. There are legal provisions relating to eligibility and exclusions, and providing for exclusion for criminal or corrupt activities. In practice, registration on the Central Supplier Database and CIDB registration for construction-related procurement establishes general baseline eligibility requirements. CIDB registration is required as a condition for eligibility to participate in construction procurement tenders for works above specified threshold. According to the CIDB *Comprehensive Guide to Contractor Registration*, all external companies on the CIDB Register must have and maintain a registered physical address in South Africa and be registered with the Companies and Intellectual Property Commission. Continuing the theme of eligibility, the PFMA regime does not establish rules for participation of state-owned enterprises²⁶ as bidders in public procurement processes. The overall picture is highly fragmented and there is no clear, consolidated list of rules on eligibility and exclusion to be applied to determine qualification of interested parties.

Debarment on conviction for corruption-related offences is subject to due process of the courts, which make an order to endorse an offender’s particulars on the Register of Tender Defaulters. The CIDB investigates complaints, which may result in restriction or prohibition from participating in public-sector construction works procurement for a period of up to 10 years. Suppliers may also be debarred from doing business with government by inclusion in the Restricted Supplier List. The high level of discretion available to the individual AO/AA in being able to add a supplier to the Restricted Supplier List raises risks of inconsistency and/or bias unless robust control and review measures are in place. An AO/AA may also disregard a bid in circumstances described in rather broad terms in Treasury Regulations, which again raises concerns as to the efficacy of the process where significant discretion is exercised at a local level.

Procurement documentation and specifications (sub-indicator 1(e))

²⁶ For the purposes of the MAPS Assessment the term “state-owned enterprises” is used to refer collectively to Major Public Entities (Sched 2) and Public Entities (3A and C), as defined by the PFMA.



There are limited provisions in Treasury Instructions relating to the content of procurement documents. Minimum content of procurement documents is prescribed in the standard bidding documents issued by OCPO with minimal changes when customising them for local use, which must be used by organs of state. In the case of construction-related procurement, CIDB standard procurement documents must be used. In practice, procurement opportunities advertised on the eTenders portal and CIDB website must include copies of the full tender documents. The content of the standard bidding/procurement documents available to suppliers is relevant and sufficient for suppliers to respond to the requirements.

The general principles requiring organs of state to have a supply chain management system that is “fair, equitable, transparent, competitive and cost-effective” is generally understood to require the use of neutral specifications and acceptance of equivalence, with the fairness principle of particular relevance. The PFMA regime does not, however, contain specific provisions requiring use of neutral specification or use of the words “or equivalent”. They do not specify use of international norms where possible or provide for use of output-based specifications, where appropriate. These requirements are included in the SCM Guide, which is advisory in nature. The CIDB Standard for Uniformity (SFU) has specific provisions requiring use of neutral specifications which, where possible, should be functional/output-based and specify national or international standards. Use of the words “or equivalent” is required where it is not possible to specify requirements other than by using names, trademarks etc.

If potential bidders wish to clarify procurement documents, they can use the eTenders portal clarification function, with requests and responses being uploaded but this is not mandatory. Provisions on clarification are included in the SCM Guide, which is advisory in nature, and in the CIDB Standard Conditions of Tender.

Evaluation and award criteria (sub-indicator 1(f))

Criteria must be specified in advance in the procurement documents so that the award decision is made on the basis of prescribed criteria. This includes both functionality evaluation criteria and application of the preference point system for identified goals. The PFMA regime does not clearly provide for the use of price and non-price attributes and/or consideration of life cycle cost or total cost of ownership. Where functionality criteria are used, the prescribed methodology, using pass/fail scoring, means that the value-for-money assessment will not always fully reflect the full value of qualitative aspects of tenders. The legal framework requires quality to be a major consideration in evaluating proposals for consulting service and there are clear procedures and methodologies for doing so.

Submission, receipt and opening of tenders (sub-indicator 1(g))

Procedures for receipt and opening of tenders, and record-keeping are described in the SCM Guide and CIDB SFU but would benefit from additional detail and clarity. There are legally binding Codes of Conduct, which require confidentiality of bid information to be respected, with specific reference to protection of intellectual property in the case of construction-related procurement.

Right to challenge and appeal (sub-indicator 1(h))

The procurement legal framework does not set out an express right for participants to challenge decisions or actions taken by the procuring entity; establish the matters that are subject to review; or designate a route for challenge. There is some provision for a complaints mechanism at the procuring entity level relating to the operation of the SCM system, with detail left to be described at the procuring entity level, in line with the PFMA principle of “letting managers manage”. Rights to challenge and grounds for challenge are based on administrative and common law rights and principles using applications for judicial



review applications submitted direct to the relevant Division of the High Court. The rules for submission of challenges; timelines; process to be followed; submission and consideration of evidence; and decision making are thus governed by statutory provisions applying to the right to apply for judicial review and rules of the court. In practice, it can take several months between filing an application for judicial review and publication of a judgment. Supplier confidence in the system is limited. In response to the MAPS private-sector survey, 58% of respondents said that the system for challenging public procurement decisions and appeals to the court are not trustworthy and 56% were of the view that court judgments are not consistent. There is no central source of all public procurement-related decisions by the High Court. Individual judges may decide to publish a judgment if it is in the public interest to do so or if it concerns an important point of law. As a general rule, all hearings are public and any judgment or order of the court is a public document. The High Court issues final and enforceable decisions. Decisions of the High Court can be appealed to a superior court.

Contract management (sub-indicator 1(i))

Functions for contract management are prescribed at a high level in Treasury Regulations, with more detail found in the SCM Guide, Contract Management Framework and Contract Management Guide. Conditions for contract amendments are defined in SCM Instructions, with reporting obligations where the value of the original contract is expanded or varied beyond specified percentages or amounts. The PFMA regime does not include provisions on dispute resolution. Dispute resolution is addressed in contract terms issued by OCPO and in contract terms issued by CIDB or an external standard for contracts designated for use by the CIDB. The CIDB provides an adjudication service. The final outcomes of dispute resolution processes are enforceable.

Electronic procurement (e-procurement) (sub-indicator 1(j))

The legal framework deals with use of e-procurement in a piecemeal manner and allows or mandates e-procurement solutions only for certain aspects of the procurement cycle where open competitive bidding is used. There are no provisions in the current legal framework that ensure the use of tools and standards that provide unrestricted and full access to the system, taking into consideration privacy, security of data and authentication. There are no provisions in the current legal framework that require interested parties to be informed which part of the process will be managed electronically.

Norms for safekeeping of records, documents and electronic data (sub-indicator 1(k))

National Treasury/OCPO have not issued a comprehensive list for use by organs of state at the operational level of procurement records and documents to be retained related to procurement transactions, including contract management. Rights of access for public inspection are covered by the Promotion of Access to Information Act (PAIA) and PAIA Manuals issued by public bodies in accordance with statutory obligations. There is no procurement-specific document retention policy or procurement-specific security protocols to protect records. The National Archives and Record Service Act, 1996²⁷ and regulations made under that Act regulate the proper management and care of records of government bodies. The National Archives Records Management Policy Manual lists different retention/disposal periods for documents. The retention periods are compatible with standard audit cycles. The MAPS Assessment team was unable to establish conclusively whether the document-retention periods for procurement documents is sufficiently well aligned with the limitation period for corruption-related prosecutions to prevent loss of relevant documents prior to expiry of the limitation period.

²⁷ The National Archives and Record Service Act, 1996 (Act No.43 of 1996) (as amended).



Public procurement in specialised legislation (sub-indicator 1(l))

The PFMA regime applies to procurement activities conducted by the State Information Technology Agency (SITA) for procurement of information technology systems and services on behalf of departments and organs of state, and when acting as an agent of the SA Government. There are Treasury Instructions concerning procurement through SITA. Procurement of PPPs is governed by guiding procurement principles. There are provisions covering the process for feasibility study, procurement and award of a PPP agreement set out in Treasury Regulations, Section 16, with amendments currently proposed by National Treasury, which is responsible for developing policies and supporting implementation of PPPs.

- **Gaps**

Substantive gaps

Legal and regulatory framework for procurement: The legal and regulatory body of norms applying to public procurement is extensive, complex and fragmented. The multitude of legislative provisions impacting planning, conduct and delivery of procurement outcomes presents significant challenges in identifying and understanding the procurement system as a coherent whole. The PFMA regime comprises numerous documents, is not comprehensive in coverage and is not presented in a consolidated manner. Due to limits on powers under the PFMA for National Treasury to mandate compliance by organs of state in a detailed manner, provisions are sometimes vague or expressed in a manner that leads either to uncertainty or permits the exercise of discretion, which can negatively impact the operation of the system as a whole. Although the PFMA regime and CIDB regime are aligned from a technical perspective, there is a lack of fit, including, for example, in inconsistent terminology and different approaches to standard tender documents so that they present as two distinct regimes, adding to complexity.

This gap is assigned a red flag because it obstructs efforts to improve the public procurement system, is a deeply imbedded systemic issue and cannot be immediately mitigated solely through actions in the public procurement system. The required changes to the legislative framework at all levels of the legal hierarchy (not just primary legislation) require significant levels of ongoing inter-institutional co-operation.

Internationally-funded projects: The PFMA regime does not contain provisions specifically addressing the issue of whether or to what extent it applies to contracts arising from international agreements, international treaty or which are concluded under provision financed by multilateral financing institutions. In this context, it is not clear which provisions would take precedence if the use of that specific institution's procurement rules and procedures are required.

Procurement methods: Open Competitive Bidding is the required default method for procurement above the threshold of ZAR 1 000 000 for organs of state to whom TR 16 SCM applies. The legal framework does not establish a sufficiently single clear and unambiguous list or definitions of available procurement methods, with associated conditions for use in every case, applying to the procurement of goods, services, consulting services and construction-related procurement (works and works-related).

Appropriate standards for competitive procedures: The permitted use of "other means", which are not exhaustively defined, affords wide discretion at a local level, reducing the clarity and coherence of the system. This opens up the possibility of inappropriate use of less or non-competitive procedures.



Timeframes for submission of bids: No minimum timeframes are specified for procurement methods other than open competitive bidding. There is no provision specifically requiring the 21-day period for open competitive bidding to be extended when international competition is solicited.

Rules on eligibility and exclusions: The overall picture is fragmented and there is no clear, consolidated list of rules on eligibility and exclusion to determine the qualification of interested parties.

Potential barriers to participation: Charges for bidding documents; CIDB registration as a condition for eligibility; and CIDB requirements for external companies registered with the CIDB to maintain an office and have a registered physical address in South Africa and be registered with the Companies and Intellectual Property Commission (CIPC) are all potential barriers to entry.²⁸

Grounds for exclusion: There is no list of grounds for exclusion covering terrorist-related offences, money-laundering or terrorist-financing, child labour, or human trafficking as prescribed by the MAPS methodology.

Restricted Supplier List: There is a high level of discretion afforded to AO/AA in deciding upon debarment of a supplier from doing business with government by inclusion in the Restricted Supplier List. This raises risks of inconsistency and/or bias in the application of grounds for restrictions on participation.

Grounds for disregarding a bid: The wording of the grounds upon which an AO/AA may disregard a bid in TR16A9.2 is vague and not well-aligned with the anti-corruption regime. This raises concerns as to the efficacy of the process where significant discretion is exercised at a procuring entity level.

Restricted/prohibited suppliers: The list of CIDB-restricted/prohibited suppliers, Restricted Supplier List, and Tender Defaulter Report published by NT/OCPO are not linked, creating complexity and reducing clarity.

Rules for participation of state-owned enterprises:²⁹ The PFMA regime does not establish rules for participation of state-owned enterprises as bidders in public procurement processes. This may jeopardise fair competition as state-owned enterprises may have an unfair advantage over other bidders because, for example, they benefit from subsidies, tax exemptions or other forms of preferential treatment.

Neutral specifications and equivalence: Treasury Regulations do not contain specific provisions requiring use of neutral specification nor do they specify use of international norms where possible or provide for the use of output-based (“functional” in MAPS terminology) specifications to promote innovation where appropriate. Although guidance makes it clear that organs of state should include the words “or

²⁸ See also Gap and supporting recommendation at 3(a) on critical review of the effectiveness of current measures for empowerment and economic and industrial growth (including local preference – local production and local content) through public procurement, including whether they may create barriers to entry for domestic or foreign suppliers.

²⁹ For the purposes of the MAPS Assessment the term “state-owned enterprises” is used to refer collectively to Major Public Entities (Sched 2) and Public Entities (3A and C), as defined by the PFMA.



equivalent” where neutral specifications are not available, Treasury Regulations do not contain specific provisions that make this a requirement.

Bidder clarification: Although SCM Instruction provides for the uploading of clarification requests, and responses and guidance makes it clear that organs of state should provide for a process for clarification of procurement documents, Treasury Regulations do not contain specific provisions making this a requirement.

Evaluation of price and non-price attributes: The PFMA regime does not clearly provide for the use of price and non-price attributes and/or consideration of life cycle cost or total cost of ownership. Where functionality criteria are used, the prescribed methodology means that the value-for-money assessment will not always fully reflect the full value of qualitative aspects of tenders.

Bid opening: Although it is generally understood that bid opening is to be conducted in public, there is no procedure prescribed for the public opening of tenders in Treasury Regulations or Instructions. The right of bidders, their representatives, and others with legitimate interest in outcomes, such as representatives of civil society, is not referenced in the PFMA regime.

Records of bid proceedings: The provisions on records of bid proceedings in the current legal framework are limited and should be enhanced to ensure standard practices, and enhance transparency and accountability.

Disclosure of specific sensitive information: Provisions on disclosure of specific sensitive information are limited and should be enhanced to take into account the legitimate needs of bidders to protect trade secrets and other proprietary information.

Modality of submitting tenders: The modality of submitting tenders and receipt by government is not well defined in the legislative framework. This raises the risk of rejection of otherwise compliant proposals.

Timeframes for submission and decision on challenges: Timeframes for issuing decisions on appeal are not specified in the public procurement legal framework. The rules applying to timeframes for application for judicial review and covering the process for issuance of decisions are contained in statutory provisions and rules, which are of general application to judicial review cases heard by the High Court. The available procedures and time taken for court proceedings and decisions do not, in practice, guarantee an effective and efficient process meeting the practical and commercial imperatives of procurement-related complaints.

This gap is assigned a red flag because the lack of an efficient review system can severely impede the objectives sought through public procurement by reducing confidence in the system. This can have a negative impact on competition. In addition, necessary reforms require a national mandate and actions going beyond those relying solely within the procurement sphere.

Publication of decisions on appeal: The publication of decisions in procurement cases allows interested parties to be better informed as to the consistency and fairness of the process. Court judgments are, as a general rule, public documents but High Court judgments are not published as a matter of course and there is no official central government source of all public procurement-related decisions made by the High Court.



The gap is assigned a red flag because the lack of comprehensive and reliable information on review can severely impede the objectives sought through public procurement by reducing confidence in the system.

Electronic procurement (e-procurement): The current legal framework requires updating to fully align with current use of e-procurement and allow for future developments in the use of e-procurement solutions.

Tools and standards for e-procurement: The legal framework does not include necessary provisions to facilitate effective use of e-procurement systems by ensuring the use of tools and standards that provide unrestricted and full access to the system, taking into consideration privacy, security of data and authentication.

Processes to be managed electronically: There are no provisions in the current legal framework that require interested parties to be informed about which part of the process will be managed electronically. Bidders need to know in advance which parts of the process will be managed electronically so they have a clear understanding of the processes to be followed.

List of procurement records to be retained at operational level: There is no comprehensive list for use by organs of state at the operational level of procurement records and documents to be retained related to procurement transactions, including contract management. This potentially affects the ability to look at implementation performance, which is important information for the functioning of both internal and external control systems.

Document retention policy: There is no procurement-specific document retention policy.

Security protocols: There are no established security protocols to protect public procurement records (physical and/or electronic), thus jeopardising the ability to check implementation performance due to lack of availability of relevant records.

- **Recommendations**

Substantive gaps

Legal and regulatory framework for procurement: Wholesale changes to the legislative framework must be made to reduce the number of legislative provisions impacting on planning, conduct and delivery of procurement outcomes. The aim should be to create a far simpler, coherent framework with clear underpinning principles, common provisions, terminology and procurement methods applying to all procurement (goods, works (construction), and services, including consulting services) by all organs of state using public funds and in accordance with requirements of the Constitution. Ideally this should be contained in a single piece of dedicated primary legislation, supported by comprehensive implementing regulations.

International agreements: Introduce provisions in the new primary legislation to address the issue of whether and/or to what extent it applies to contracts arising from international agreements, international treaty or which are concluded under provision financed by multilateral financing institutions. See, for example, United Nations Commission On International Trade Law (UNCITRAL) Model Law on Public Procurement, Article 3.



Procurement methods and appropriate standards for competitive procedures (combined recommendation): To improve clarity, coherence and certainty, introduce legislative provisions listing in a clear and unambiguous manner all available procurement methods to include competitive and less competitive procurement procedures. Each of the available methods should be clearly defined, with associated conditions for use. The procurement methods listed should apply, as relevant, to the procurement of goods, services, consulting services and construction-related procurement. The list of available procurement methods and associated conditions for use should, ideally, be placed in a higher-level legal instrument of universal application. This provides both stability and consistency. Lower-level instruments can be used to regulate methods and conditions at a more detailed level, including to accommodate particular sectoral requirements.

Timeframes for submission of bids: To enhance consistency, introduce legislative provisions specifying minimum timeframes for less competitive procurement methods and establish criteria for setting the minimum time period, including factors such as the complexity of the procurement and level of expected competition and location of bidders. Ideally, these provisions should be placed in a higher-level legal instrument of universal application, with lower-level instrument/s used to regulate at a more detailed level, including to accommodate particular sectoral requirements. Opportunities for construction-related procurement must be advertised both on the eTenders portal and on the CIDB website. There is no automatic link between the eTenders portal and the CIDB website. To further improve consistency as well as to reduce administration and eliminate duplication, consider putting into place measures to enable procuring entities to place a single advertisement, which is then published at both locations and/or implement a single system and location for all advertisements.

Potential barriers to participation: Undertake a critical review of the impact on all potential suppliers, including micro-, small and medium enterprises (MSMES) and foreign suppliers. Review market competition of charges for bidding documents, CIDB registration as a condition for eligibility and CIDB requirements for external companies registered with the CIDB to maintain an office and have a registered physical address in South Africa and be registered by the Companies and Intellectual Property Commission (CIPC). Where a negative impact is identified, the review should identify measures to remove or reduce the impact and to stimulate market participation. See also, Gap and Recommendations for sub-indicator 3(a) Sustainable Public Procurement concerning need for critical review of current measures for empowerment, and economic and industrial growth through public procurement including specific reference to local preference/local content measures.

Rules on eligibility and exclusions: To enhance clarity, include in the legal framework a clear, consolidated list of rules on (1) exclusion; and (2) eligibility; in each case, with grounds and conditions clearly prescribed and supported by practical guidance. Ideally, these provisions should be placed in a higher-level legal instrument of universal application, with lower-level instrument/s used to regulate at a more detailed level, including to accommodate particular sectoral requirements.

Grounds for exclusion: Include in the legal framework specific provisions listing grounds for ineligibility due to conviction by final judgment for specified organised crime, terrorist and trafficking offences (participation in a criminal organisation; terrorist offences or offences linked to terrorist activities or inciting, aiding, abetting or attempting to commit such an offence; money-laundering or terrorist-financing; child labour; and all forms of human trafficking).



Restricted Supplier List: Review operation of the processes and outcomes of the system for adding suppliers to the Restricted Supplier List. In particular, establish the detailed grounds upon which a decision is made, the consistency of the decisions and the resulting periods of debarment. If inconsistencies, bias or other issues are flagged, identify measures to remedy these issues to ensure that the system is fit for purpose.

Grounds for disregarding a bid: Review and amend, redraft or remove (as necessary) the grounds upon which bids may be disregarded to ensure that they are aligned with anti-corruption legislation and well-defined, thus limiting room for misapplication. It is advisable to provide additional Instructions or guidance, including practical examples, to inform and support officers in decision making on this issue.

Restricted/prohibited suppliers list: To simplify checks on suppliers who are restricted or prohibited from participation, consider linking list of CIDB-restricted/prohibited suppliers, the Restricted Supplier List and Tender Defaulter report published by NT/OCPO to provide a single source of reference.

Rules for participation of state-owned enterprises: Include in the legal framework specific rules applying to participation of state-owned enterprises³⁰ as bidders in public procurement processes, aimed at promoting fair competition.

Neutral specifications and equivalence: Introduce legislative provisions to specifically refer to use of international or other recognised equivalent norms and to the principle of equivalence for procurement of goods, services including consulting services, and construction-related procurement. Also consider including provisions requiring use of output-based specifications in the case of all procurements, where appropriate, to promote innovation.

Bidder clarification: To enable equal treatment of suppliers, help them to understand clearly what is requested of them, and how the procurement process is to be carried out, introduce legislative provisions to clearly provide a right for potential bidder to request clarification of a procurement document, with specified timelines for responses and a requirement for written communication of clarifications to all potential bidders.

Evaluation of price and non-price attributes: Include provisions in the legal framework to clearly provide for the use of methods such as life cycle costing or total cost of ownership together with clear requirements on the data bidders should provide in their tenders to make the determination. Consider the ways in which non-price functionality criteria can be best assessed to ensure that the qualitative benefits can be differentiated and, potentially, higher marks awarded for offers which exceed baseline requirements.

Bid opening: To enhance transparency and accountability, introduce legislative provisions applying to procurement of goods, services, consulting services and construction-related procurement to clearly set out the process for bid opening and specify who is permitted to attend public opening of tenders.

³⁰ For the purposes of the MAPS Assessment the term “state-owned enterprises” is used to refer collectively to Major Public Entities (Sched 2) and Public Entities (3A and C), as defined by the PFMA.



Legislative provisions on bid opening should also require that, save in specified cases, bids are opened immediately after the deadline for submission of tenders to reduce the possibility of loss of or alteration of proposals and submissions.

Records of bid proceedings: Introduce legislative provisions applying to procurement of goods, services, consulting services and construction-related procurement clearly setting out the information that should be recorded, which, for open tendering should include: name and address of bidders; date and condition the tender was received (for compliance); tender price; any withdrawals or modifications to tenders duly submitted; and any alternative offers requested or permitted (where relevant and permissible). Legislative provisions should also require that records of bid opening are shared and maintained so that they are available for review and audit purposes.

Disclosure of specific sensitive information: Introduce legislative provisions applying consistently to procurement of all types – goods, services, consulting services and construction-related procurement – to ensure measures that take into account the legitimate needs of bidders to protect trade secrets and other proprietary information as well as the need to avoid disclosing information that can be used to distort competition. It can be a difficult balancing act to ensure appropriate levels of transparency while protecting legitimate interests and so it is advisable to support such provisions with practical guidelines to facilitate decision making on a case-by-case basis.

Modality of submitting tenders: Introduce provisions applying to procurement of goods, services, consulting services and construction-related procurement clearly setting out how bids are to be submitted, including number of copies, sealing and marking of envelopes, and addressing security and confidentiality requirements, with necessary flexibilities to allow for e-Government Procurement (e-GP) electronic submission and receipt.

Timeframes for submission and decision on challenges: Consider undertaking a critical study of the data and information available and stakeholders' views on the operation of the system of judicial review, including timeframes for submission and decisions on challenges, to assess the fitness for purpose and efficiency of the current system for procurement complaints using the route of judicial review and to gauge confidence in and effectiveness of the operation of the system in practice. This should be undertaken with the aim of identifying whether the existing route may be adapted to meet the MAPS methodology requirements for an efficient review system or whether a new approach is required, such as the establishment of a specialist independent procurement review body.

Publication of decisions on appeal: Pending review and decision on the fitness for purpose of the current system and proposals for improvement or changes, consider ways to gather more information on High Court judgments in procurement matters in order to collate relevant information. One possibility may be to require organs of state to report to NT when an application for judicial review is issued in the High Court and to notify NT of the outcome, with relevant case references.

Electronic procurement (e-procurement): The legal framework will need to be reviewed to permit and facilitate the introduction and implementation of the upgraded or new e-Government Procurement (e-GP) systems. This will require consideration of changes having an impact on the whole procurement cycle, from procurement planning through to contract and performance management, delivery and payment. If substantially upgraded or new e-GP systems are foreseen, it is likely that functionalities will be progressively rolled out. Provisions in the legal framework will need to allow sufficient flexibility to take



account of staged roll-out, including stages when end-to-end procurement is conducted partly using e-GP system and partly paper-based.

Tools and standards for e-procurement: Introduce provisions into legal framework to ensure the consistent application of electronic technologies and require standardised formats, technical equipment and connection arrangements, and procedures to grant unrestricted and full access to e-procurement. These provisions will need to be comprehensive and tailored to reflect the particularities of the e-GP system/s in South Africa.

Processes to be managed electronically: Introduce provisions into legal framework to make it mandatory to inform potential bidders which parts of the processes will be managed electronically (e.g. availability of procurement documents, communication, bid submission, contract awards, billing and payments etc.). Provisions in the legal framework will need to allow sufficient flexibility to take account of staged roll-out in the event of upgraded or new end-to-end e-GP systems and will need to clarify whether conventional paper-based procurement is still allowed and at what phases of the procurement process.

List of procurement records to be retained at operational level: Consider publishing a checklist for use by organs of state at an operational level which sets out which procurement documents are to be retained to ensure complete procurement records. This should refer to and align with rights of public access to information under the Promotion of Access to Information Act.

Document retention policy: To assist those responsible for managing procurement records to be clear about document retention and destruction rules applying to procurement-related documents, prepare and issue a procurement-specific document retention policy, note or guidance (as appropriate) on document retention and destruction in the particular context of procurement. This must be aligned with national archiving requirements and the limitation period for corruption-related prosecutions.

Security protocols: Establish security protocols to protect records of public procurement, both physical and electronic, and consider measures, including enforcement, to ensure compliance in a consistent manner by all organs of state. This will need to be closely aligned with new provisions to be introduced to ensure appropriate alignment with operation of the e-GP systems.

Summary of substantive gaps and recommendations of Indicator 1

	Substantive gap	Risk classification and red flags	Recommendations
1(a)	Legal and regulatory framework is extensive, complex and fragmented	High, red flag	Wholesale changes to the legislative framework must be made to reduce the number of legislative provisions impacting on planning, conduct and delivery of procurement outcomes. The aim should be to create a far simpler, coherent framework with clear underpinning principles, common provisions, terminology and procurement methods applying to all procurement (goods, works (construction), and services, including



			consulting services) by all organs of state using public funds and in accordance with requirements of the Constitution. Ideally this should be contained in a single piece of dedicated primary legislation, supported by comprehensive implementing regulations.
	No provisions on application of procurement legal framework to contracts arising from international agreements, international treaty or concluded under provision financed by multilateral financing institutions	Medium	Introduce provisions in the new primary legislation to address the issue of whether and/or to what extent it applies to contracts arising from international agreements, international treaty or concluded under provision financed by multilateral financing institutions. See, for example, UNCITRAL Model Law on Public Procurement, Article 3.
1(b)	No single clear and unambiguous list of procurement methods with associated conditions for use	High	Combined recommendation for 1(b)(a) and 1(b)(d) To improve clarity, coherence and certainty, introduce legislative provisions listing in a clear and unambiguous manner all available procurement methods to include competitive and less competitive procurement procedures. Each of the available methods should be clearly defined, with associated conditions for use. The procurement methods listed should apply, as relevant, to the procurement of goods, services, consulting services and construction-related procurement. The list of available procurement methods and associated conditions for use should ideally be placed in a higher-level legal instrument of universal application. This provides both stability and consistency. Lower-level instruments can be used to regulate methods and conditions at a more detailed level, including to accommodate particular sectoral requirements.
	Standards for competitive procedures not sufficiently defined	High	See combined recommendation at 1(b)(a)
1(c)	Lack of specified minimum timeframes and improved consistency in advertising	Medium	To enhance consistency, introduce legislative provisions specifying minimum timeframes for less competitive



			<p>procurement methods and establish criteria for setting the minimum time, including factors such as the complexity of the procurement and the level of expected competition and location of bidders.</p> <p>Ideally, these provisions should be placed in a higher-level legal instrument of universal application, with lower-level instrument/s used to regulate at a more detailed level, including to accommodate particular sectoral requirements.</p> <p>To further improve consistency as well as reduce administration and eliminate duplication, consider putting into place measures to enable procuring entities to place a single advertisement which is then published at both locations and/or implement a single system and location for all advertisements.</p>
1(d)	Rules on eligibility and exclusion are fragmented	High	<p>To enhance clarity, include in the legal framework a clear, consolidated list of rules on (1) exclusion; and (2) eligibility, in each case with grounds and conditions clearly prescribed and supported by practical guidance.</p> <p>Ideally, these provisions should be placed in a higher-level legal instrument of universal application, with lower-level instrument/s used to regulate at a more detailed level, including to accommodate particular sectoral requirements.</p>
	Potential barriers to participation: charges for bidding documents, CIDB registration requirements	Medium	<p>Undertake a critical review of the impact on all potential suppliers, including MSMEs and foreign suppliers, and market competition of charges for bidding documents, CIDB registration as a condition for eligibility and CIDB requirements for external companies registered with the CIDB to maintain an office and have a registered physical address in South Africa and to be CIPC-registered. Where a negative impact is identified, the review should identify</p>



			measures to remove or reduce the impact and to stimulate market participation. ³¹
	Grounds for exclusion do not specifically reference organised crime, terrorist and trafficking offences	Medium	Include in the legal framework specific provisions listing grounds for ineligibility due to conviction by final judgment for specified organised crime, terrorist and trafficking offences (participation in a criminal organisation; terrorist offences or offences linked to terrorist activities or inciting or aiding or abetting or attempting to commit such an offence; money-laundering or terrorist-financing; child labour; and all forms of human trafficking).
	Restricted Supplier List – exercise of discretion	Medium	Review operation of the processes and outcomes of the system for adding suppliers to the Restricted Supplier List, in particular, to establish the detailed grounds upon which a decision is made, factors which are taken into account in decision making, the process applied, consistency of the decisions and the resulting periods of debarment. If inconsistencies, biases or other issues are flagged, identify measures to remedy these issues, including guidance if necessary. This is to ensure that the system is fit for purpose, acknowledging that each situation needs to be decided on its own merits within a clear framework for decision making.
	Grounds for disregarding of bids are vague and poorly aligned	High	Review and amend, redraft or remove (as necessary) the grounds upon which bids may be disregarded to ensure that they are aligned with anti-corruption legislation and well-defined, thus limiting room for misapplication. It is advisable to provide additional Instructions or guidance, including practical examples, to inform and support officers in decision making on this issue.

³¹ See also, Gap and Recommendations at sub-indicator 3(a) Sustainable Public Procurement concerning need for critical review of current measures for empowerment and economic and industrial growth through public procurement including specific reference to local preference/local content measures.



	Restricted/prohibited suppliers lists not linked	Low	To simplify checks on suppliers who are restricted or prohibited from participation, consider linking list of CIDB-restricted/prohibited suppliers and Restricted Supplier List and Tender Defaulter report published by NT/OCPO to provide a single source of reference.
	No rules on participation of state-owned enterprises ³² as bidders	Medium	Include in the legal framework specific rules applying to participation of state-owned enterprises as bidders in public procurement processes, aimed at promoting fair competition.
1(e)	Lack of provisions on neutral specifications and equivalence	Low	Introduce legislative provisions to specifically refer to use of international or other recognised equivalent norms and to the principle of equivalence for procurement of goods, services including consulting services, and construction-related procurement. Also consider including provisions requiring use of output-based specifications in the case of all procurements, where appropriate, to promote innovation.
	Bidders' right to clarification is not enshrined in legislation	Medium	To enable equal treatment of suppliers, help them to understand clearly what is requested of them and how the procurement process is to be carried out; introduce legislative provisions to clearly provide a right for potential bidder to request clarification of a procurement document, with specified timelines for responses and a requirement for written communication of clarifications to all potential bidders.
1(f)	Price and non-price attributes	High	Include provisions in the legal framework to clearly provide for the use of methods such as life cycle costing or total cost of ownership together with clear requirements on the data bidders should provide in their tenders to make the determination. Consider the ways in which non-price functionality criteria can be best assessed to ensure that the qualitative benefits can be differentiated and,

³² For the purposes of the MAPS Assessment the term “state-owned enterprises” is used to refer collectively to Major Public Entities (Sched 2) and Public Entities (3A and C), as defined by the PFMA.



			potentially, higher marks awarded for offers that exceed baseline requirements.
1(g)	No detailed procedure prescribed for bid opening	Medium	To enhance transparency and accountability, introduce legislative provisions applying to procurement of goods, services, consulting services and construction-related procurement to clearly set out the process for bid opening and specify who is permitted to attend public opening of tenders. Legislative provisions on bid opening should also require that, save in specified cases, bids are opened immediately after the deadline for submission of tenders to reduce the possibility of loss or alteration of proposals and submissions.
	Records of bid proceedings not clearly prescribed	Medium	Introduce legislative provisions applying to procurement of goods, services, consulting services and construction-related procurement clearly setting out the information that should be recorded, which, for open tendering should include: name and address of bidders; date and condition the tender was received (for compliance); tender prices; any withdrawals or modifications to tenders duly submitted; and any alternative offers requested or permitted (where relevant and permissible) and shared with the bidders are available for review and audit purposes.
	Limited provisions on disclosure of specific sensitive information	Low	Introduce legislative provisions applying to procurement of goods, services, consulting services and construction-related procurement to introduce measures which take into account the legitimate needs of bidders to protect trade secrets and other proprietary information as well as the need to avoid disclosing information that can be used to distort competition. It can be a difficult balancing act to ensure appropriate levels of transparency while protecting legitimate interests and so it is advisable to support such provisions with practical guidelines to facilitate decision making on a case-by-case basis.



	Modality of submitting tenders not well-defined	Low	Introduce provisions applying to procurement of goods, services, consulting services and construction-related procurement clearly setting out how bids are to be submitted, including number of copies, sealing and marking of envelopes, and addressing security and confidentiality requirements, with necessary flexibilities to allow for e-GP electronic submission and receipt.
1(h)	Timeframes for submission and decision on appeals do not guarantee an efficient and effective process	High, red flag	Consider undertaking a critical study of the data and information available, and stakeholders' views on the operation of the system of judicial review, including timeframes for submission and decisions on challenges, to assess the fitness for purpose and efficiency of the current system for procurement complaints using the route of judicial review and to gauge confidence in the effectiveness of the operation of the system in practice. This should be undertaken with the aim of identifying whether the existing route may be adapted to meet the MAPS methodology requirements for an efficient review system or whether a new approach is required, such as the establishment of a specialist independent procurement review body.
	Decisions on appeals are not all published or easily accessible	High, red flag	Pending review and decision on the fitness for purpose of the current system and proposals for improvement or changes, consider ways to gather more information on High Court judgments in procurement matters to start to collate relevant information. One possibility may be to require organs of state to report to NT when an application for judicial review is issued in the High Court and to notify NT of the outcome, with relevant case references.
1(j)	Legal framework needs to be updated to cater to e-procurement	Medium	The legal framework will need to be reviewed to permit and facilitate the introduction and implementation of the



			<p>upgraded or new e-GP systems. This will require consideration of changes having an impact on the whole procurement cycle, from procurement planning through to contract and performance management, delivery and payment. If substantially upgraded or new e-GP systems are foreseen, it is likely that functionalities will be progressively rolled out. Provisions in the legal framework will need to allow sufficient flexibility to take account of staged roll-out, including stages when end-to-end procurement is conducted partly using e-GP system and partly paper-based.</p> <p>See 1(j)(a) and 1(j)(b) below for specific gaps and related recommendations to include provisions in the revised legal framework that (1) ensure the use of appropriate tools and standards that provide unrestricted and full access to the system (2) require interested parties to be informed which parts of the processes will be managed electronically.</p>
	No tools and standards for e-procurement	Low	<p>Introduce provisions into legal framework to ensure the consistent application of electronic technologies and require standardised formats, technical equipment and connection arrangements and procedures to grant unrestricted and full access to e-procurement. These provisions will need to be comprehensive and tailored to reflect the particularities of the e-GP system/s in South Africa.</p>
	No requirement to inform which parts of the process will be managed electronically	Low	<p>Introduce provisions into legal framework to make it mandatory to inform potential bidders which parts of the processes will be managed electronically (e.g. availability of procurement documents, communication, bid submission, contract awards, billing and payments etc.). Provisions in the legal framework will need to allow sufficient flexibility to take account of staged roll-out in the event of upgraded or new end-to-end e-GP systems and will need to clarify whether conventional paper-based procurement is</p>



			still allowed and at what phases of the procurement process.
1(k)	No comprehensive list of procurement records to be retained at operational level	Medium	Consider publishing a checklist for use by organs of state at an operational level, which sets out which procurement documents are to be retained to ensure complete procurement records. This should refer to and align with rights of public access to information under the Promotion of Access to Information Act.
	No procurement-specific document retention policy	Low	To assist those responsible for managing procurement records to be clear about document retention and destruction rules applying to procurement-related documents, prepare and issue a procurement-specific document retention policy, note or guidance (as appropriate) on document retention and destruction in the particular context of procurement. This must be aligned with national archiving requirements and the limitation period for corruption-related prosecutions.
	No established security protocols	Low	Establish security protocols to protect records of public procurement, both physical and electronic, and consider measures, including enforcement, to ensure compliance in a consistent manner by all organs of state. This will need to be closely aligned with new provisions to be introduced to ensure appropriate alignment with operation of the e-GP system.

Indicator 2. Implementing regulations and tools support the legal framework

This indicator verifies the existence, availability and quality of implementing regulations, operational procedures, handbooks, model procurement documentation and standard conditions of contract. Ideally the higher-level legislation provides the framework of principles and policies that govern public procurement. Lower-level regulations and more detailed instruments supplement the law, make it operational and indicate how to apply the law to specific circumstances.

- **Synthesis of the indicator**

There is no clear, comprehensive and consolidated set of regulations available in a single accessible place. Practical measures are recommended to present information in a more user-friendly manner and ensure



that information is fully up-to-date. While technically aligned, the regulatory documents issued by NT/OCPO and by CIDB do not present in a coherent manner. There are model procurement documents and standard contract conditions for mandatory use published by NT/OCPO and the CIDB, who are responsible for their maintenance. The General Conditions for Contract issued by NT/OCPO is not well suited for purchase of stand-alone services or consultancy services and has not been updated for some years. CIDB contracts do not appear to have been updated for some years. Conditions of contract and contracts should be reviewed and updated. There is no comprehensive, up-to-date procurement manual detailing all procedures for the correct implementation of procurement regulations and law. It is recommended that a manual is prepared and published to enhance understanding and consistency in application of the procurement regime in practice.

- **Findings**

There is no clear, comprehensive and consolidated set of regulations available in a single accessible place. The package of NT Instructions and SCM Instructions are not consolidated or comprehensive and, in some cases, lack clarity. CIDB should work with NT/OCPO to ensure that their documents are not contradictory. While technically aligned, they do not present a coherent set of documents. Documents issued by NT/OCPO and CIDB use different terminology on key issues such as procurement procedures and methods. Documents published by NT/OCPO are published and available to download from the OCPO website but the content is not all fully up-to-date. Documents published by CIDB are available to download from the CIDB website. Responsibility for maintenance is clear.

There are model procurement documents and standard contract conditions published by NT/OCPO and the CIDB, who are responsible for their maintenance. The General Conditions of Contract for goods and ancillary services is required as part of the bidding documents. Treasury Regulations require that bid documentation is in accordance with the instructions of National Treasury or the prescripts of the CIDB in the case of a bid relating to the construction industry. There is no comprehensive, up-to-date procurement manual detailing all procedures for the correct implementation of procurement regulations and law.

- **Gaps**

Substantive gaps

Regulations: There is no clear, comprehensive and consolidated set of regulations and documents issued by NT/OCPO and CIDB available in a single accessible place. This is likely to hinder stakeholders' understanding of the system and the application of the legal framework in practice.

This gap is assigned a red flag because it obstructs clear understanding of the procurement system and thus is likely to impact on multiple aspects of the operation of the system in practice.

Standard contract conditions: The General Conditions of Contract (GCC) for goods and services published by NT/OCPO is not well suited for purchase of stand-alone services or consultancy services. GCC has not been updated for some years. CIDB contracts do not appear to have been updated for some years.

User's guide or manual for organs of state: There is no comprehensive, up-to-date procurement manual detailing all procedures for the correct implementation of procurement regulations and law. Lack of a comprehensive user manual is likely to reduce consistency of application within the procurement system.



Minor gaps

Responsibility for maintenance of the manual: Responsibility for preparation and maintenance of a PFMA regime manual is not specifically referenced.

- **Recommendations**

Substantive gaps

Regulations: Consider practical measures (1) to ensure that there is a single point of access to a comprehensive and consolidated set of regulations and documents issued by NT/OCPO and CIDB; and (2) to better present the current documents in a more user-friendly and consolidated manner, for example, by use of an interactive user manual linking explanations of procurement activities to the relevant instructions. In the meantime, implement measures to ensure that content of information available through OCPO dashboard is fully up-to-date.

Standard contract conditions/contracts: Review the General Conditions of Contract (GCC) published by NT/OCPO and revise or update as necessary to ensure that it is fit for purpose. Prepare additional standard contract conditions. At a minimum there should be standard contract conditions tailored for purchase of stand-alone services and for consultancy services. Review standard contracts published by CIDB and revise or update as necessary to ensure that they are fit for purpose.

User's guide or manual for organs of state: Prepare a comprehensive manual for use by procurement staff that incorporates law, policy and procedures, and helps turn policy into practice and enhance consistency within the procurement system. This should both explain, in an easily understandable way, the legal and regulatory requirements together with information on how these requirements are implemented in practice, including reference to relevant standard documents and templates.

Minor gaps

Responsibility for maintenance of the manual: To improve clarity, include specific reference in the legal framework to where responsibility lies for maintenance and updating the user's guide or manual.

Summary of substantive gaps and recommendations of Indicator 2

	Substantive gap	Risk classification and red flags	Recommendations
2(a)	Regulations not consolidated or comprehensive	High- red flag	Consider practical measures (1) to ensure that there is a single point of access to a comprehensive and consolidated set of regulations and documents issued by NT/OCPO and CIDB; and (2) to better present the current documents in a



			more user-friendly and consolidated manner, for example, by use of an interactive user manual linking explanations of procurement activities to the relevant instructions. In the meantime, implement measures to ensure that content of information available through OCPO dashboard is fully up-to-date.
2(c)	General Contract Conditions not suitable for stand-alone services or consultancy services. GCC/Contracts issued by NT/OCPO and CIDB not updated for some years	Medium	Review the General Conditions of Contract (GCC) published by NT/OCPO and revise or update as necessary to ensure it is fit for purpose. Prepare additional standard contract conditions. At a minimum, there should be standard contract conditions tailored for purchase of stand-alone services and for consultancy services. Review standard contracts published by CIDB and revise or update as necessary to ensure that they are fit for purpose.
2(d)	No comprehensive user's guide or manual for organs of state	Medium	Prepare a comprehensive manual for use by procurement staff that incorporates law, policy and procedures, and helps turn policy into practice and enhance consistency within the procurement system. This should both explain, in an easily understandable way, the legal and regulatory requirements together with information on how these requirements are



			implemented in practice, including reference to relevant standard documents and templates.
--	--	--	--

Indicator 3. The legal and policy frameworks support the sustainable development of the country and the implementation of international obligations

This indicator assesses whether horizontal policy objectives such as goals aiming at increased sustainability, support for certain groups in society, etc., and obligations deriving from international agreements are consistently and coherently reflected in the legal framework, i.e. whether the legal framework is coherent with the higher policy objectives of the country.

- **Synthesis of the indicator**

There is significant emphasis in South Africa on the use of procurement to promote economic and social benefits, improvements, and growth. There is, however, no single policy or strategy or related implementation plan in place to draw together and address all aspects of sustainable public procurement – economic, social and environmental – as a coherent whole. There is a notable lack of provisions allowing for environmental factors, in particular, to be incorporated at all stages of the procurement cycle. Moving forward, it is recommended that a sustainable public procurement policy/strategy and implementation plan be prepared, incorporating all aspects of sustainability at all stages of the procurement cycle, together with legal provisions for well-balanced application of all aspects of sustainability. It is recommended that a critical review of the effectiveness of current measures for empowerment, and economic and industrial growth through public procurement is included as part of the SPP strategy development process.

- **Findings**

There is significant emphasis in South Africa on the use of procurement to promote economic and social benefits, improvements and growth, in particular through the B-BBEEA and PPPFA frameworks. This includes preference provisions, and Industrial Development through Designated Sectors, National Industrial Participation Programme and related policies. There is, however, no single policy or strategy or related implementation plan in place to draw together and address all aspects of sustainable public procurement from economic, social and environmental perspectives as a coherent whole. There is a notable lack of provisions allowing for environmental factors to be incorporated at all stages of the procurement cycle.

South Africa is a World Trade Organization (WTO) member but not a signatory to the World Trade Organization Agreement on Government Procurement (GPA). It has concluded a number of free trade agreements but they do not include detailed public procurement specific chapters or annexes to be analysed for assessment of sub-indicator 3(b).

- **Gaps**



Sustainable public procurement policy/strategy and implementation plan: There is no single policy or strategy or related implementation plan in place to draw together and address all aspects of sustainable public procurement – economic, social and environmental – as a coherent whole. There is a notable lack of provisions allowing for environmental factors to be incorporated at all stages of the procurement cycle.

This gap is assigned a red flag because preparation and agreement on a sustainable public procurement (SPP) policy/strategy and implementation plan applying to all organs of state and aligning with broader national policy objectives will require input from a number of institutions.

Incorporation of all aspects of sustainability at all stages of the procurement cycle: Provisions in the PFMA regime and CIDB regime allowing for sustainability to be incorporated into all stages of the procurement cycle are limited and the main focus is on social and economic issues. There is the possibility to use “functionality” evaluation criteria, which may include criteria relating to SPP, but the way in which functional criteria are currently assessed is unlikely to deliver significant benefits from an SPP perspective. There is no detailed guidance on when and how to incorporate sustainability at all stages of the procurement cycle.

This gap is assigned a red flag because of the system-wide impact of the lack of sustainability provisions. This will hinder achievement of broader sustainability objectives and requires inter-institutional co-operation to review, identify and implement required measures in a consistent manner for all procurement in line with proposed SPP strategy and implementation plan.

Legal provisions for well-balanced application of all aspects of sustainability: Provisions for a well-balanced application of all types of sustainability criteria (economic, social and environmental) throughout the procurement cycle are not evident. There is no comprehensive supporting guidance on how to apply sustainability criteria (economic, social and environmental) to ensure value for money.

This gap is assigned a red flag because of the system-wide impact of the lack of provisions, which will hinder broader sustainability objectives. This requires inter-institutional co-operation to review, identify, and implement required measures in a consistent manner for all procurement in line with proposed SPP strategy and implementation plan.

- **Recommendations**

Sustainable public procurement policy/strategy and implementation plan, incorporation of all aspects of sustainability at all stages of the procurement cycle and legal provisions for well-balanced application of all aspects of sustainability (combined recommendations): Develop a single, consolidated, sustainable public procurement policy/strategy to draw together and implement all elements of SPP – economic, environmental (including climate considerations) and social (including gender equality and aligned with the B-BBEEA and PPPFA frameworks). The SPP should support broader national policy objectives and reflect national priorities.

It is recommended that a critical review of the effectiveness of current measures for empowerment, and economic and industrial growth through public procurement be included as part of the SPP strategy development process. This should include assessment of whether the range of current measures, including local preference (local production and local content), enhance or hinder domestic and international competition, achieve stated aims and contribute effectively to Sustainable Development Goals.



The SPP strategy should be supported by a clear implementation plan/roadmap to cover introduction of systems and tools to operationalise, facilitate and monitor the application of SPP in priority areas, in particular. It should also identify and provide for any amendments necessary to the legal/regulatory framework to allow for sustainability considerations to be fully incorporated at all stages of the procurement cycle. This would help ensure a well-balanced application of sustainability criteria from planning through to contract delivery and monitoring. SPP requirements embedded in the legal and regulatory framework should be reflected in model procurement documents, contract conditions and in supporting practical guidelines for implementation and related training.

Summary of substantive gaps and recommendations of Indicator 3

	Substantive gap	Risk classification and red flags	Recommendations
3(a)	No single sustainable public procurement policy/strategy or implementation plan	High, red flag	<p>Combined recommendations for Indicator 3</p> <p>Develop a single, consolidated, sustainable public procurement (SPP) policy/strategy to draw together and implement all elements of SPP – economic, environmental (including climate considerations) and social (including gender equality and aligned with the B-BBEEA and PPPFA frameworks). The SPP should support broader national policy objectives and reflect national priorities. It is recommended that a critical review of the effectiveness of current measures for empowerment, and economic and industrial growth through public procurement is included as part of the SPP strategy development process. This should include assessment of whether the range of current measures, including local preference</p>



			<p>(local production and local content), enhance or hinder domestic and international competition, achieve stated aims and contribute effectively to Sustainable Development Goals. The SPP Strategy should be supported by a clear implementation plan/roadmap to cover introduction of systems and tools to operationalise, facilitate and monitor the application of SPP in priority areas, in particular. It should also identify and provide for any amendments necessary to the legal/regulatory framework to allow for sustainability considerations to be fully incorporated at all stages of the procurement cycle, ensuring a well-balanced application of sustainability criteria from planning through to contract delivery and monitoring. SPP requirements embedded in the legal and regulatory framework should be reflected in model procurement documents, contract conditions and in supporting practical guidelines for implementation and related training.</p>
3(a)	Lack of incorporation of all aspects of sustainability at all stages of the procurement cycle	High, red flag	See combined recommendations above



3(a)	Lack of legal provisions for well-balanced application of all aspects of sustainability	High, red flag	See combined recommendations above
------	---	----------------	------------------------------------

3.2. Pillar II - Institutional framework and management capacity

Pillar II assesses how the procurement system defined by the legal and regulatory framework in a country is operating in practice through the institutions and management systems that make up overall governance in its public sector.

Pillar II evaluates how effective the procurement system is in discharging the obligations prescribed in the law without gaps or overlaps. It assesses: i) whether it is adequately linked with the country’s public finance management system; ii) whether institutions are in place in charge of necessary functions; and iii) whether the managerial and technical capacities are adequate to undertake efficient and transparent public procurement processes.

Indicator 4. The public procurement system is mainstreamed and well-integrated with the public financial management system

This indicator focuses on how well-integrated the procurement system is with the public financial management system, given the direct interaction between procurement and financial management, from budget preparation to planning treasury operations for payments.

- **Synthesis of the indicator**

South Africa partially complies with this indicator. Procurement plans are linked to the budget cycle and procurement expenditures should be covered by sufficient cash flow. Through its online budget platform, detailed information on budget execution is provided for major capital projects. However, South Africa recently loosened rules around availability of funds before issuing competitive procurement procedures. This introduces a significant risk that procurement procedures carried out will not translate into a signed contract because of the lack of funding. This could severely impact the attractiveness of competitive tenders in South Africa since it deprives potential bidders of budget certainty. It could also represent a waste of resources, including financial resources, both for the public and the private sector.

Putting additional financial risks on suppliers, the extent of invoices not paid within the prescribed period remains unknown. However, extrapolating from current estimates, the total amount of invoices not paid on time for entities subject to reporting obligations could be as high as 18,5% of the total amount of invoices. It also translates into interest and penalties amounting to ZAR 0.59 billion in audited institutions in 2021-2022, according to the report of the Auditor General.

- **Findings**

Procurement planning and the budget cycle (sub-indicator 4 (a))



The Medium-Term Expenditure Framework (MTEF) lays down the general pluri-annual budgeting framework applicable in South Africa. It does not mention procurement specifically, nor does the PFMA. However, Section 38 and Section 52(b) of the PFMA mention that the accounting officer/accounting authority of a procuring institution must submit to the relevant treasury a strategic or corporate plan in the prescribed format covering the affairs of that institution for the following three or five financial years. For example, Eskom's corporate plan FY24-FY28 identifies procurement as being essential to implement the company's budget priorities.

With respect to budget formulation and multi-year planning, specific references to procurement activities when developing budgets could only be found in infrastructure projects. Indeed, for large infrastructure projects (in excess of ZAR 1 billion for individual projects and ZAR 3 billion for programmes), dedicated budget preparation guidelines have been developed. The latest *Guidelines for the Preparation of Budget Submissions for Large Strategic Infrastructure Projects*³³ was published on 26 May 2023 and explicitly mentions that submissions must include a procurement and implementation plan.

More broadly, the SCM Instruction 2 of 2016-2017 mandates public entities listed in Schedule 2 to prepare, update and report on annual procurement plans. These procurement plans must be submitted to NT by 31 March every year and include purchases of over ZAR 500 000. Paragraph 3.1.2 of the SCM Instruction 2 of 2016-2017 mentions that public institutions must align the procurement plan with the institution's budget and annual performance plan for a specific financial year. Further, paragraph 8.4 (b) of Instruction 3 of 2021-2022³⁴ now details that accounting officers "must ensure that cash flow is sufficient to meet contractual obligations".

Section 16A.11 of the Treasury Regulations indicates that the accounting officer or the accounting authority must submit to the relevant treasury supply chain management information. Apart from this section, the PFMA is silent on reporting procurement information as part of the budget execution.

However, Instruction 2 of 2016-2017 stipulates in its paragraph 4 that the accounting officer/authority of public institutions must report quarterly on procurement plans. This includes reporting on the actual acquisition concluded over the quarter (paragraph 4.1.2.1). Nonetheless, discussions with stakeholders highlighted that the National Treasury is not regularly and systematically kept abreast of the implementation of procurement plans and this notably arises when organs of state are using deviations from the standard open competitive bidding procedure.

Besides regulatory requirements to report on budget execution, several fora provide opportunities to discuss these issues. The provincial visits of the National Treasury, organised once a year, offer the possibility to discuss with provincial treasuries budget execution. However, similar visits do not exist at the national level with departments. On top of these visits, the Standing Committee on Public Accounts (SCOPA) provides an opportunity to discuss overall procurement expenditures of the organs of state and these discussions happen frequently.

³³ [Microsoft Word - 2023 LargeInfraBudgetGuideline - NTDS \(003\) \(treasury.gov.za\)](#)

³⁴

https://static.pmg.org.za/PFMA_SCM_Instruction_No_03_Of_2021_22_Enhancing_Compliance_Transparency_and_Accountability_In_SCM.pdf



For major capital projects, the online open budget platform Vulekamali³⁵ provides detailed information on infrastructure projects across the country. In addition, the National Treasury developed a circular to implement a standardised reporting approach to provincial infrastructure projects. The National Treasury extended the scope of the infrastructure reporting model from April 2021 to include national government. The model aims to enhance transparency and uniformity on infrastructure budget analysis and spending reviews across the spheres of government. To improve consolidation of reporting on project details for national government, infrastructure data was collated. The National Treasury committed to start in-depth monitoring and analysis of capital expenditure for national government from 1 April 2023. At the time of writing, the assessors could not access monitoring reports or analyses of capital expenditure.

Financial procedures and the procurement cycle (sub-indicator 4 (b))

Relationships between budget availability and issuance of procurement processes seem to have been exposed to recent tensions. Indeed, NT SCM Instruction Note 3 2016-2017³⁶ mentioned in its paragraph 11 that “an Accounting Officer/Accounting Authority must not advertise a bid for which no provision has been made in the budget”. However, NT SCM Instruction Note 3 2021-2022³⁷ repealed the previous instruction and now details that accounting officers “may not invite price quotation or bids if no or insufficient provision is made in the budget of the institution”.

While the latest Instruction Note expanded the scope of procurement procedures subject to considerations on budget availability to include price quotation and the notion of budget availability to include insufficient budget provision, it now only suggests accounting authorities/officers to consider this provision. Ultimately, the decision to comply with such provision is now left to individual procuring institutions and their individual supply chain management framework.

In infrastructure projects, requirements to ensure budget availability before commencing a procurement process are more clearly spelled out. Indeed, paragraph 16.4.2 of the PFMA, which deals with the establishment of PPPs, specifies that an institution may not proceed with the procurement phase of a PPP without the prior written approval of the relevant treasury for the feasibility study.

With regards to payments to suppliers, the PFMA in its Section 38(1)(f)] imposes on accounting officers to settle all contractual obligations and pay all money owing, including intergovernmental claims, within the prescribed period. Treasury Regulation 8.2.3 provides that unless determined otherwise in a contract or other agreement, all payments due to creditors must be settled within 30 days from receipt of an invoice.

³⁵ <https://vulekamali.gov.za/>

³⁶

<https://www.ectreasury.gov.za/modules/content/files/Documents/Treasury%20Circulars/2016/National%20Treasury%20SCM%20Instruction%20No%203%20of%202016-2017-%20Prevention%20and%20combating%20abuse%20in%20SCM.pdf>

³⁷

https://static.pmg.org.za/PFMA_SCM_Instruction_No_03_Of_2021_22_Enhancing_Compliance_Transparency_and_Accountability_In_SCM.pdf



The “Annual Report on Non-Compliance with Payments of Supplier’s Invoices within 30 days” for the fiscal year 2021-2022³⁸ shows that invoices not paid within the prescribed timeframe in rand value amount to ZAR 39.8 billion. This corresponds to 469 653 invoices. However, the share these invoices represents compared to the total number and amount of invoices remains unknown. Provincial departments account for almost 90% of invoices not paid within 30 days in rand value and for 70% of the number of invoices.

- **Gaps**

Lacking certification of availability of funds before issuing tenders: The NT Instruction Note 3 of 2021-2022 is a step backwards from the previous NT SCM Instruction Note 3 of 2016-2017 in terms of ensuring budget availability before issuing competitive tenders. With the former instruction repealing the latter, it now seems mechanisms to ensure budget availability is left to the supply chain management framework of each organ of state.

Indeed, the Framework for Supply Chain Management (2003) adopted by the National Treasury stipulates that the accounting officer or accounting authority of an institution to which these regulations apply must develop and implement in that institution an effective and efficient supply chain management system. The supply chain management system must provide, at least, a policy covering demand management (paragraph 3.2(c)). Therefore, supply chain management policies of each institution to which this Framework applies need to cover this phase of the procurement cycle. However, the Framework for Supply Chain Management is silent on the minimum elements which should be integrated, including ensuring budget availability before issuing a competitive bidding process.

This could severely impact the attractiveness of competitive tenders in South Africa since it deprives potential bidders of budget certainty. In addition, it potentially represents a waste of time and resources for the public sector and the private market should tenders be cancelled due to the lack of availability of funds.

Limited reporting on budget execution and procurement plans: While accounting officers must report quarterly on procurement plans (paragraph 4.1.2.1), discussions with stakeholders highlighted that the National Treasury is not systematically kept abreast of the implementation of procurement plans and this notably arises when organs of state are using deviations from the standard open competitive bidding procedure.

Late payments: While organs of state are required to report to provincial treasuries and the National Treasury on the number of invoices which are not paid within the prescribed timeframe, the share it represents compared to the total number and amount of invoices remains unknown. Indeed, the National Treasury has no means to record the total number and total amount of invoices processed by organs of state in a fiscal year. This implies that the minimum quantitative indicator (invoices for procurement of goods, works and services paid on time in % of total number of invoices) provided for in the MAPS methodology cannot be assessed.

In addition, at the time of the assessment, reporting requirements only extended to national and provincial departments. These requirements do not apply to constitutional institutions and public entities, the latter representing a significant share of public procurement expenditure in the country. If

³⁸ [ANNUAL REPORT ON NON-COMPLIANCE WITH PAYMENTS OF SUPPLIER’S INVOICES WITHIN 30 DAYS – FY2021/22 \(treasury.gov.za\)](https://www.treasury.gov.za/annual-reports/2021-2022/annual-report-on-non-compliance-with-payments-of-supplier-s-invoices-within-30-days-fy2021-22)



extrapolated from the latest estimated breakdown by type of organs of state included in the 2018 report on national and provincial procurement spend, one could estimate that national and provincial institutions currently subject to reporting requirements typically represent around 23.5% of total procurement expenditure (i.e. ZAR 220 billion in FY16/17 out of a total of ZAR 938 billion). Using the estimated total procurement expenditure provided for in the Concept note, the estimated total procurement expenditure for these institutions for FY 21/22 should be around ZAR 218 billion (i.e. 23.5% of ZAR 931.5 billion in FY 21/22). Taking into account that for the same year the total amount of invoices paid after 30 days was ZAR 39.8 billion, around 18.5% of invoices in rand value are not paid within the prescribed timeframe.

Further, the average payment timeframe for those invoices which are not paid within 30 days is not disclosed, preventing understanding of how serious the problem of late payment to suppliers is.

Further, delayed payments incur interest rates, which put an additional strain on limited public budgets. The 2021-2022 report of the Auditor General of South Africa³⁹ notes that: “It is common for government to have to pay interest incurred due to late payments, such as when auditees do not pay their creditors within 30 days... Interest and penalties were the reasons for R0,59 billion of the fruitless and wasteful expenditure of high impact auditees”.

These gaps raise a red flag considering estimates around the number of invoices not paid within the prescribed timeframe and their financial impact on limited public finances. This situation defeats the overarching principle of fairness of the South African public procurement system.

- **Recommendations**

Increase integration of procurement plans in budget planning and appropriation to strengthen the efficiency of the public procurement system: While general provisions exist to require organs of state to devise corporate plans, including procurement expenditures, which align with the Medium-Term Expenditure Framework, such plans do not provide detailed information about future procurement expenditures. Specific provisions linking procurement plans to budget planning and appropriation only exist for major capital projects.

South Africa could consider strengthening the alignment between budget allocation and procurement expenditures to reinforce certainty around budget availability when organs of state are conducting procurement procedures, thereby supporting competition in open bidding procedures.

Harmonise the reporting on the implementation of procurement plans including processes that are not subject to open competitive bidding: Currently, accounting authorities from public institutions are required to prepare and report quarterly on the implementation of their procurement plans. These plans include purchases of over ZAR 500 000. On the other hand, SCM Instruction Note 3 of 2021-2022 requires organs of state to report to the relevant Treasury and AGSA on procurement “by other means” (i.e. other than open competitive bidding) within 14 days after its finalisation. Without taking into account the weak enforcement of the latter Instruction⁴⁰, this means that parallel reporting occurs, with different

³⁹ <https://pfma-2021-2022.agsareports.co.za/wp-content/uploads/2022/12/22253B-2021-22-PFMA-General-Report-interactive-V3.pdf>

⁴⁰ [National Treasury SCM Instruction No. 03 of 2021/22 & implementation of Integrated Financial Management System; with Minister | PMG](#)



timeframes. And, procurement “by other means” under the prescribed value is not included in reports on the implementation of procurement plans.

Harmonising practices to ensure budget availability before issuing competitive bidding processes:

Current Instruction Note 3 of 2021-2022⁴¹ provides for additional discretionary power to organs of state to regulate in their supply chain management frameworks requirements on budget availability before issuing competitive bidding processes. This, in turn, increases uncertainty for bidders who may, as a result, refrain from participating in tenders to avoid investing resources in responding while they are not certain a contract will be signed due to a lack of budget availability.

The National Treasury could reintroduce a formal obligation to ensure sufficient budget availability before issuing tenders or price quotation, inspired by provisions existing for major capital projects.

Strengthen timely payments to suppliers to avoid putting further strains on public budgets and increase SME’s appetite for participating in competitive bidding:

Delayed payments incur interest rates, which put an additional strain on limited public budgets. The 2021-2022 report of the Auditor General of South Africa⁴² notes that: “It is common for government to have to pay interest incurred due to late payments, such as when auditees do not pay their creditors within 30 days”.

In addition to adding unnecessary financial pressure to already constrained public funds, late payment can disproportionately affect companies. Small and medium-sized enterprises might face difficulties missing cash flow from late payments and can therefore be discouraged from participating in future public procurements.

National Treasury should further reinforce its oversight around timely payments within the prescribed timelines by collecting information on the total number of and total amount of invoices processed by organs of state and by expanding reporting requirements to large organs of state such as public entities. Doing so would help understanding of how systemic the challenges around late payments are and allow to quantitatively define how much they impact public finances.

Summary of substantive gaps and recommendations of Indicator 4

	Substantive gap	Risk classification and red flags	Recommendations
4 (a)	Limited reporting on budget execution and the implementation of procurement plans	Medium	Strengthening reporting on budget execution, including on procurement expenditures beyond infrastructure projects and including procurement through other means, could reinforce

⁴¹

https://static.pmg.org.za/PFMA_SCM_Instruction_No_03_Of_2021_22_Enhancing_Compliance_Transparency_and_Accountability_In_SCM.pdf

⁴² <https://pfma-2021-2022.agsareports.co.za/wp-content/uploads/2022/12/22253B-2021-22-PFMA-General-Report-interactive-V3.pdf>



			transparency and accountability of organs of state.
4 (b)	Uncertainty about budget availability when issuing a competitive bidding process	High	National Treasury could reintroduce a formal obligation to ensure sufficient budget availability before issuing tenders or price quotation, inspired by provisions existing for major capital projects.
4 (b)	Late payments to suppliers	High, red flag	National Treasury should further reinforce its oversight around timely payments within the prescribed timelines by collecting information on the total number of and total amount of invoices processed by organs of state and by expanding reporting requirements to large organs of state such as public entities. A closer monitoring of late payments could help understanding of the magnitude of the issue and how much it puts additional financial pressure on public budgets.

Indicator 5. The country has an institution in charge of the normative/ regulatory function

This indicator refers to the normative/regulatory function in the public sector and its proper discharge and co-ordination. The assessment of the indicator focuses on the existence, independence and effectiveness of these functions and the degree of co-ordination between responsible organisations. Depending on the institutional set-up chosen by a country, one institution may be in charge of all normative and regulatory functions. In other contexts, key functions may have been assigned to several agencies, e.g. one institution might be responsible for policy, while another might be in charge of training or statistics. As a general rule, the normative/regulatory function should be clearly assigned, without gaps and overlaps. Too much fragmentation should be avoided and the function should be performed as a well-co-ordinated joint effort.



- **Synthesis of the indicator**

South Africa displays several significant gaps with this indicator. While National Treasury retains a constitutional oversight on the procurement system, the existence of many institutions with overlapping mandates and roles introduces a lack of clarity and diminishes the authoritative standing of some institutions.

The legal and regulatory body of norms applying to public procurement is extensive, complex and fragmented. The multitude of institutions having a policy or regulatory function presents significant challenges in identifying and understanding the procurement system as a coherent whole. South Africa should completely overhaul this complexity.

- **Findings**

Status and legal basis of the normative/regulatory institution function (sub-indicator 5(a))

Section 217 of the South African 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 by following a system which is fair, equitable, transparent, competitive and cost-effective.” Expanding on this general statement, the PFMA further details in its Section 76 (4) (c) that: “The National Treasury may make regulations or issue instructions applicable to all institutions to which this Act applies concerning the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective”.

Section 38(1)(a) (for departments and constitutional institutions) and Section 51(1)(a) (for public entities listed in schedules 2 and 3) of the PFMA state that an accounting officer/authority must ensure that they have and maintain an appropriate procurement and provisioning system that is fair, equitable, transparent, competitive and cost-effective.

Created in 2013, the Office of the Chief Procurement Officer (OCPO) within the National Treasury is responsible for the public procurement regulatory framework and policies in South Africa. It reports directly to the Director General of the National Treasury. The OCPO, working with all government institutions, was established to modernise and oversee the South African public-sector supply chain management (SCM) system to ensure that the procurement of goods, services and construction works are fair, equitable, transparent, competitive and cost-effective, in line with the Constitution and all relevant legislation.

However, above and beyond National Treasury and the OCPO, a number of other institutions develop policies and regulations that apply to procurement. For example, SITA also develops Minimum Interoperability Standards applicable to information and communication technology (ICT) procurement. The involvement of other institutions in the regulatory framework applicable to the procurement of goods, services or public works could be found in the preferential procurement system.

The 2017 Preferential Procurement Regulations, designed by the National Treasury, stipulated that the DTIC be able to designate specific industries of critical and/or strategic importance for tenders in which it is indicated that only locally manufactured products with a prescribed minimum threshold for local content will be considered. However, the 2022 Preferential Procurement Regulations, which repealed the 2017 Regulations, do not assign a specific role to DTIC to define designated sectors.



Beyond the procurement of goods and services, the Construction Industry Development Board, a Schedule 3A public entity of the Department of Public Works and Infrastructure (DPWI), is responsible for designing standards for uniformity in construction procurement through prescripts. These prescripts are applicable to all construction-related procurement, including associated services.

Responsibilities of the normative/regulatory function (sub-indicator 5 (b))

The responsibilities listed in the MAPS methodology are assigned as follows:

Function	Institution / Mandate
Providing advice to procuring entities	<p>The OCPO within National Treasury developed several guidelines to support procuring institutions, mostly setting up supply chain management policies. The <i>General Procurement Guidelines</i>⁴³, the <i>2004 Supply Chain Management: A guide for accounting officers/authorities</i>⁴⁴ or, more recently, the <i>Implementation Guide on Preferential Procurement Regulations, 2022</i>⁴⁵ are all documents that further detail how accounting officers/authorities are supposed to design their supply chain management policies. For public works, the Construction Industry Development Board (CIDB) developed construction standards which can be used by procuring institutions when outsourcing construction services. Implementing agents such as the South African Development Bank or the Department for Public Works and Infrastructure can support procuring institutions which are outsourcing infrastructure projects. They can either procure on behalf of these institutions or provide ad-hoc support.</p> <p>SITA, part of the Department of Public Service and Administration, also provides end-to-end procurement services for ICT to public agencies to ensure cost-effective procurement of ICT products and services in a manner that is consistent with government procurement prescripts (including the State Information Technology Agency Act 1998: Regulations), and promote the South African ICT industry, particularly in the context of the Broad-Based Black Economic Empowerment policy.</p> <p>The Department of Trade, Industry and Commerce (DTIC) provides guidance to ensure provisions of the B-BBEE Act are respected and fully implemented.</p> <p>More broadly, the Government Technical Advisory Centre, established in terms of the Public Service Act (1994) as a</p>

⁴³

http://ocpo.treasury.gov.za/Resource_Centre/Legislation/GENERAL%20PROCUREMENT%20GUIDELINES%20-%20202.pdf

⁴⁴ http://ocpo.treasury.gov.za/Resource_Centre/Legislation/SCM%20Jan900-Guidelines.pdf

⁴⁵ [IMPLEMENTATION GUIDE PPR 2022 - MARCH 2023 VERSION 1.pdf \(treasury.gov.za\)](http://ocpo.treasury.gov.za/Resource_Centre/Legislation/IMPLEMENTATION%20GUIDE%20PPR%202022%20-%20MARCH%202023%20VERSION%201.pdf)



	<p>government component, assists organs of state to build their capacity for efficient, effective and transparent financial management, including specialised procurement support for high-impact government initiatives.</p>
Drafting procurement policies	<p>National Treasury through OCPO is responsible for drafting instructions, circulars and guidelines to support the implementation of Section 217 of the Constitution, the PFMA and the PPPFA.</p> <p>The DTIC is responsible for drafting policies relating to the implementation of the B-BBEE Act.</p> <p>The CIDB is responsible for drafting policies and guidelines relating to construction procurement.</p> <p>SITA is responsible for drafting policies and guidelines relating to ICT procurement.</p>
Proposing changes/drafting amendments to the legal and regulatory framework	<p>National Treasury through OCPO is responsible for proposing changes and drafting amendments to the legal and regulatory procurement framework.</p> <p>The DTIC is responsible for proposing changes and drafting amendments relating to the B-BBEE Act.</p> <p>The CIDB is responsible for proposing changes and drafting amendments to the Construction Act.</p> <p>SITA is responsible for proposing changes and drafting amendments to the SITA Act.</p>
Monitoring public procurement	<p>OCPO's unit, "SCM Governance, Monitoring and Compliance", manages the SCM governance framework including its design, development and implementation, monitoring and evaluation of compliance, and management of non-compliance in all three spheres of government. This mandate is delegated to Provincial Treasuries for Provincial Departments, Schedule 3C public entities and municipalities. However, significant responsibility is left to the accounting officer/authority in each organ of state to monitor public procurement practices.</p> <p>The CIDB monitors compliance with its prescripts and can fine public entities in case of breach.</p> <p>The DTIC monitors compliance with the B-BBEE Act.</p>
Providing procurement information	<p>OCPO through the eTenders platform and the Central Supplier Database provides procurement information.</p> <p>The CIDB manages the Register of Contractors for construction procurement.</p>
Managing statistical databases	<p>OCPO, through its SCM-ICT unit, manages statistical information on procurement and publishes available data on data.eTenders.gov.za</p>
Preparing reports on procurement to other parts of government	<p>National Treasury produces reports on procurement by national and provincial government. However, the last report is five-years-old and does not seem that reports have a set frequency (i.e. monthly, annual).</p>



	<p>NT and OCPO also prepare reports related to procurement for the Standing Committee on Public Accounts and the Standing Committee on Appropriations.</p>
<p>Developing and supporting implementation of initiatives for improvements of the public procurement system</p>	<p>The PFMA in its Section 76(4)(c) stipulates that: “The National Treasury may make regulations or issue instructions applicable to all institutions to which this Act applies concerning the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective”. To support the implementation of this mandate, the OCPO is the custodian of public procurement modernisation and oversees this role for the South African government. The CIDB is responsible for designing and implementing improvements to the construction procurement framework. The DTIC is responsible for the implementation of improvements/changes to the B-BBEE Act.</p>
<p>Providing tools and documents, including integrity training programmes, to support training and capacity development of the staff responsible for implementing procurement</p>	<p>The Capacity Building unit within the Office of the Accountant General (OAG) in the National Treasury provides training solutions and support to requesting departments. The Capacity Building unit has developed a strategy for public financial management⁴⁶ which covers elements of supply chain management. Training is carried out by the National School of Government (NSG) and private training providers accredited by the OAG. Further, through bilateral engagements with individual clients, the CIDB provides support, including training and capacitation.</p>
<p>Supporting the professionalisation of the procurement function (e.g. development of role descriptions, competency profiles, and accreditation and certification schemes for the profession)</p>	<p>The OAG has developed a technical competency dictionary on supply chain management⁴⁷ as part of the broader competency framework for financial management, which outlines various proficiency levels in procurement competencies and maps them against typical roles in the supply chain management function. On the other hand, the OCPO has established an SCM Interim Council to professionalise SCM discipline in the South Africa. Yet, the SCM Council at the time of the assessment is still not fully functional. There is no certification of SCM professionals.</p>

46

<https://oag.treasury.gov.za/Capacity%20Building%20Directorates1/Capacity%20Development%20Strategy.pdf>

47

<https://oag.treasury.gov.za/Publications/18.%20Competency%20Framework%20for%20Public%20Financial%20Management/%28New%29%20Implementation%20of%20the%20Revised%20SCM%20Technical%20Competency%20Dictionary%20and%20the%20Expl%20Note/Annexure%20B%20-%20SCM%20Explatory%20Note.pdf>



Designing and managing centralised online platforms and other e-procurement systems, as appropriate.

The **OCPO** (through its ICT unit) has designed and is managing the Central Supplier Database (CSD) and the eTenders portal. These centralised online platforms cover supplier registration to participate in public tenders and announcements of tenders as well as exchange of information between organs of state and interested bidders. The rest of the procurement cycle (demand management and contract execution) is dealt with by internal systems in organs of state.

Organisation, funding, staffing, and level of independence and authority (sub-indicator 5 (c))

National Treasury, under the leadership of the Ministry of Finance, retains the overall responsibility to “make regulations or issue instructions applicable to all institutions to which this Act applies concerning... the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective”, according to Section 76 (4) (c) of the PFMA.

However, the operational arm of the Treasury is the OCPO, which should ensure that the system for procuring goods, services and construction works is conducted in a fair, equitable, transparent, competitive and cost-effective way, in line with the Constitution and all relevant legislation. The OCPO is placed in the National Treasury directly under the Director General. The Chief Procurement Officer is appointed by the Minister of Finance upon Cabinet concurrence. Nevertheless, the Chief Procurement Officer can be revoked by the Director General of National Treasury.

The OCPO is financed by the national budget. In 2022-2023, its annual budget was ZAR 182 796 000 (approximately EUR 9.7 million) with 35% (ZAR 63 454 000) allocated to compensation of employees. Formally located in National Treasury’s Programme 5, the Office of Chief Procurement Officer had, as of 31 March 2023, 140 positions available, of which 104 were funded and 36 positions unfunded. Of the 140 approved positions, only 80 positions were filled (60 positions vacant), showing a vacancy rate of 43%⁴⁸.

Economic Classification 2022/2023	R'000								TOTAL	
	CPO	CD:TC	CD:SCM ICT	CD:PL	CD:GMC	CD:SCS	CD:SP			
Compensation of Employees	3 888	13 415	9 742	8 879	18 317	3 789	5 424	63 454	35%	
Goods & Services	110 162	1 214	2 233	582	1 644	644	860	117 339	64%	
Payment for Capital Assets	70	701	750	126	174	82	100	2 003	1%	
TOTAL	114 120	15 330	12 725	9 587	20 135	4 515	6 384	182 796	100%	

When compared to the average vacancy rate within NT, which is about 15%, this rate is almost threefold in OCPO.

The starkest illustration of this issue could be found in OCPO leadership. Indeed, the Chief Procurement Officer position was vacant for almost five years before the current Chief took office in August 2022.

The CIDB is also financed by the national budget. In 2023-2024, its total annual budget was ZAR 222 743 000 (approximately EUR 11.3 million), with ZAR 17 222 000 allocated to its programme on procurement⁴⁹.

Avoiding conflict of interest (sub-indicator 5 (d))

⁴⁸ [National Treasury Annual Report 2022-23.pdf](#)

⁴⁹ [Construction Industry Development Board, Annual performance plan 2021/2022](#)



The system in place within NT/OCPO draws on the general provisions relating to conflicts of interest. Various instructions or notes have been developed by the National Treasury that help in devising a framework for preventing abuse in supply chain management such as TR 16A 8.3 and 16A8.4. Paragraph 2 of the National Treasury Practice Note Number SCM 4 of 2003 provides a code of conduct for supply chain management practitioners that must be adhered to at all times. Paragraph 2 of the Practice Note Number SCM 4 of 2003 directly addresses conflict of interest. Sub-paragraph 2.1 states that “SCM practitioners, to the extent required by their position should declare any business, commercial and financial interests or activities undertaken for financial gain that may raise a possible conflict of interest”.

Furthermore, National Treasury issued a code of conduct for bid adjudication committees (BAC) that addresses issues of conflict of interests for BAC members. SCM Instruction 3 of 2016/17 on preventing and combating abuse in the supply chain management system in Paragraph 3.1 mandates the accounting officer/authority to establish a system that deals with the management of complaints and or allegations of abuse in the supply chain management system.

The National Treasury also developed provisions dealing exclusively with the management of conflicts of interest. It issued a practice note⁵⁰ in October 2009 that provides for guidance to accounting officers on how to prevent and manage conflict of interest. This practice note complements Treasury Regulation 16A8.4, which stipulates that if a supply chain management official or other role player, or any close family member, partner or associate of such official or other role player, has any private or business interest in any contract to be awarded, that official or other role player must disclose that interest and withdraw from participating in any manner whatsoever in the process relating to that contract.

Since conflict of interests in public procurement can also take root in the private sector, National Treasury issued a standard bidding document (SBD4) form wherein bidders are required to declare their interest and failure to do so may result in the invalidation of the bid.

Besides National Treasury, the Department of Public Service and Administration (DPSA) also issued a directive to public-service employees to disclose their financial interests and another directive specifically for senior managers and heads of departments (HODs) to disclose their financial interests. The disclosure is done by electronic means through the platform eDisclosure. Further, the Public Administration and Management Act 11 of 2014 prevents employees from conducting business with the State or to be a director of a public or private company doing business with the State.

The survey sent to the private sector included a question on the perception of existing conflict of interest in NT and OCPO. The results display a mixed picture.

⁵⁰ [TO \(treasury.gov.za\)](http://TO(treasury.gov.za))



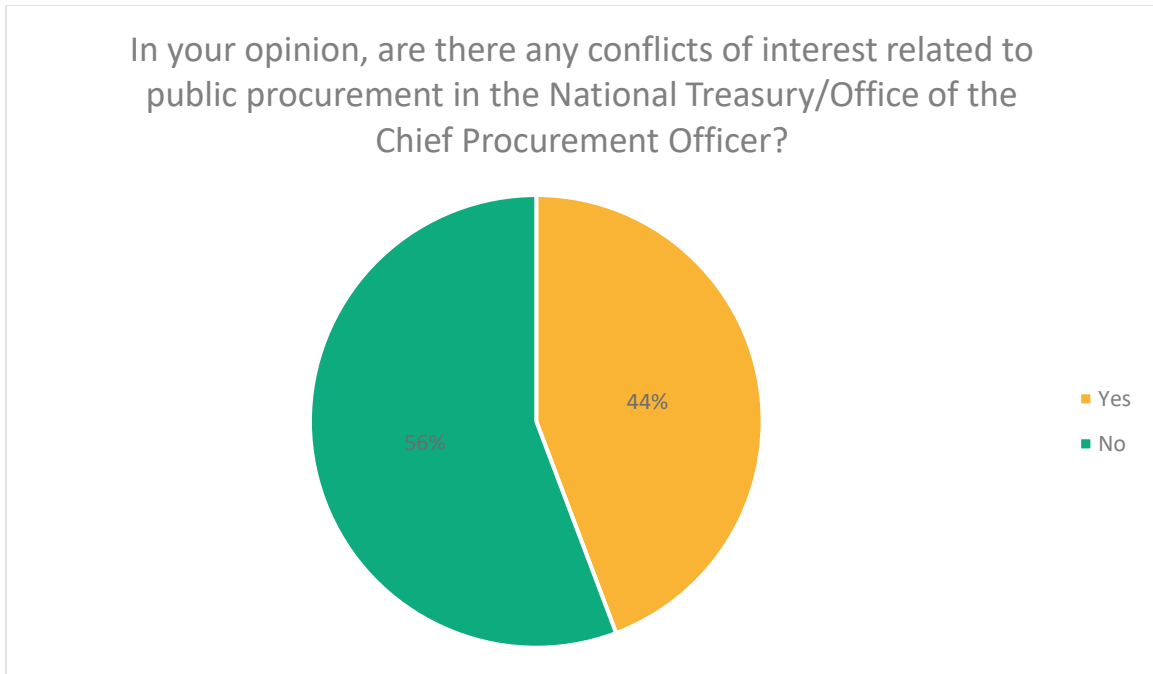


Figure 1: Perception of conflict of interest in National Treasury/Office of the Chief Procurement Officer;
Source: Private Sector Survey

Out of the 366 respondents to the survey, about 44% felt there are conflicts of interest related to public procurement in NT/OCPO.

- **Gaps**

Risk of confusion about the application of the correct normative framework: Having placed responsibilities for devising the normative framework on various institutions regarding the type of procurement carried out, this poses significant challenges for organs of state to ensure they apply the correct normative framework.

It further increases complexity for responsible institutions to ensure the various yet interconnected regulatory provisions are aligned and do not contradict each other. A clear illustration of this challenge can be found in construction procurement. For this type of procurement, overall responsibilities are assigned both to National Treasury as the overall custodian of the supply chain management system and to the CIDB, eliciting rules and prescripts for the construction industry.

Treasury Instruction No.4 of 2015/16 Standard for Infrastructure Procurement and Delivery Management (SIPDM) was developed to regulate infrastructure procurement. CIDB, being also responsible for developing construction procurement standards, developed its own regulations, such as the 2019 Standard for Uniformity. The 2015/2016 Treasury Instruction was repealed and replaced by NT SCM Instruction No.3 of 2019/2020 Framework for Infrastructure Delivery and Procurement Management (FIDPM).

Based on discussions with stakeholders it seems that one of the reasons for the repeal of the SIPDM and replacement with FIDPM was that the former contradicted the CIDB's Standard for Uniformity (SFU). The new FIDPM is now fully aligned with the CIDB SFU.



Lack of authoritative standing of the regulatory function: The OCPO, located within National Treasury, has no statutory role granted by a legislative provision. It is only in terms of the PFMA and the MFMA that the office plays an authoritative regulatory function. However, such basis does not cover all instances of procurement and the relationship between the PFMA and other regulatory instruments (e.g. SITA Act, the CIDB Act, etc.) is not clear in all instances, resulting in regulatory gaps where the OCPO cannot fulfil an authoritative standard-setting function.

Leaving aside the statutory standing of the OCPO, the institution is further exposed to the systemic and longstanding issue of inadequate resourcing. The mandate of the OCPO is extremely wide, from policy making to monitoring and managing the e-procurement system yet almost half of the positions in the Office are vacant. Severe shortages of human resources due to the unavailability of corresponding budgets have also been experienced by CIDB⁵¹.

Besides issues around the structure and human resources of the OCPO, stewardship in the South African public procurement system is also exposed to deviations from rules and standards. Indeed, the recommendations made by the OPCO and NT to organs of state are not systematically complied with by organs of state. Under the previous SCM Instruction Note 3 of 2016/2017 where the authorisation from National Treasury was mandatory, several hearings before the Standing Committee on Public Accounts (SCOPA) underlined the tendency of decisions taken by National Treasury regarding deviations or expansions not being followed by accounting Officers in organs of state.

With the new SCM Instruction Note 3 of 2021/2022, which only obliges accounting officers of organs of state to report on deviations or expansions to National Treasury, this problem now manifests in the questionably low number of deviations and expansions reported. Indeed, when comparing deviations in the fourth quarter of 2021-2022 (under the regime of Instruction Note 3 of 2016/2017) to deviations in the first quarter of 2022-2023 (under the regime of Instruction Note 3 of 2021/2022), reported deviations amounted to less than 10% of those in the previous quarter (ZAR 2 979 071 208 vs. ZAR 228 319 236)⁵².

This gap is assigned a red flag, considering the systemic nature of the issue and that inadequate staffing, including the consequences of granting additional discretionary powers to organs of state, cannot support the achievement of the objectives of the South African public procurement system.

The normative environment could be more effective at managing potential conflicts of interest: The functions and roles of NT/OCPO in the South African public procurement system are extremely varied (from policy making to the management of electronic systems and an overall oversight function). This variety of roles would warrant specific provisions to deal with conflict of interests going beyond general requirements applicable to the entire public administration.

While numerous and longstanding provisions exist to prevent and manage conflict of interests in public procurement, the AGSA found a number of cases where these provisions were not followed. In 2008, the AGSA published a thematic report on conflict of interest in which it presented conclusions from performance audits on a sample of procurement cases. It found that 32% of national departments were

⁵¹ [Construction Industry Development Board, Annual performance plan 2021/2022](#)

⁵² [Chief Procurement Officer on Requests for contract deviations and expansions in Quarter 1 2022/23 | PMG](#)



an area of concern in terms of employee-related companies or close family members-related companies doing business with his/her own department⁵³.

About 10 years after the publication of the report, the Auditor General shared its insights on this issue before the SCOPA. It noted that compared with its 2008 audit, the same situations were only found in three departments (8%) in 2015-2016. However, the Auditor General also noted a sharp increase (24% of departments concerned) of situations where companies related to employees of other organs of state were doing business with the department⁵⁴.

Therefore, the effectiveness of provisions dealing with the management of conflict of interests could be reinforced. Indeed, several dimensions could be strengthened, such as regulating post-public employment for public procurement officials or expanding the prohibition to do business with the State beyond directors of companies.

An amendment to the 2014 Public Administration and Management Bill was submitted to Parliament⁵⁵ on February 2024. It includes provisions to address post-employment restrictions by defining a 12-month “cooling off” period for employees involved in the procurement of services of service providers. It provides for a prohibition from accepting employment or appointment to the board of the service provider, the performance of remunerated work or the receipt of any other gratification. Service providers or employees who contravene this provision are guilty of an offence and on conviction would be liable to a fine of ZAR 1 million.

This gap is assigned a red flag because it cannot be addressed solely within the public procurement system.

- **Recommendations**

Ensure clarity on the applicable normative public procurement framework: The legal and regulatory body of norms applying to public procurement is extensive, complex and fragmented. The multitude of legislative provisions impacting on planning, conduct and delivery of procurement outcomes presents significant challenges in identifying and understanding the procurement system as a coherent whole. South Africa should completely overhaul this system.

Before a complete new normative public procurement framework, National Treasury and other stakeholders should consider developing practical tools, such as guides, to explain the various procurement model policies, different procurement methods, and instances in which they are used, and list relevant standards and bidding documents. Doing so would provide additional clarity to organs of state and help them navigate the public procurement framework.

Reinforce the authoritative standing of the regulatory function: The role undertaken by the OCPO cannot be effectively fulfilled if the office is not granted the necessary human resources, both in numbers and skills, and if it does not enjoy effective independence. National Treasury needs to address the severe issue of vacancy rates in the OCPO to provide the institution with the human capacity necessary to carry out its mandate. Further, National Treasury could consider granting the regulatory function the power to issue

⁵³ [Report of the Auditor General to Parliament on a performance audit of entities that are connected with government employees and doing business with national departments](#)

⁵⁴ [Conflict of Interest in Government: Auditor General briefing | PMG](#)

⁵⁵ [Public Administration Management Amendment Bill](#)



binding instructions along with developing mechanisms to ensure adequate staffing and effective independence.

Develop dedicated provisions for OCPO, expand the scope of existing conflict-of-interest provisions and leverage technology to proactively manage potential conflict-of-interest situations: Considering the role of NT and OCPO in the public procurement system (including the implementation and award of transversal terms contracts), general provisions on the management of conflict of interest would need to be reinforced. National Treasury could expand the scope of conflict-of-interest provisions. Indeed, several dimensions could be strengthened such as post-public employment for public procurement officials or expanding the prohibition to do business with the State beyond directors of companies.

In the longer run, National Treasury could leverage technological advances to proactively manage potential conflict-of-interest situations. Data from the eDisclosure platform could be matched with data from procurement and financial management databases. Here, the implementation and full roll-out of the Integrated Financial Management System (IFMS II) would provide a great opportunity to automatically check potential relationships between employees of the public sector and companies participating in procurement.

Summary of substantive gaps and recommendations of Indicator 5

	Substantive gap	Risk classification and red flags	Recommendations
5 (b)	Multiple procurement frameworks cause confusion	High	NT/OCPO should develop further guidance to help supply chain management professionals navigate the normative environment. Even if the public procurement bill reunites the three spheres of government under the same public procurement regime, it is likely that concurrent frameworks will remain based on the type of procuring institutions or categories of procurement.
5 (c)	Lack of authoritative standing of the regulatory function	High, red flag	National Treasury needs to address the severe issue of vacancy rates in the OCPO to provide the institution with the human capacity to carry out its mandate. Further, National Treasury could consider granting the regulatory function the power to issue binding



			instructions along with developing mechanisms to ensure adequate staffing and effective independence. This gap is assigned a red flag because of the systemic nature of the issue and that inadequate staffing, including consequences of granting additional discretionary powers to organs of state, cannot support the achievement of the objectives of the South African public procurement system.
5 (d)	Weak management of conflict of interest	High, red flag	This risk is assigned a red flag because it cannot be addressed solely within the public procurement system. A more proactive approach to conflict-of-interest identification would require effective participation of the DPSA in terms of sharing data relating to employees of the public sector.

Indicator 6. Procuring entities and their mandates are clearly defined

This indicator assesses: i) whether the legal and regulatory framework clearly defines the institutions that have procurement responsibilities and authorities; ii) whether there are provisions for delegating authorities to procurement staff and other government officials to exercise responsibilities in the procurement process, and iii) whether a centralised procuring entity exists.

- **Synthesis of the indicator**

South Africa largely complies with this indicator. Each organ of state is required to have a supply chain management function in place and the accounting officer/authority is accountable for any procurement expenditure.

Beyond defining the mandate and structure of individual organs of state, South Africa also developed centralised initiatives aggregating public procurement needs notably under Transversal Term Contracts, the equivalent of framework agreements. These agreements are used for a various set of general commodities. On top of these tools, South Africa also invested in shared services strategies, notably in ICT



procurement. However, major reforms of the country's digital architecture are impeded by a lack of resources within the central procuring institution.

- **Findings**

- **Procuring entities (sub-indicator 6 (a))**

Section 217 in the Constitution of South Africa states that “When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, procures goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective”. The definitions classify “organ of state” as (a) any department of state or administration in the national, provincial, or local sphere of government; or (b) any other functionary or institution (i) exercising a power or performing a function in terms of the Constitution. The Schedules of the PFMA list all the public entities. Schedule 1 lists constitutional institutions, Schedule 2 details major public entities, while Schedule 3 lists all other public entities (national public entities, state-owned companies, national government business enterprises, provincial public entities, and provincial government business enterprises).

Within each organ of state, the accounting officer or the accounting authority plays a central role. Indeed, in the PFMA, Section 38 (for departments and constitutional institutions) and Section 51 (for public entities) mention that each organ of state must have an accounting officer/authority who is responsible and should be held accountable for any expenditures relating to supply chain management in their line of responsibility. Any expenditure incurred should be subject to appropriate regulation and accounting officers'/authorities' directives and procedures.

In support to the PFMA, NT Regulation on the Framework for Supply Chain Management (TR16A) stipulates in its Section 16A4(1) that the “accounting officer or accounting authority of an institution to which these regulations apply must establish a separate supply chain management unit within the office of that institution's chief financial officer, to implement the institution's supply chain management system”.

National Treasury further published in 2004 *Supply chain management: A guide to accounting officers/ authorities*, which details how a supply chain management function should be designed within organs of state. Supply chain management units are to be created in the Chief Financial Officer structures of institutions. Therefore, according to the legislative and regulatory environment, each organ of state should be equipped with a dedicated and integrated supply chain management function covering the whole public procurement cycle.

For the related minimum quantitative indicator, the assessors can therefore conclude that 100% of organs of state have a designated, specialised procurement function.

Treasury Regulations 8.2.1 issued in terms of the PFMA indicates that an “official of an institution may not spend or commit public money except with the approval (either in writing or by duly authorised electronic means) of a properly delegated or authorised officer”⁵⁶. The level at which procurement decision making is delegated within each procuring entity is left to the SCM policy of each organ of state. However, based

⁵⁶ [Gazette Version 090301.PDF \(treasury.gov.za\)](#)



on a few policies consulted^{57 58}, it seems decisions on procurement expenditure are delegated at the Director-level within the SCM Unit.

However, in virtue of the PFMA, accounting officers/authorities remain accountable for procurement decisions made. Sections 44(2)(d) and 56(2)(c) further state that a delegation from the accounting officer/authority to another official “does not divest the AO/AA of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty”.

Centralised procurement bodies (sub-indicator 6 (b))

South Africa has considered the recourse to a centralised procurement function in various ways. First, referred to as “Transversal Term Contracts”, South Africa has in place collective procurement instruments that are managed by different institutions. Transversal Term Contracts are procurement instruments to which organs of state may decide to opt in. Treasury Regulations 16A6.5 provides that the “accounting officer or accounting authority may opt to participate in transversal term contracts facilitated by the relevant treasury. Should the accounting officer or accounting authority opt to participate in a transversal contract facilitated by the relevant treasury, the accounting officer or accounting authority may not solicit bids for the same or similar product or service during the tenure of the transversal term contract”.

Transversal term contracts are mostly managed by the relevant treasuries depending on the nature of the procured goods and services, and the number of procuring institutions that wish to participate. Provincial treasuries will facilitate transversal term contracts for the utilisation of that province’s departments. The OCPO manages transversal term contracts for the utilisation of all procuring institutions in all spheres of government who wish to opt-in. As of 20 May 2022, OCPO managed 61 commodities under transversal term contracts⁵⁹. Considering the lack of visibility of organs of state’s procurement expenditure, it is not possible to understand the share of expenditure managed under these transversal term contracts for these commodities. The use of these contracts is optional for organs of state.

Besides those managed by OCPO and the provincial treasuries, the State Information Technology Agency SOC Ltd (SITA) is also responsible for transversal term contracts for ICT procurement. SITA is a Schedule 3A National Public Entity that reports to the Department of Communications and Digital Technology (DCDT). As for OCPO, these contracts are optional for organs of state.

However, the SITA Act (Act 88 of 1998 as amended by SITA Amendment Act 38 of 2002) introduces another form of centralisation by imposing the use of SITA services for specific categories of ICT procurement. The NT Practice Note 5 of 2009/2010⁶⁰ clarifies that SITA must provide the following services to departments and provinces:

- Provide or maintain a private telecommunication network or a value-added network;
- Provide or maintain transversal or departmental-specific information systems;
- Provide data-processing or associated services for transversal or departmental-specific information systems;

⁵⁷ [Microsoft Word - DBSA Supply Chain Management Policy - 19May22](#)

⁵⁸ [Department of Environmental Affairs, Supply Chain Management Policy](#)

⁵⁹ [Transversal Contracting Contact List May 2022.pdf \(treasury.gov.za\)](#)

⁶⁰ [PNote5 0910.pdf \(treasury.gov.za\)](#)



- Provide IT (information technology) for government.

For ICT procurement, SITA acts as a central purchasing body. The SITA Act describes the legal status, funding and responsibilities of SITA. The agency is incorporated as a private company in the sense of the Company Act where the State is the sole shareholder of the company. It is funded by contributions from participating departments and has the overall responsibility of providing information technology, information systems and related services in a maintained information systems security environment to, or on behalf of, participating departments and organs of state. SITA is headed by a Board of Directors appointed by the Minister for the Public Service and Administration after consultation with Cabinet. The Minister also designates the non-executive Chairperson of the Board and the company's Managing Director.

According to its annual report 2022-2023⁶¹, SITA experienced numerous challenges strongly affecting the effectiveness of centralised procurement. The procurement and contracting of ICT commodities for government stakeholders faced service delivery challenges due to several factors. Challenges faced encompassed leadership transitions, the inability to fully automate manual supply chain processes coupled with shortage and high turnover of key resources. In the same report, the number of employees dedicated to the programme is responsible for procurement activities only accounts for 1.7% of the total number of employees (55 out of 3 236 employees). One of the most prominent challenges relates to the severe delays in procuring a new integrated financial management system (IFMS) that would be used by all organs of state, facilitating aggregation of spending information.

For general commodities, there is no independent central purchasing body. It is a unit within OCPO, which implements and manages transversal term contracts. As opposed to SITA, the legal and regulatory framework does not provide for details about its legal status, funding, responsibilities and decision-making powers.

Out of the 140 approved positions in the OCPO overall, the Transversal Contracting Unit has 28 approved positions of which 25 positions are filled and 3 vacant. Being headed by a Chief Director who reports to the Chief Procurement Officer, the unit does not have the same authoritative standing as SITA.

- **Gaps**

Delegation of decision-making authority to the appropriate competent level: The assessors have limited information on the extent to which decision-making authority is delegated to the appropriate competent level as there are no general rules. Given the overall issues with timely execution of procurement procedures, it could be worth examining if the current process of delegation (or, subsequently, any lack of proper delegation) in decision making represents a source of inefficiencies in the execution of procurement procedures.

Authoritative standing of the central purchasing body for general commodities: Unlike SITA, the central purchasing function of the OCPO is placed in National Treasury and the legal and regulatory framework does not provide for details about its legal status, funding, responsibilities and decision-making powers.

- **Recommendations**

⁶¹ [Annual Report 2022 - 2023.pdf \(sita.co.za\)](#)



Assess the effectiveness of the procurement function within organs of state: Authorities could examine whether the current level at which decision making is delegated represents a source of inefficiencies in procurement execution.

Ensure a greater authoritative standing for the central purchasing function for general commodities: Centralised procurement has proven to be an effective strategy to achieve economies of scale, reduce red tape and support competition in open bidding processes. These objectives are particularly relevant in heavily standardised product categories such as general commodities. However, ensuring the effectiveness of centralised procurement strategies requires the stewardship of an organisation with sufficient authoritative standing and adequate financial and human resources.

National Treasury could ensure that the centralised purchasing function for general commodities, irrespective of where it is located, benefits from sufficient authoritative standing and adequate financial and human resources.

Summary of substantive gaps and recommendations of Indicator 6

	Substantive gap	Risk classification and red flags	Recommendations
6 (b)	Lack of authoritative standing for the CPB for general commodities	Medium	NT should ensure that the CPB function for general commodities is provided with the means to carry out its mandate effectively.

Indicator 7. Public procurement is embedded in an effective information system

The objective of this indicator is to assess the extent to which the country or entity has systems to publish procurement information, to efficiently support the different stages of the public procurement process through application of digital technologies, and to manage data that allows for analysis of trends and performance of the entire public procurement system.

- **Synthesis of the indicator**

The South African public procurement system is exposed to large gaps in this indicator. While several electronic platforms exist to provide procurement information to interested stakeholders, they offer limited insights on procurement activity in the country. The absence of vertical integration of systems, coupled with scarce horizontal integration, provides a very fragmented e-procurement landscape, which defeats the objectives of transparency and accountability.

E-procurement systems only cover competitive bidding, thus excluding procurement through “other means”, which significantly reduces transparency. For procedures covered by e-procurement systems, information remains oftentimes extremely limited when technical flaws do not simply prevent access to legitimate data. The limited amount of information available is not only due to systems’ deficiencies but also to a great extent because of the very low compliance of organs of state with mandatory publication requirements. These elements imply that most of the minimum quantitative indicators listed in the MAPS methodology could not be evaluated by the assessors.

- **Findings**



Publication of public procurement information supported by information technology (sub-indicator 7 (a))

South Africa has seven electronic tools (database or systems) that host procurement information:

Name	Owner	Purpose
OCPO website	OCPO	Providing legislative and regulatory information and list of procurement opportunities
Central Supplier Database (CSD)	OCPO	Registry of suppliers willing to do business with organs of state
eTenders	OCPO	Online e-procurement system providing access to information on competitive bidding processes. Also providing statistical information
B-BBEE database	B-BBEE Commission	Providing information about B-BBEE status of bidders
Registry of Contractors	CIDB	Registry of companies willing to do business with organs of state in construction procurement
Logistical Information System (LOGIS)	National Treasury	Internal financial management tool that supports asset management and supply chain functions
Basic Accounting System	National Treasury	Internal financial management tool that manages payments and other accounting functions

Most procurement information is available from three sources. Legislative and regulatory procurement information can be found on the OCPO website, which lists all applicable legislation. Information is available on existing Instruction Notes, Circulars, Guidelines and PPPFA Regulations. However, information is displayed by type of norm and by year making it challenging to easily find procurement legislation information on specific themes. Besides the normative environment, buyers can access standard bidding forms and suppliers can access bidding opportunities.

The two main information systems providing procurement information are the CSD and the eTenders portal, both being managed by the OCPO. The CSD allows interested suppliers to register and provide relevant business information. The system is integrated with the South African Service Revenue (SARS) tax system and with the Companies and Intellectual Property Commission (CIPC) electronic database. Integration with these two systems allows for the automatic verification of business registration and bank accounts. It also provides details about B-BBEE certification for those issued by CIPC. However, they account for a marginal share of B-BBEE certificates, most of the suppliers using sworn affidavits to declare their B-BBEE status. Registration in the CSD is mandatory for businesses willing to work with organs of state. In addition to this database, the CIDB manages a dedicated business registry (the Register of Contractors) for construction procurement.

Besides being a database centralising information about the identity of prospective bidders, the CSD recently allowed public institutions to run Requests for Quotations (RFQ) for any procurement not exceeding ZAR 1 000 000, including all applicable taxes⁶². If this functionality is activated by organs of state, identified suppliers will be notified via e-mail about the request and they can access RFQ documentation

⁶² [PFM SCM Instruction No. 02 of 2021-22 Procurement thresholds and processes.pdf \(treasury.gov.za\)](https://www.treasury.gov.za/pfm/scm/02%20of%202021-22%20Procurement%20thresholds%20and%20processes.pdf)



online and upload their quotes. However, discussions with stakeholders highlighted that this functionality is seldom used by organs of state, which continue to use their internal systems.

Information on competitive bidding procedures, notably on the tendering phase, is to be found on the eTenders portal. NT SCM Instruction Note 9 of 2022/2023⁶³ reinstates the mandatory requirements about the publication on eTenders of bid opportunities, bid awards and any related bid notification. However, beyond these requirements for open competitive bids, paragraph 3.2 of the Instruction Note states that procurement through other means such as deviations or price quotations do not require the publication of procurement information on the eTenders portal. Deviations or expansions of existing contracts are only reported to the respective Treasury and to the Auditor General of South Africa and such information is not provided through any dedicated electronic system making aggregation of such information practically unfeasible.

The eTenders portal provides information about tender opportunities free of charge. It further includes the publication of procurement plans that list all currently advertised tender opportunities by organs of state. However, organs of state may decide to provide bidding documentation for a fee according to *Supply Chain Management: A Guide for Accounting Officers/Authorities*⁶⁴. Information on award notices is seldom published.

Statistical information on procurement is provided on data.etenders.gov.za. Detailed monthly data for public procurement can be downloaded in Open Contracting Data Standard (OCDS)-compliant CSV, JSON and Excel formats. The website displays rankings of most procured good, services and works. It also provides a ranking of the biggest organs of state, largest contracts, and largest suppliers. Such information can be filtered to look at specific timeframes, product categories or organs of state.

Contract awards and contract implementation, including amendments, for procurements carried out under a competitive bidding method must also be published according to NT SCM Instruction Note 9 of 2022/2023⁶⁵. However, low compliance rate (see quantitative indicator below) puts a significant strain on this requirement. There is no information published for payments and/or appeals decisions.

In terms of procurement information available in open data format, it doesn't seem that the full set of bidding documents, evaluation reports, or full contract documents including technical specification and implementation details are accessible.

Use of e-procurement/uptake (sub-indicator 7 (b))

While the NT SCM Instruction Note 9 of 2022/2023⁶⁶ reinstates the mandatory requirements about the publication on eTenders of bid opportunities, bid awards and any related bid notification, compliance with this Instruction Note is low. According to National Treasury, since the beginning of the 2023-2024 Financial Year, 2 991 upcoming tenders identified in procurement plans were published on the system from 100 organs of state. During the same period, 15 338 tenders were published by 606 organs of state and 314 contracts were captured by 35 organs of state. These numbers show that only 12% of organs of state registered on eTenders loaded procurement plans during the period under review. For publication of

⁶³ [PFMA SCM Instruction No. 09 of 2022/2023](#)

⁶⁴ [Microsoft Word - SCM Jan900-Guidelines.doc \(dffe.gov.za\)](#)

⁶⁵ [PFMA SCM Instruction No. 09 of 2022/2023](#)

⁶⁶ [PFMA SCM Instruction No. 09 of 2022/2023](#)



tenders, the data show that 73% of organs of state have published tenders and only 3% published contract notices.

According to the OCPO, eTenderseTenders training sessions are conducted for the benefit of organs of state on Tuesdays and Thursdays every week.

For the recent RFQ functionality available in the CSD, organs of state users will receive online training before utilising the CSD RFQ functionality. Training material is shared after the training with officials who attended the sessions. Additional online help is embedded in the CSD system to empower the user while utilising the system.

Strategies to manage procurement data (sub-indicator 7 (c))

The OCPO is in charge of managing the eTenders portal, which contains a reporting section on:

- Procurement opportunities
- Open tenders
- Awarded tenders
- Closed tenders

The Instruction Note 9 of 2022/2023⁶⁷ mandates the use of the eTenders portal for publication of bid opportunities, bid awards and any bid-related modifications. Paragraph 3.3 mentions that institutions “must capture the following information on eTenders Portal as per online form requirements:

- a) bid information;
- b) bidders list within 10 working days of open competitive bid closing date;
- c) award information within 10 working days of successful bidder accepting the bid award;
- d) bid cancellation information;
- e) bid amendments at least 10 working days before the bid closes

However, since Instruction Note 3 of 2021/2022 grants responsibility to accounting officers/authorities to approve procurement “by other means” (i.e. a deviation from the normal bidding process) and variations or expansions of contracts, a large proportion of procurement information is not collected through the e-procurement system or other information technology. Indeed, the Instruction Note only foresees a report to be submitted to the AGSA and the relevant Treasury within a prescribed period in a format determined by Treasury. The list of expansions and deviations are then published by quarter in a PDF format on the OCPO website⁶⁸.

For normal competitive bidding, which is administered through the eTenders portal, the procuring entity has the possibility to activate the e-submission functionality. Doing so allows bidders to submit their offers electronically in the system and therefore provides insights on trends related to levels of participation.

For other trends such as efficiency and economy of procurement, which can be analysed through several proxies such as the number of variations or expansions of public contracts, the low compliance of organs

⁶⁷ [PFMA SCM Instruction No. 09 of 2022/2023](#)

⁶⁸ [Pages - Deviations and Expansions \(treasury.gov.za\)](#)



of state with the requirement to publish them on the eTenders portal prevents any interested stakeholders from carrying out a meaningful analysis based on the system.

For request for quotations, the CSD database is the platform from which procurement information can be retrieved. The RFQ functionality recently introduced in the CSD database can provide the following reports:

- List of RFQs per organ of state
- RFQ detail report
- List of most invited suppliers
- RFQ supplier details highlighting all the RFQs a supplier participated in

These reports can provide initial insights about the diversity of suppliers' portfolio. The CSD further integrates automatic checks on tax status, trade registration number and bank account, yet it doesn't provide an automatic check of compliance with the self-declared B-BBEE status, which is one of the most systematically used requirements in the preference point system.

The AGSA regularly performs testing of controls of the central supplier database (CSD). In its presentation before the Standing Committee on Finance of audit reports on the finance portfolio for the year 2021-2022, the Auditor General of South Africa noted that there were no weaknesses identified during the testing of automated controls embedded into the central supplier database (CSD)⁶⁹. For the eTenders portal, no assessment from the AGSA has been found.

The transparency dashboard in eTenders provides aggregated information for procurement carried out through competitive bidding. However, it suffers from a number of limitations, which are detailed in the section below.

- **Substantive gaps**

The assessors note several substantive gaps relative to the MAPS methodology. The gaps relate to four broad areas:

- Incomplete functionalities of the e-procurement system
- Limitations in the usability of the e-procurement system
- Low uptake of e-procurement in practice
- Limitations in the quality of procurement information

Incomplete functionalities of the e-procurement system: The system to manage public procurement projects (i.e. eTenders) does not cover the entire procurement cycle. Namely, the planning and contract management phase do not seem to be fully covered in the whole e-procurement ecosystem and e-procurement systems are not automatically connected with financial management systems. The MAPS methodology calls for an e-procurement system that covers the entire procurement cycle. That means that any management of procurements that remains either fragmented or paper-based should be minimised as it risks jeopardising the efficiency of any electronic procedure and disincentives its use.

First, having a clear understanding of future public procurement opportunities is challenging. The eTenders portal includes the publication of procurement plans. However, from information available

⁶⁹ <https://static.pmg.org.za/230315pcfinancereport.pdf>



online, the timescale of published information remains unclear as tenders with past publishing dates are displayed alongside future tenders to be published in the current quarter. While NT receives procurement plans for the full year, the information published is limited to the current quarter, making it challenging for interested suppliers to have a good understanding of future procurement opportunities.

Second, while competitive bidding and requests for quotations can be supported by e-procurement tools (eTenders and the CSD), deviations are currently not managed through an electronic system and are individually reported by organs of state to relevant treasuries and the Auditor General each month. This prevents further analysis of the extent of exceptions to competitive bidding in the South African public procurement system. It also prevents compiling and publishing information on the amount of exceptional procurement expenditures.

Finally, the contract management phase is not covered by the eTenders portal but managed using procuring institutions' internal financial management systems, including LOGIS and BAS. Supply chain management, financial management and information management are supported by disparate core systems maintained and managed by the National Treasury and physically hosted by the National Treasury. This results in a fragmentation of procurement information covering the post-award phase of public contracts.

More than two decades ago, the South African administration decided to replace these various financial management systems with an integrated solution. The Integrated Financial Management System (IFMS) project was first approved in 2002. However, a complex governance structure and technical approach led to protracted delays in implementation and an amended approach (IFMS 2) was approved and initiated in 2013. However, a decade later, the project was still suffering from implementation delays and subject to investigations by the Special Investigation Unit. National Treasury, the Department of Public Service and Administration and the State Information Technology Agency presented a detailed account of the numerous implementation challenges before the SCOPA⁷⁰. At the time of writing this assessment, implementation challenges have not been resolved and the IFMS project is not rolled out.

Considering that a number of minimum quantitative indicators defined by the MAPS methodology could not be identified, this gap is assigned a red flag.

Limitations in the usability of the e-procurement system: Several gaps relate to the adequacy of the e-procurement system for its intended purpose and the ease of use of the systems. As a general note, the existence of several platforms and systems for e-procurement provides for a fragmented environment, hindering an efficient use and accessibility of information. Information remains fragmented and therefore difficult to use analytically. For both users and the public, a fragmented system hinders access to information and, thus, the transparency of the e-procurement system. For contracting authorities, a fragmented system results in unnecessary repetition and, therefore, higher transaction costs.

A concrete example relates to necessary information on companies participating in competitive bidding processes. Information related to the identity and status of potential bidders is available in the CSD platform where all interested suppliers must register. While this provides for automated checks on tax and business registers, the information linked to B-BBEE status is based on self-declaration and is not checked against the B-BBEE database. Given the role of B-BBEE status in awarding additional points in the

⁷⁰ [IFMS: SIU investigations & National Treasury progress; with Deputy Minister of Finance | PMG](#)



framework of the PPFA, this leads to regular disputes and complaints about the accuracy of companies' information referred to as B-BBEE fronting.

Another example lies with the use of procurement information for analytical purposes. On the dedicated statistical pages of the eTenders portal (data.etenders.gov.za), search functions are limited to aggregated information such as number of contracts awarded by suppliers or number of tenders issued by an organ of state and do not allow disaggregation of information. It does not seem to be possible to access data on specific procurement processes (by name of procuring entity, by name of supplier, by time range, etc.) to download the corresponding procurement information in an open data format. Links between the information displayed cannot be made, such as identifying the organs of state from which the largest suppliers received contracts.

Further, availability of monthly datasets is not secured and the portal displays error messages when trying to access downloads. While, theoretically, procurement information in an open data format is made available on the portal, technical deficiencies prevent interested users from accessing such information.

Low uptake of e-procurement in practice: Beyond the limitations mentioned above in terms of coverage of the whole public procurement cycle and the overall usability of the systems, the little publication of procurement data in important stages of the procurement cycle (e.g. award decision) further hinders an effective use of these e-procurement tools.

While the NT SCM Instruction Note 9 of 2022/2023⁷¹ reinstates the mandatory requirements about publication on eTenders of bid opportunities, bid awards and any related bid notification, compliance with this Instruction Note is low. According to National Treasury, since the beginning of the 2023-2024 financial year, 2 991 upcoming tenders identified in procurement plans were published on the system from 100 organs of state. During the same period, 15 338 tenders were published by 606 organs of state and 314 contracts were captured by 35 organs of state. Only 12% of organs of state registered on eTenders loaded procurement plans during the period under review. For publication of tenders, the data shows that 73% of organs of state have published tenders and only 3% published contract notices.

While training sessions are being proposed by the OCPO, the extremely low compliance rate with publication requirements on eTenders suggests that the supply chain management function is not sufficiently equipped to reliably and efficiently use e-procurement systems.

This gap is assigned a red flag given that the use of the e-procurement system for critical stages of the procurement cycle such as contract awards is extremely low (3% in FY 2023-2024).

Limitations in the quality and quantity of procurement information: While the Instruction Note 9 OF 2022/2023⁷² mandates the use of the eTenders portal for publication of bid opportunities, bid awards and any bid-related modifications, information accessed online demonstrates that these requirements are seldom followed. Most of the published information only relates to the issuance of a call for tender.

⁷¹ [PFMA SCM Instruction No. 09 of 2022/2023](#)

⁷² [PFMA SCM Instruction No. 09 of 2022/2023](#)



For most of the quantitative indicators in the MAPS methodology, the assessors did not have access to the data needed for an evaluation. This demonstrates the limitations of the data and information gathered in the e-procurement system, including quality and amenability for performance analysis.

The following quantitative indicators were not assessed, due to a lack of data:

Minimum indicators:

- Total number and value of contracts
- Public procurement as a share of government expenditure and as a share of GDP
- Total value of contracts awarded through competitive methods in the most recent fiscal year
- Key procurement information published along the procurement cycle (in % of total number of contracts)
- Share of procedures where an invitation to bid was extended (in % of total number of contracts)
- Contract awards (purpose, supplier, value, variations/amendments)
- Details related to contract implementation (milestones, completion and payment)
- Appeals decisions posted within the timeframes specified in the law (in %)
- Uptake of e-procurement
- Number of e-procurement procedures in % of total number of procedures
- Value of e-procurement procedures in % of total value of procedures

Recommended indicators:

- Bids submitted online (in % of all bids submitted)
- Bids submitted online by Micro-, small and medium-sized enterprises (in %)

Considering that a number of minimum quantitative indicators defined by the MAPS methodology could not be identified, this gap is assigned a red flag.

- **Recommendations**

Considering the importance of a sound and robust e-procurement ecosystem to support an effective public procurement system, many of the gaps identified could only be mitigated by a complete overhaul of current tools and practices. Below, recommendations are meant to address two overarching objectives: streamlining the e-procurement ecosystem and providing interested stakeholders with reliable insights to inform future procurement reforms.

Streamlining the e-procurement ecosystem: The fragmented nature of the existing e-procurement landscape in South Africa makes it challenging, if achievable at all, for users to navigate various tools and to minimise administrative red tape, which leads to low uptake of e-procurement systems and, possibly, competition in public tenders. South Africa could consider revamping its eTenders platform to incorporate the RFQ module currently operated outside to automate integration of information about suppliers contained in the CSD, including automated checks of the B-BBEE status against the B-BBEE database and to interoperate with organs of state's financial management tools covering the post-award phase of the procurement cycle.

South Africa should urgently conclude the IFMS project and ensure the interoperability of the financial management tool with the eTenders portal so as to benefit from integrated tools covering the whole



procurement cycle. This would stop organs of state from having to input the same procurement information in different tools, thus reducing the risk of discrepancies and easing the use of e-procurement tools.

Reinforcing the uptake of e-procurement: Without a stronger enforcement of publication obligations of organs of state, the availability of procurement information remains significantly limited. The National Treasury could identify organs of state with the lowest adherence to publication obligations and investigate further reasons why these organs of state do not comply with such obligations. Further, the OCPO could expand the scope and assess the reach of training sessions so as to address the systemic issue of low compliance with publication requirements in the e-procurement systems.

Providing interested stakeholders with reliable insights to inform future procurement reforms: With aggregated information about exemptions from competitive bidding and expansions of public contracts not available to interested stakeholders in the e-procurement ecosystem, evidence-based decision making on procurement reforms is extremely limited. South Africa should consider developing an electronic tool or system (whether a dedicated module in the eTenders platform or a separate, yet interconnected, tool) which would collect and aggregate detailed information about exemptions and expansions (nature, amount, supplier, etc.).

Summary of substantive gaps and recommendations of Indicator 7

	Substantive gap	Risk classification and red flags	Recommendations
7 (a)	Gaps in the completeness of records available in the e-procurement system (e.g. deviations and expansions)	High	South Africa should consider developing an electronic tool or system (whether a dedicated module in the eTenders platform or a separate yet interconnected, tool) which would collect and aggregate detailed information about exemptions and expansions (nature, amount, supplier, etc.).
7 (a)	Lack of availability of procurement information on individual procurement process	High, red flag	Considering that publication of mandatory and critical information such as contract award notice is extremely low (3% in FY 2023-2024), National Treasury could identify organs of state with the lowest adherence to publication obligations and investigate why these organs of state do not comply with such obligations. A red flag is assigned as this significantly impedes the achievement of the overarching principle of transparency laid out in the Constitution.
7 (a)	Absence of interoperability of the CSD and eTenders portal with the B-BBEE database	Medium	Given the influence of B-BBEE status on the award of points under the PPFSA, South Africa should automate checks against the B-BBEE database to avoid incorrect self-declaration by bidders and minimise the risk



			of disputes after the award of contracts. A red flag is not assigned as this gap can be addressed within the procurement system.
7 (a)	Information is not available in an open format	Medium	While statistical information (purchasing entities, suppliers, number and value of contracts) is allegedly displayed in open data format, technical issues prevent users from downloading corresponding data. The OCPO should resolve these technical deficiencies and could consider expanding the type of procurement information available in an open data format to other important procurement data (bidding documents, evaluation reports, completion date of contracts, etc.).
7 (b)	Low uptake of e-procurement	High, red flag	This red flag is combined with the gap identified for 7 (a) “lack of availability of procurement information on individual procurement process”, since the use of the e-procurement system for critical stages of the procurement cycle (e.g. contract award) is extremely low (3% in FY 2023-2024).
7 (b)	E-procurement functionalities do not cover the contract management phase	Medium	An expansion of procurement functionalities would enhance the procurement system. The severity of this gap is considered moderate as essential functions of the e-procurement system are provided. National Treasury and other relevant stakeholders should conclude the IFMS project and ensure the interoperability of the financial management tool with the eTenders portal so as to benefit from integrated tools covering the whole procurement cycle.
7(c)	Procurement information in e-procurement systems do not allow for analysis of trends, levels of participation, efficiency and economy of procurement and compliance with requirements.	High, red flag	This gap relates to the gap identified for 7 (a) “Information is not available in an open format”. Considering that a number of minimum quantitative indicators defined by the MAPS methodology could not be identified, this gap is assigned a red flag. NT should develop functionalities that allow capturing minimum quantitative information (e.g. invitation to bid as a % of contracts, expansions as a share of total contracts, etc.).



Indicator 8. The public procurement system has a strong capacity to develop and improve

This indicator focuses on the strategies and ability of the public procurement systems to develop and improve. Three aspects should be considered: i) whether strategies and programmes are in place to develop the capacity of procurement staff and other key actors involved in public procurement; ii) whether procurement is recognised as a profession in the country's public service; iii) whether systems have been established and are used to evaluate the outcomes of procurement operations and develop strategic plans to continuously improve the public procurement system.

- **Synthesis of the indicator**

South Africa only partially complies with this indicator. While a dedicated set of competencies and skills has been defined for supply chain management professionals, the professionalisation agenda lacks stewardship. The Interim Supply Chain Management Council that was created to steer the professionalisation of public procurement officials has not been active since its inception. Further, the existing training requirements do not apply to supply chain management professionals in entities listed in Schedule 2 and 3B of the PFMA, which include SOEs, presenting both a significant share of procurement spend and systemic weaknesses according to investigation findings.

Due to the lack of readily available data, the public procurement system cannot be meaningfully improved. Indeed, the latest comprehensive report on public procurement activities covering both national and provincial level dates from 2018. This absence of regular monitoring impedes a concrete understanding of trends, strengths and weaknesses of the public procurement system.

- **Findings**

- **Training, advice and assistance (sub-indicator 8(a))**

Practice Note Number SCM 5 of the 2004 "Guide for minimum training and deployment of supply chain management officers", applicable to national and provincial departments, constitutional institutions and Schedule 3A, 3C entities (as defined in the PFMA), mandates the design and implementation of SCM training. SCM training should be offered to all supply chain management officials and newcomers. The training should be structured in three modules:

- Introduction to supply chain management
- Intermediate training with focus on intensive training on all elements of supply chain management
- Advanced training that includes specialist skills in each element of supply chain management such as strategic sourcing

The Interim Supply Chain Management Council was created in February 2018 to lead the work on the professionalisation of the supply chain management function. It includes members representing key stakeholder groups, namely private and public sector, academia, professional bodies, and associations.

The Chief Directorate Capacity Building within the Office of the Accountant General (OAG) is responsible for co-ordinating the research, design, development and support of the delivery of SCM Education, Training and Development (ETD) solutions. The Office designed and developed the Public Sector SCM



Master Learning Curriculum (MLC) for National Qualification Framework (NQF) Levels 5 to 8 to standardise the contents of qualifications and short learning programmes in public sector SCM. The Office introduced the National Certificate: Supply Chain Management, which is accredited by the South African Qualifications Authority (SAQA).

Training courses are then implemented by the National School of Government (NSG). The course directory, which can be found on the NSG website, displays several trainings dedicated to supply chain management⁷³. These trainings mostly target new entrants and middle managers in public institutions and typically involve a five-day training programme. Further, for more senior managers and from the 2022 booklet of NSG's executive training portfolio⁷⁴, it appears that several executive trainings relate to financial management or exercising an oversight function which arguably contain elements related to supply chain management.

In accordance with Practice Note Number SCM 5 of 2004, National Treasury is responsible for validating the training material developed by training providers through the Validation Board. Evaluation reports and details about officials having successfully completed a course should be sent to NT.

Recognition of procurement as a profession (sub-indicator 8 (b))

The National Treasury has developed a series of technical competency dictionaries (the Competency Framework for Financial Management (CFFM)) covering the major occupational groups in the field of public financial management. These dictionaries set out a series of descriptions of the skills and knowledge required from a competent practitioner in carrying out a number of standard tasks at various levels of responsibility within the overall function.

One technical dictionary deals with supply chain management for the procurement of goods and services⁷⁵. The dictionary details competences in SCM and different proficiency levels based on roles. However, the dictionary does not apply to construction procurement.

The appointment, promotion and performance assessment of supply chain management officials follow standard procedures applicable to civil servants in South Africa.

Monitoring performance to improve the system (sub-indicator 8 (c))

The monitoring of the performance of the South African public procurement system has been devolved to National Treasury in accordance with the Constitution and the PFMA. The report on the state of procurement spent in national and provincial departments⁷⁶ published in 2018 highlights major trends in the South African public procurement system based on data from FY 2016-17 and FY 2017-18.

⁷³ [National School of Government, Course directory](#)

⁷⁴ [National School of Government, Executive Education Portfolio](#)

⁷⁵

<https://oag.treasury.gov.za/Publications/18.%20Competency%20Framework%20for%20Public%20Financial%20Management/%28New%29%20Implementation%20of%20the%20Revised%20SCM%20Technical%20Competency%20Dictionary%20and%20the%20Expl%20Note/Annexure%20B%20-%20SCM%20Explatory%20Note.pdf>

⁷⁶ [2018 State of procurement spent.pdf \(treasury.gov.za\)](#)



Using data from the CSD, the report analysed procurement spend between different spheres of government; the performance of procurement processes in achieving socio-economic objectives spelled out by the B-BBEE Act and the PPPFA; the share of registered suppliers doing business with the government; the level of SME participation; and a number of other detailed procurement spend analytics.

While the report ends with forward-looking conclusions calling for policy changes, the assessors could not find a direct link between the results of this analysis and the development of specific procurement policies.

- **Gaps**

Lack of stewardship to develop the procurement professionalisation agenda: While the Interim Supply Chain Management Council was created in February 2018 after the project was financed by the German development agency (GIZ), for the purpose of developing a strategy to advance the professionalisation agenda in the South African public procurement system, it seems that this body has not been active⁷⁷.

Absence of monitoring of the effectiveness of existing training programmes: While the Practice Note SCM 5 of 2004 mandates the implementation of training programmes and National Treasury takes the lead in developing and piloting the delivery of various SCM education and training programmes, the implementation of these programmes is not monitored. According to stakeholders, NT does not have quantitative information, such as the number of trained individuals, the type of training courses or the number of training providers validated.

Exclusion of state-owned enterprises (SOEs) from provisions governing SCM training: Schedule 2 and 3B entities in PFMA are excluded from the provisions contained in Practice Note SCM 5 of 2004, which is only applicable to national and provincial departments, constitutional institutions, and Schedule 3A and 3C entities (as defined in the PFMA). There is no special provision set out for SCM training laid down for Schedule 2 and 3B entities.

Considering the importance of a skilled procurement workforce for an effective public procurement system and the gaps identified in terms of professionalisation strategies and coverage of capacity-building programmes, these gaps are assigned a red flag.

Ineffective resource management practices: Several reports of the Auditor General emphasise systemic issues around poor procurement practices hindering the effective use of public funds. As noted in its last report⁷⁸, these practices are caused by a number of factors, including ineffective resource management and lack of consequence management. According to the Auditor General, this issue can only be addressed by further “ensuring qualified and competent officials are appointed and equipped to perform public functions conscientiously and with a strong sense of public service and ethical disposition. Achieving this goal requires support for the implementation of the professionalisation framework that prioritises meritocracy (merit-based management) as its foundation”.

Absence of regular comprehensive monitoring to improve the system: While the 2018 report published by NT provided a wealth of insightful evidence to inform future procurement improvements, no follow-up comprehensive assessment has been conducted in the last five years. This absence of regular

⁷⁷ [giz2021-en-gsp-ii-public-procurement-f.pdf](#)

⁷⁸ [PFMA Report 2022-23 FINAL INTERACTIVE PDF.pdf \(agsa.co.za\)](#)



monitoringmonitor impedes a concrete and adequate understanding of trends, strengths and weaknesses of the public procurement system, hence a red flag is assigned.

- **Recommendations**

Designing a clear vision and action plan to increase the professionalisation of the public procurement workforce: A skilled workforce is paramount to an effective public procurement and the development of professionalisation strategies requires strong stewardship. While the Interim SCM Council was precisely created to steer this agenda, it has not been active in recent years. National Treasury should reactivate this Council so a professionalisation roadmap can be developed and effectively implemented across the South African public procurement system.

Closely monitor the effectiveness of existing training and certification programmes: While the Practice Note SCM 5 of 2004 mandates the submission of reports on the implementation of training programmes to National Treasury, this obligation does not seem to be complied with. Indeed, NT states that it does not have quantitative information such as the number of trained individuals, type of training courses or number of training providers validated. To ensure efforts invested in developing a full course of training programmes are paying off, NT should enforce the provision contained in the Practice Note SCM 5 of 2004 and ensure that such information is provided.

Ensure the supply chain management function of SOEs receives dedicated training: Considering the economic significance of SOEs in the South African public procurement system and the systemic nature of abuse in supply chain management in these entities, it is critical that dedicated training is regulated and provided to their supply chain management function.

Further investing in the professionalisation of the supply chain management function: NT and the DPSA could further invest in the professionalisation of the supply chain management function, ensuring that officials are equipped with the right set of skills and competences to effectively use public funds. Doing so might further help address the systemic issue of vacant positions in supply chain management units.

Engage in regular monitoring of the performance of the public procurement system: What is not measured cannot be improved. Considering that National Treasury and the OCPO host and manage the two main public procurement databases (eTenders and CSD), engaging in more regular monitoring of the performance of the public procurement system should be considered. Such analysis would provide key insights on the ability of the public procurement system to achieve the overall objectives spelled out in the Constitution, including socio-economic objectives.

Summary of substantive gaps and recommendations of Indicator 8

	Substantive gap	Risk classification and red flags	Recommendations
8 (a)	Lack of stewardship to develop the procurement professionalisation agenda	Medium	National Treasury should reactivate the Interim SCM Council so a professionalisation roadmap can be developed and effectively implemented across



			the South African public procurement system.
8 (a)	Absence of monitoring of the effectiveness of existing training programmes	High	To ensure efforts invested in developing a full course of training programmes are paying off, NT should enforce the provision contained in the Practice Note SCM 5 of 2004 and ensure that such information is provided. This risk is not assigned a red flag because it can be resolved within the public procurement system.
8 (a)	Exclusion of SOEs from provisions governing SCM training	High, red flag	Considering the economic significance of SOEs in the South African public procurement system and the systemic nature of abuse in supply chain management in these entities, it is critical that dedicated training is regulated and provided to their supply chain management function. This risk is assigned a red flag because it significantly impedes the achievement of the objectives of the public procurement system.
8 (b)	Ineffective resource management practices	High, red flag	NT and the DPSA could further invest in the professionalisation of the supply chain management function, ensuring that officials are equipped with the right set of skills and competences to effectively use public funds.
8 (c)	Absence of regular comprehensive monitoring to improve the system	High, red flag	Considering that National Treasury and the OCPO host and manage the two main public procurement databases (eTenders and CSD), engaging in more regular monitoring of the performance of the public procurement system should be considered. This risk is assigned a red flag because not regularly measuring the performance of the procurement system defeats its very own objectives.



3.3. Pillar III - Public procurement operations and market practices

This pillar looks at the operational efficiency, transparency and effectiveness of the procurement system at the level of the implementing entity responsible for managing individual procurements (procuring entity). In addition, it looks at the market as one means of judging the quality and effectiveness of the system in putting procurement procedures into practice. This pillar focuses on how the procurement system in a country operates and performs in practice.

Indicator 9. Public procurement practices achieve stated objectives

The objective of this indicator is to collect empirical evidence on how procurement principles, rules and procedures formulated in the legal and policy framework are being implemented in practice. It focuses on procurement-related results that, in turn, influence development outcomes, such as value for money, improved service delivery, trust in government and achievement of horizontal policy objectives.

- **Synthesis of the indicator**

Procurement planning exhibits a positive emphasis on defining requirements and aligning with national policies yet there are apparent communication gaps between organs of state and economic operators. Selection and contracting demonstrate strengths in clear procurement documents and bid submission processes though confidentiality measures and performance incentives require improvement. Transparency issues arise, with many cases not complying with publication requirements, exacerbating concerns about information dissemination to stakeholders. Contract management exposes gaps in execution, highlighted by delays and limited information availability, suggesting a need for enhanced monitoring and stakeholder engagement to ensure timely project delivery and accountability throughout the procurement process.

Significant gaps across procurement operations and market practices are revealed. In procurement planning, concerns persist regarding the absence of market research, with the private-sector survey indicating low recognition of its existence and effectiveness, alongside fears of biased specifications. Additionally, environmental considerations are not incorporated into the process. Shortcomings in the selection and contracting phase include unclear procurement documents, insufficient time for submissions, and inadequate presentation of evaluation processes, raising doubts about transparency and accessibility. Administrative deficiencies, such as confidentiality in bid submission, further undermine integrity. Delays in procurement, particularly for non-consulting services, coupled with issues of competitiveness and limited visibility and control over contract execution activities, underscore the need for improvements in contract management practices, including stakeholder involvement to enhance transparency and accountability in the procurement system.

The assessment stresses the need for enhanced procurement planning, advocating for utilising resources and tools to facilitate needs analysis, and market research alongside developing Green Public Procurement guidelines to align with broader priorities. The report also highlights stakeholder participation in selection and contracting processes, recommending measures such as encryption of tender submissions and adopting e-Government Procurement solutions to ensure confidentiality and transparency. It further suggests incorporating functionality scores in evaluations and publishing procurement information in machine-readable formats for improved fairness and transparency. Lastly, in contract management, the report emphasises monitoring mechanisms, adherence to payment terms, and



the involvement of external stakeholders for enhanced oversight and accountability while proposing comprehensive reporting mechanisms to ensure transparency throughout procurement processes.

The sampling strategy was agreed upon with the National Treasury and included the selection of 13 organs of state representative of the country's reality and distributing the sample cases by type of contract and procurement methods. The annual procurement plans for the last three fiscal years were collected for each entity.

To collect a volume of approximately 130 procurement cases and since difficulties in collecting documentation were anticipated, around 15 contracts were identified per procuring entity. During the data collection, three organs of state had to be replaced to overcome the difficulty of accessing information. In the end, data from 166 contracts was taken into account. The assessment team collected evidence of the entire procurement cycle for each sample case, from procurement planning to contract execution. All the collected information was anonymised, compiled in a file and processed as a whole to obtain the required performance indicators set out in Indicator 9 of the methodology.

- **Findings**

- **Procurement planning (sub-indicator 9(a))**

The analysis of Indicator 9 reveals a mixed picture of the procurement system. Regarding procurement planning, organs of state prioritise bidding process preparation, focusing on clearly defining requirements and expected outcomes in tender documents. At the same time, this approach is perceived positively by a significant portion of the economic operators' survey respondents. There is a notable alignment with national policies, especially concerning social and economic sustainability, indicating a degree of conscientiousness in procurement processes. However, the discrepancy between the perception of clarity among organs of state and economic operators highlights potential communication gaps that could be addressed to enhance transparency and understanding.

- **Selection and contracting (sub-indicator 9(b))**

Moving to selection and contracting, the assessment underscores the utilisation of multi-stage bidding, although not widespread, a fact reinforced by almost 50% of the respondents to the Private Sector Survey (Figure 2).

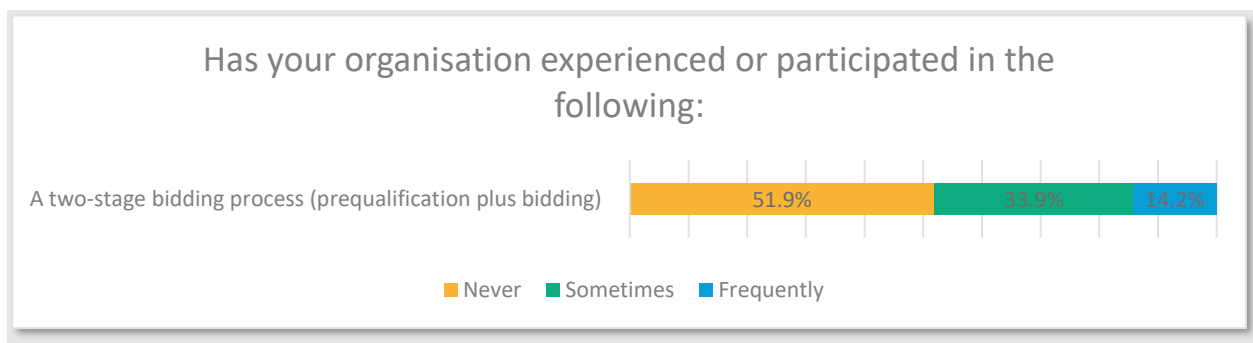


Figure 2: Use of multi-stage bidding; Source: Private Sector Survey



Procurement documents are generally deemed clear, as confirmed by 58% of the respondents to the Private Sector Survey (Figure 3), and procedures for bid submission, receipt and opening are clearly described in the procurement documents and complied with, facilitating participation from potential bidders. This is confirmed by 79.2% of respondents to the Private Sector Survey (Figure 4).

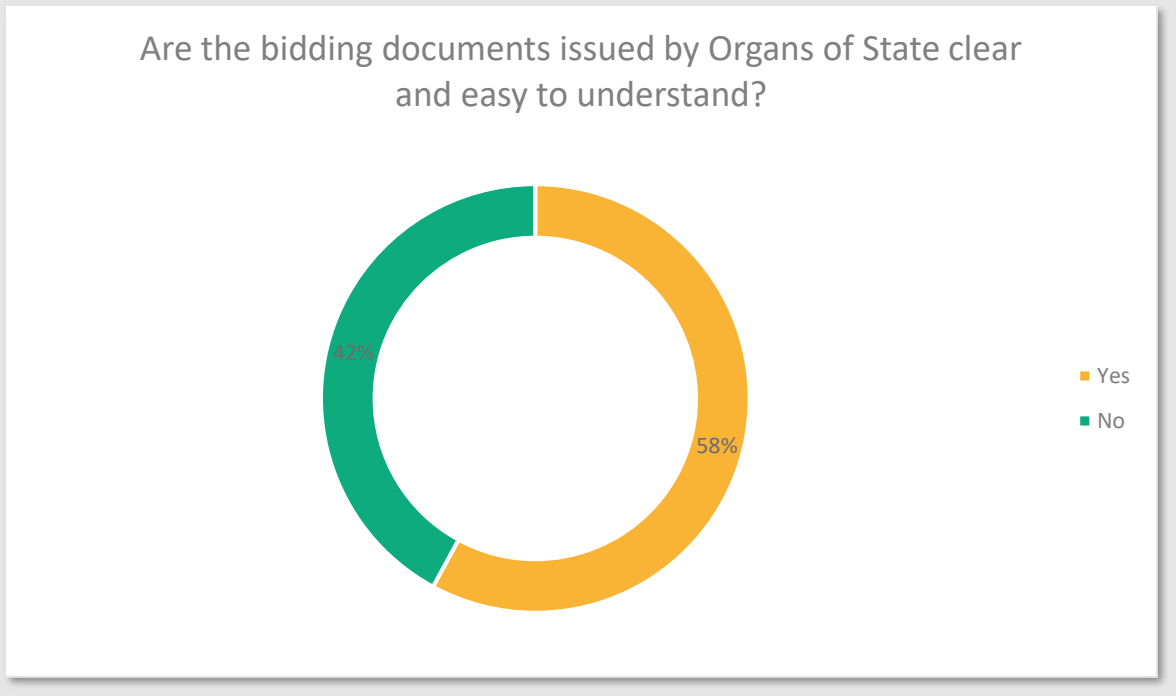


Figure 3: Clearness of procurement documents; Source: Private Sector Survey

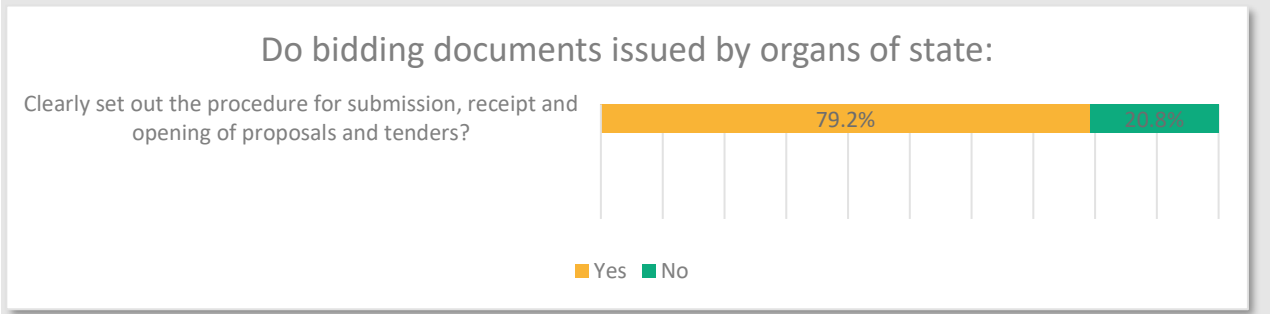


Figure 4: Procedures for submission, receipt and opening; Source: Private Sector Survey

Confidentiality measures during submission, evaluation, and award processes are generally implemented, albeit with room for enhancement in consistent information dissemination. There are however cases, when confidentiality is compromised due to bid submission by e-mail without encryption. The bid evaluation process is methodical, employing a two-stage approach that assesses functionality, preference, and pricing to determine the winning bid. While certain preferences and penalties are embedded within contracts, a notable gap exists in incentivising good performance. Moreover, the duration of procurement cycles varies significantly, with non-consulting services procurement particularly prone to delays, highlighting potential inefficiencies within the system.



In terms of transparency, i.e. compliance with all publication requirements, 44% of cases are not complied with. This is confirmed by the responses to the Private Sector Survey in which 61% of respondents say that they do not receive sufficient information to support the decisions of the organs of state (*Figure 5*).

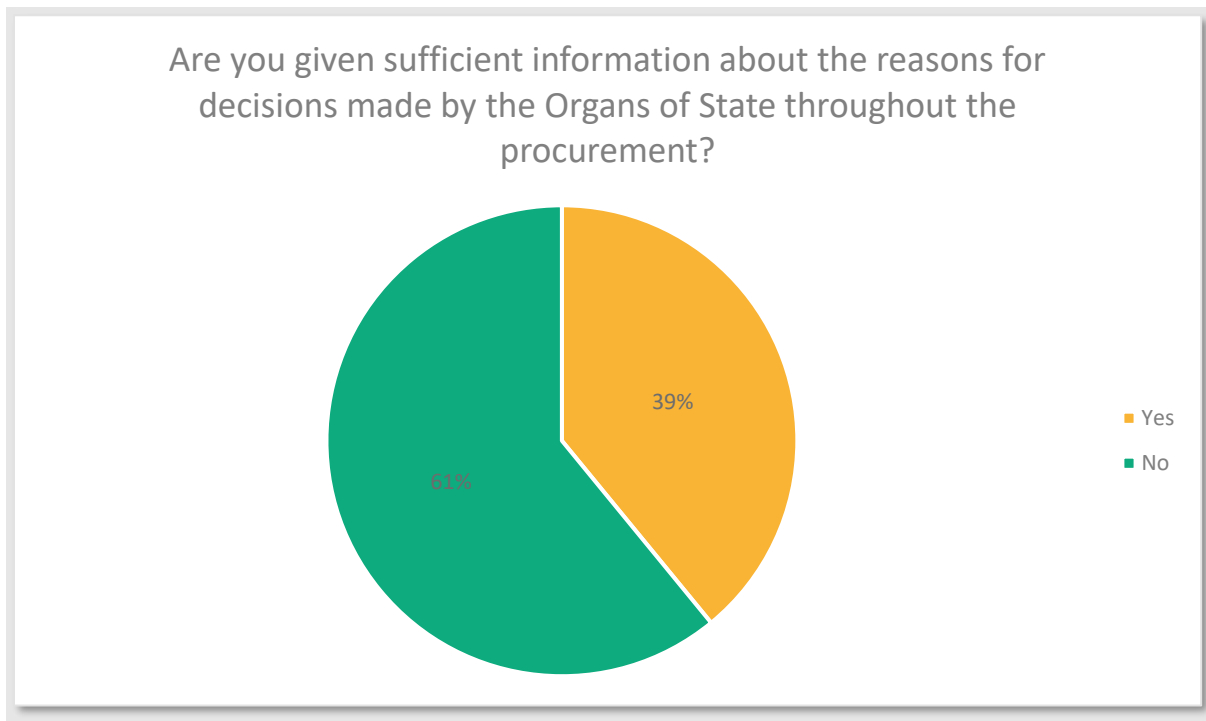


Figure 5: Economic operators' perception of access to justification for decisions by organs of state;
Source: Private Sector Survey

Contract management (sub-indicator 9(c))

Lastly, in contract management, the analysis reveals significant gaps, particularly in the execution phase. Delays in finalising non-consulting services contracts and limited information availability highlight challenges in monitoring and ensuring timely project delivery. While payment terms align with international standards, the lack of comprehensive procurement statistics and limited stakeholder engagement, particularly from civil society organisations, present opportunities for enhancing accountability and transparency. Furthermore, the delegation of responsibility for contract execution to beneficiary business units risks fragmentation in supply chain management, underscoring the need for centralised oversight to prevent inefficiencies and ensure contractual obligations are met effectively.

- **Gaps**

Procurement planning (sub-indicator 9(a)): Concerning procurement planning, concerns persist regarding the lack of market research and the results of the Private Sector Survey reinforce these concerns with only 13% of respondents recognising the existence of market research (*Figure 6*) and 18% recognising that this research is effective (*Figure 7*). On the other hand, 51% of respondents consider that the studies potentially lead to biased specifications (*Figure 8*). Additionally, incorporating environmental considerations in the procurement process is not a practice.



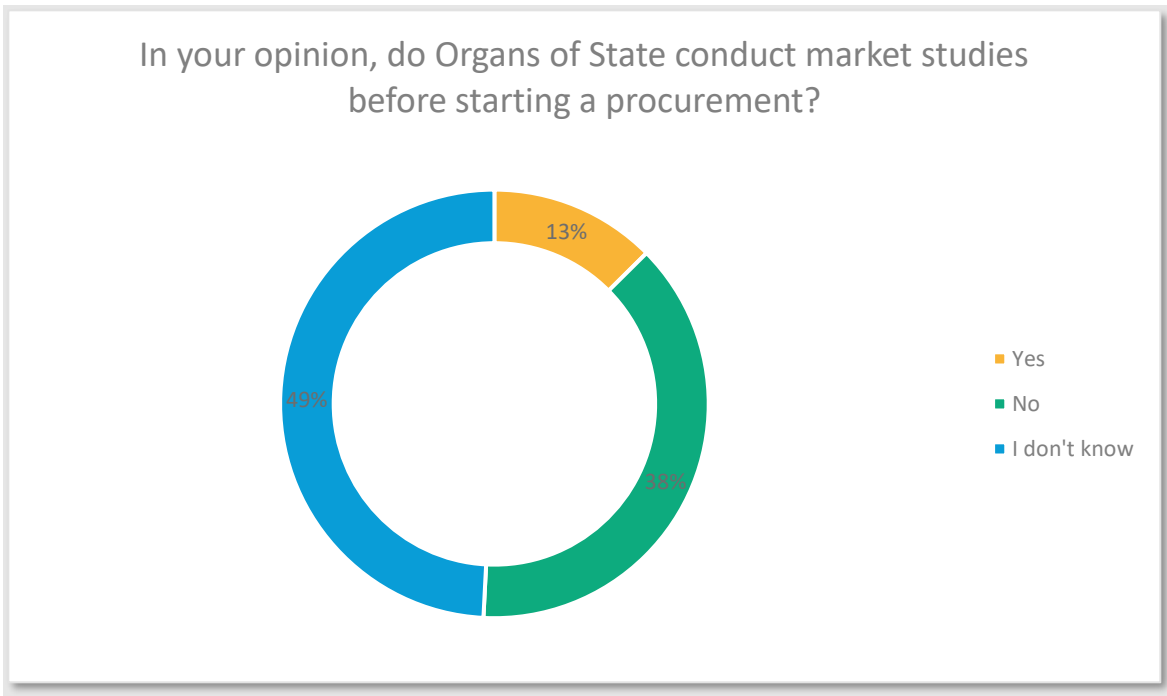


Figure 6: Economic operators' perception of carrying out market research;
Source: Private Sector Survey

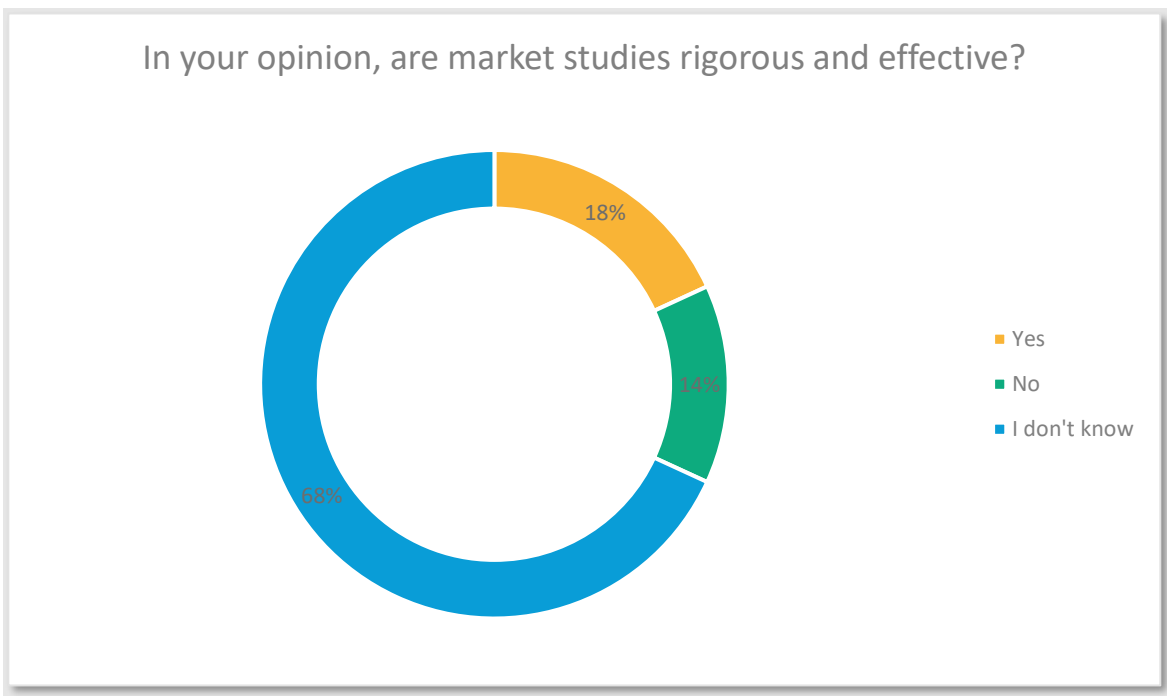


Figure 7: Economic operators' perception of the effectiveness of market research;
Source: Private Sector Survey



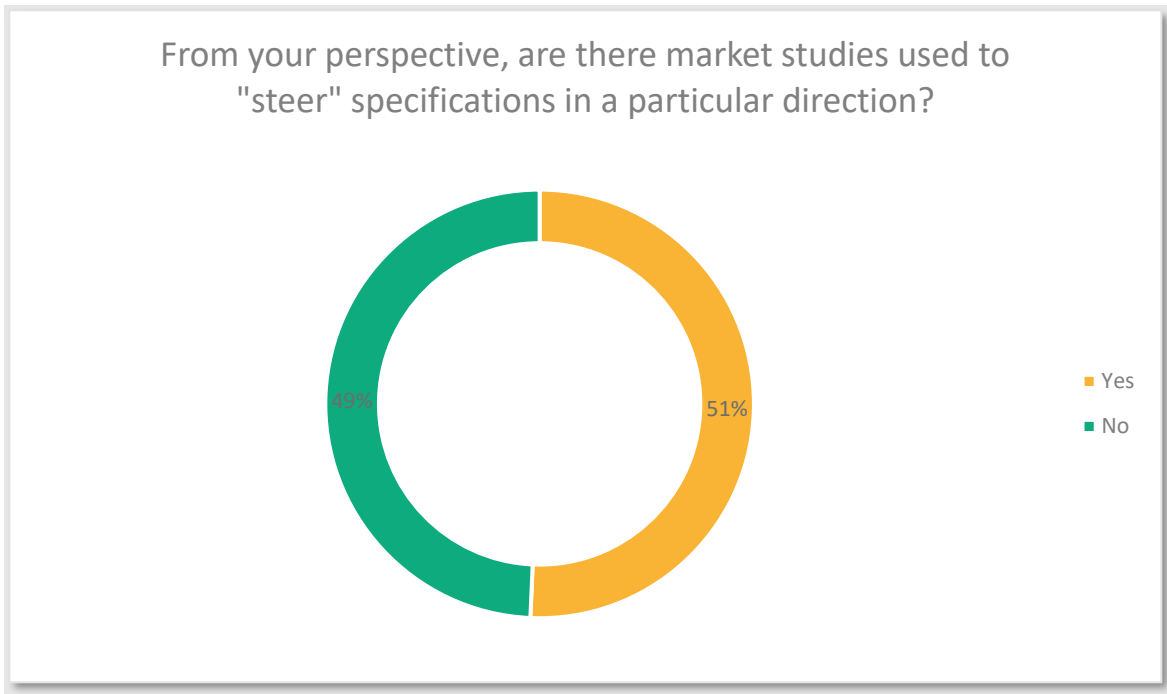


Figure 8: Economic operators' perception of the "steer" effect of market research;
Source: Private Sector Survey

Selection and contracting (sub-indicator 9(b)): Moving to the selection and contracting phase, shortcomings in the clarity and accessibility of procurement documents are noted, with a substantial percentage of respondents to the private sector survey indicating issues such as unclear procurement documents (see Figure 9), insufficient time for submissions (40%), and inadequate presentation of the proposal/tender evaluation processes (31.4%).

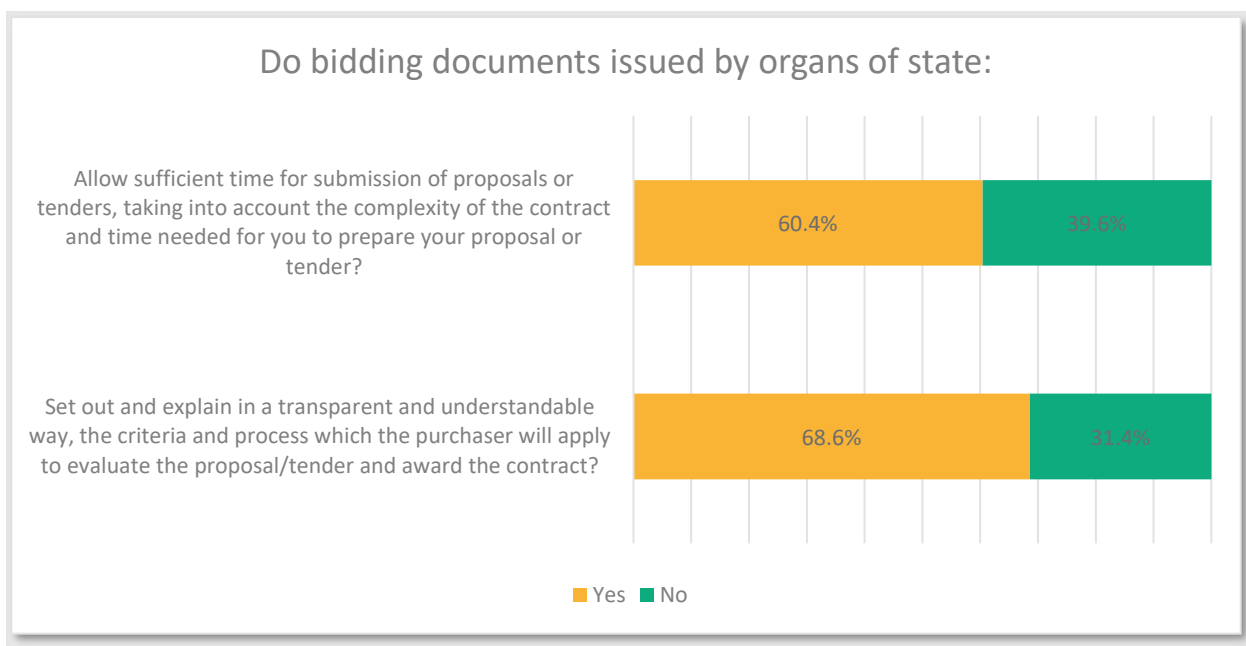


Figure 9: Economic operators' perception of the time allowed for submissions and explanation of the



evaluation process; Source: Private Sector Survey

Furthermore, deficiencies in administrative practices, such as the lack of confidentiality in bid submission and insufficient bid box sizes to accommodate all the bids until the opening date, raise concerns about the integrity and transparency of the procurement process. Moreover, the absence of provisions for bidder or civil society involvement during bid opening and administrative simplification practices, such as non-secure e-mail submissions and lack of encryption, undermine the confidentiality and security of the bidding process. Additionally, shortcomings in the scoring system, which does not capture the full value of tenders as it excludes the functionality score from the final evaluation, have a negative impact on the procurement value. Failure to use the existing solution to fulfil the publication requirements, mandatory under the regulations issued by NT, and the use of non-machine-readable publication formats contribute to the lack of transparency in procurement operations. In terms of efficiency of the procurement process, delays are identified, with the average time to procure non-consulting services up to 250 days, highly influenced by a number of contracts with extreme values. If these extremes are removed by using the median, the time to acquire non-consulting services still reaches 185 days, settling at 88 days for consulting services and 150 days for goods and works (Figure 10).

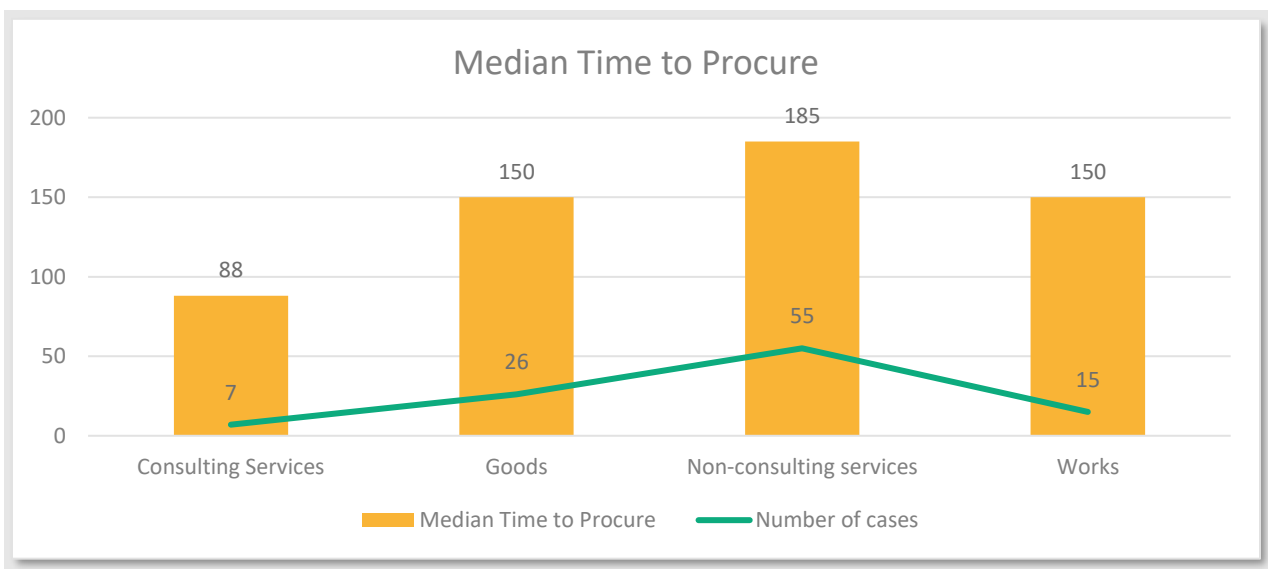


Figure 10: Median time to procure; Source: Sample of procurement cases

Analysing the same indicator with a focus on Open Tenders, the values rise considerably (Figure 11).



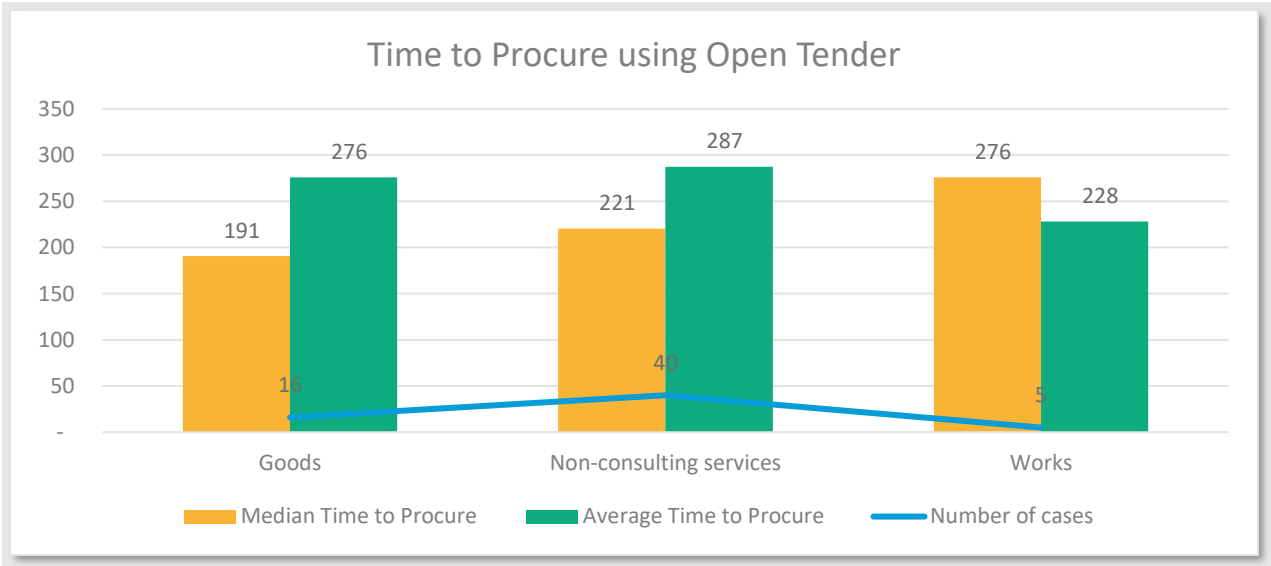


Figure 11: Time to Procure using Open Tender; Source: Sample of procurement cases

As far as competitiveness is concerned, there were a high number of bids for both non-consulting services and works in the sample. This group had a responsiveness rate⁷⁹ of only around 30% responsiveness. The responsiveness rate rises to 55% for goods and consulting services (Figure 12).

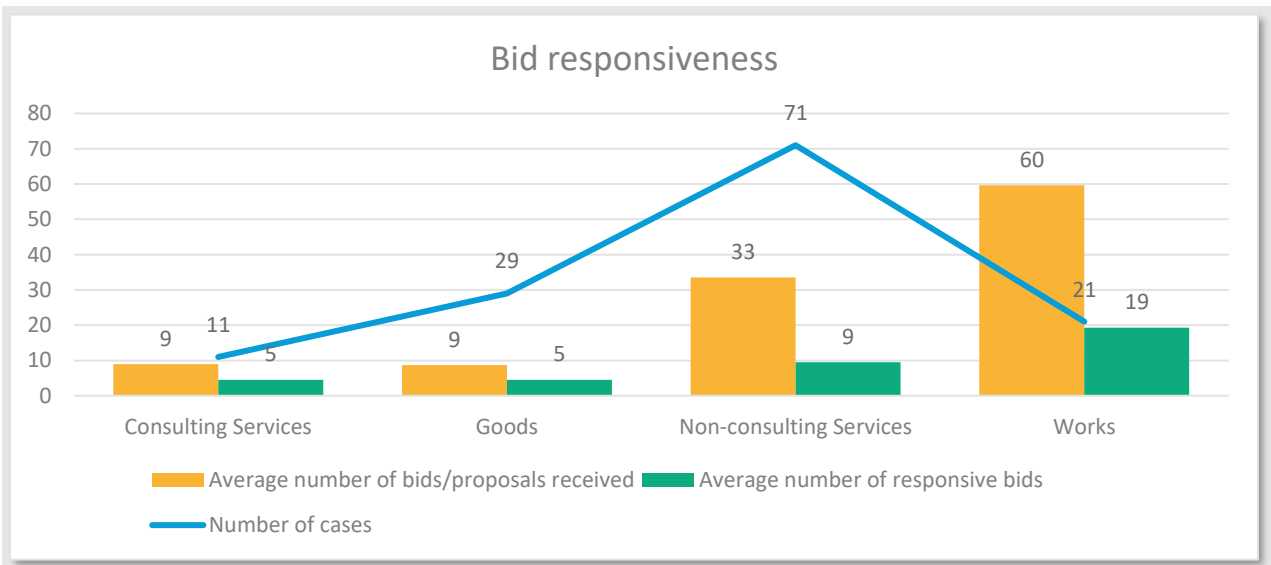


Figure 12: Bid responsiveness; Source: Sample of procurement cases

Contract management (sub-indicator 9(c)): In contract management, significant gaps emerge in the execution phase, with limited visibility and control over contract execution activities such as inspection, quality control, and payment processing. In fact, it was only possible to collect and validate information

⁷⁹ While a significant number of bids meet the mandatory submission requirements, the share of bids that passed the functionality evaluation and thus are included in the final price and evaluation assessment is significantly less.



on 41 cases out of the 166 considered for analysis. In these 41 cases, only delays in the execution of non-consulting services contracts were identified, with an average delay of 70 days in finalising the contract.

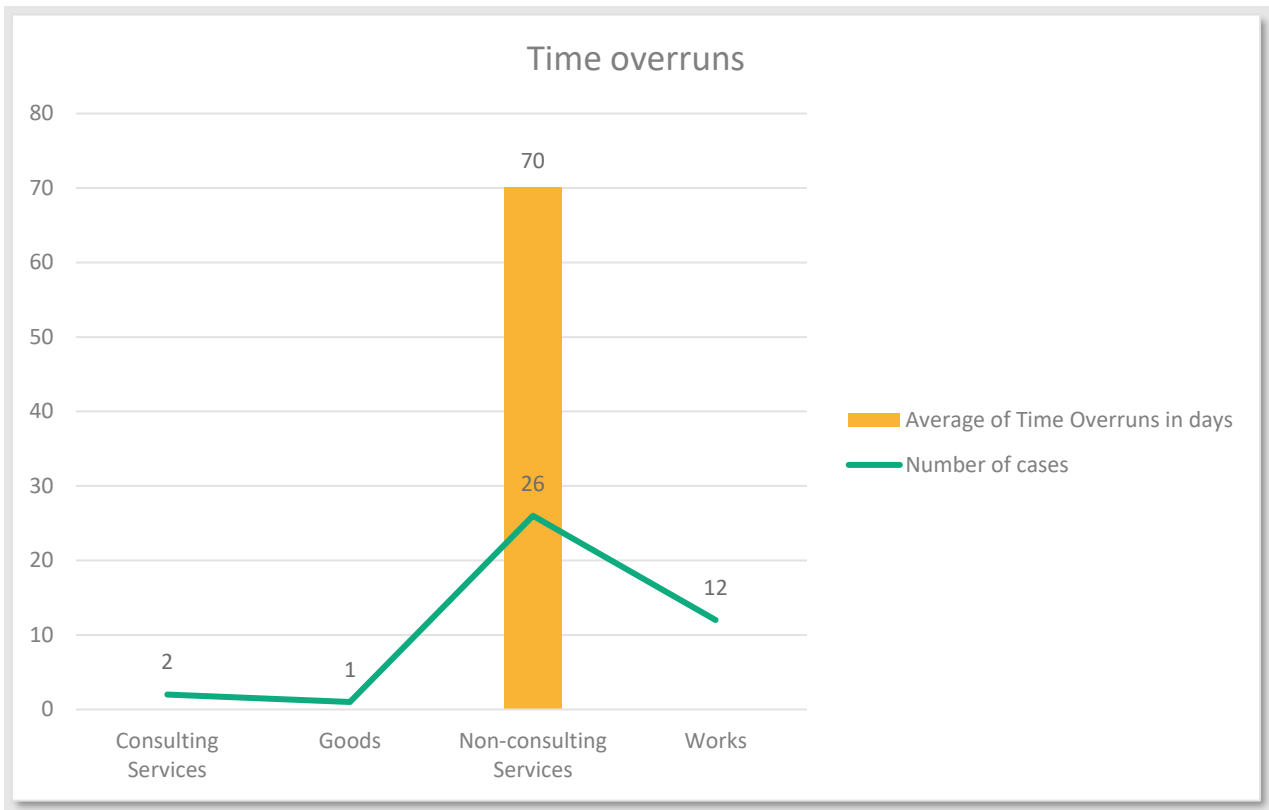


Figure 13: Time overruns in contracts; Source: Sample of procurement cases (due to inadequate number of cases, this data hardly represents the actual cases of contracts delivery time overruns)

The delegation of responsibilities to business units and the lack of a centralised file contribute to the opacity and inefficiency of contract management processes. Delays in payments (Figure 14), unilateral changes to contract values by public entities, and limited procurement statistics further underscore the need for improvements in contract management practices. Additionally, the lack of stakeholder involvement, particularly from civil society organisations, highlights a broader issue of transparency and accountability in the procurement system. In some cases, contract extensions or variation orders are issued as new contracts, making it impossible to track contract extensions.



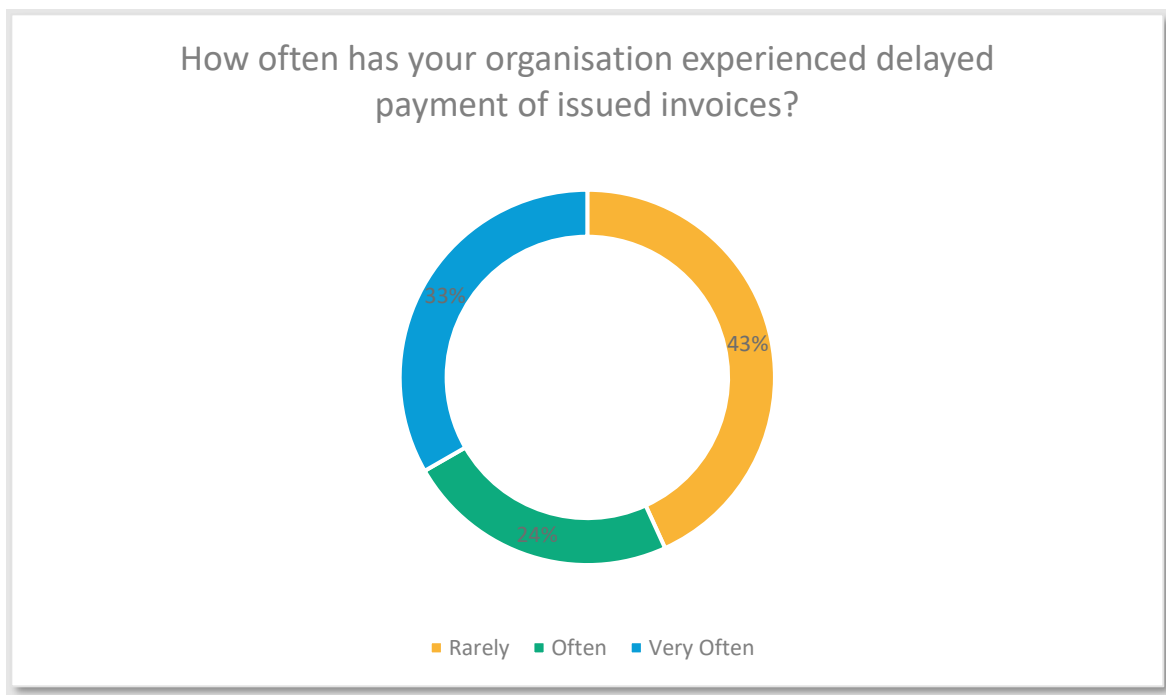


Figure 14: Economic operators' perception on delayed payment of invoices;
Source: Private Sector Survey

- **Recommendations**

Procurement planning (sub-indicator 9(a)): Emphasis is placed on procurement planning, advocating for the implementation of resources and tools to facilitate needs analysis and market research, thereby aiding in the development of optimal procurement strategies. Additionally, it is suggested that environment protection (Green Public Procurement) guidelines be developed to ensure alignment with broader priorities, alongside measures to monitor the execution of those priorities.

Selection and contracting (sub-indicator 9(b)): The assessment underscores the importance of stakeholder participation, particularly from bidders and civil society representatives, in selection and contracting to establish effective control and monitoring mechanisms. Recommendations extend to the encryption and security of tender submissions and the adoption of e-Government Procurement to safeguard confidentiality. Moreover, incorporating functionality scores in the second stage of the evaluation process is suggested to capture the best value-for-money of the bids. Procurement information publication in machine-readable formats is advocated to enhance transparency and fairness in the procurement process.

Contract management (sub-indicator 9(c)): Lastly, in the domain of contract management, the significance of monitoring and quality control mechanisms during contract execution is highlighted, emphasising adherence to payment terms and the transparent publication of payment statistics by public entities. Furthermore, the involvement of external stakeholders, including civil society organisations, throughout the procurement stages is encouraged to foster accountability and oversight (see Indicator 11 for additional analysis on direct CSO involvement in the procurement process). The establishment of comprehensive reporting mechanisms for procurement processes, both pre- and post-contract, is proposed to ensure the availability of pertinent information and promote transparency across all phases of procurement activities.



Summary of substantive gaps and recommendations of Indicator 9

	Substantive gap	Risk classification and red flags	Recommendations
9(a)	Conducting market research is not common practice.	High	Consider implementing a requirement to conduct market research and furnishing resources such as tools and templates to facilitate needs analysis and market research, aimed at delineating optimal procurement strategies. Additionally, market research can also be centralised with standard market briefs issued to guide procuring officials.
9(b)	The size of the bid boxes may not be sufficient to accommodate all the bids, forcing the bid evaluation committee to manipulate their contents during the bidding period. Administrative simplification practices have been detected in some organs of state that do not ensure the confidentiality of the process.	High, red flag	The submission of tenders without being able to ensure that they are encrypted and secured until they are opened by the bid evaluation committee should be banned. Alternatively, the use of an e-Government Procurement solution that ensures confidentiality should be promoted. A red flag is assigned because the existence of a single case where there is lack of confidentiality can significantly impede achieving the objectives sought through public procurement.
9(b)	The existing scoring system doesn't capture the full value of tenders as it excludes the functionality score from the final evaluation.	High	The inclusion of the functionality score in the final weighting, which includes price and preferences, should be considered.
9(b)	Contract awards are not consistently announced and the published information is not user-friendly.	High, red flag	Procurement information, including award notices, must be published centrally in a machine-readable format. A red flag is assigned because it is considered that the existence of a single case where there is lack of confidentiality can significantly impede achieving the objectives sought through public procurement.
9(b)	<ul style="list-style-type: none"> High average time to procure Low responsiveness rate 	Medium	<ul style="list-style-type: none"> The reasons behind the gaps must be identified and monitored, particularly regarding the average time to procure and the responsiveness rate.



	<ul style="list-style-type: none"> Publication requirements are not generally met 		<ul style="list-style-type: none"> Verification of fulfilment of publication requirements should be intensified.
9(c)	The process of collecting information from the sample cases revealed strong gaps regarding information on the execution phase of contracts.	High	The organs of state must ensure monitoring and quality control mechanisms during the execution phase of the contracts.
9(c)	Application of inspection, quality control, supervision of work and final acceptance is not visible to SCM units as it is delegated to the business units. Due to this and to the absence of a single file there is no visibility on the application of quality assurance mechanisms.	High	Payment terms must be respected. Public entities must transparently demonstrate their compliance by publishing their average payment times and overdue payments.
9(c)	Contract extensions or variation orders are issued as new contracts making it impossible to track contract extensions.	Low	Contract amendments to be issued as such, not as new contracts.
9(c)	Ready-to-use procurement statistics are very limited.	Low	Sets of ready-to-use procurement statistics should be made available
9(c)	The involvement of external stakeholders, particularly civil society organisations, is almost non-existent.	Low	The participation of external stakeholders, namely civil society organisations, in all stages of the procurement process should be promoted.
9(c)	The records are not complete and accurate, and are not easily accessible in a single file since responsibility within the organs of state is transferred to the beneficiary business units during	High, red flag	Contract execution reporting mechanisms should be set up to ensure that all information relating to procurement processes is centrally available, both in the pre- and post-contract phases. A red flag is assigned because it is considered that the absence of complete, accurate and easily accessible records hinders the achievement of public procurement objectives.



	<p>the contract execution phase. This detachment from the supply chain management units means that the contract is lost.</p>		
--	--	--	--

Indicator 10. The public procurement market is fully functional

The objective of this indicator is to assess the market response to public procurement solicitations. This response may be influenced by many factors, such as the general economic climate, policies to support the private sector and a good business environment, strong financial institutions, the attractiveness of the public system as a good, reliable client, the kind of goods or services being demanded, etc.

- **Synthesis of the indicator**

The assessment reveals a mixed landscape. While efforts to foster dialogue and partnerships between the public and private sectors are evident, challenges persist in maintaining transparency and inclusivity. Despite initiatives like public consultation processes, many stakeholders feel excluded from decision making, exacerbated by limited dissemination of information on regulatory changes. The absence of dedicated capacity-building programmes further hampers private-sector engagement and understanding of procurement processes. Positive strides, such as a centralised supplier database, are noted, yet they are overshadowed by broader challenges, highlighting the need for a more holistic approach to dialogue, transparency, and capacity building.

Gaps in the system include ineffective mechanisms for dialogue with the private sector, leading to dissatisfaction among economic operators. A lack of awareness and involvement in government initiatives underscores a disconnect between policy formulation and stakeholder engagement. Concerns also arise regarding the ease of access to finance and the effectiveness of procurement-related decision review mechanisms. Moreover, shortcomings in checks and balances for the performance of prescribed entities, along with inadequate systems to monitor transversal contract utilisation, further exacerbate systemic weaknesses.

To address these challenges, recommendations focus on proactive outreach with the private sector to ensure transparent feedback on procurement reforms. Comprehensive training programmes and targeted interventions are proposed to strengthen procurement skills and knowledge. Additionally, reforms to enhance access to funding and improve appeal mechanisms are suggested to promote fairness and accountability. A call for a comprehensive oversight framework, including advanced risk management practices and clear procurement guidelines, underscores the need for systemic reforms to enhance governance and economic development within the procurement ecosystem.

The analysis was complemented with a web-based (Private Sector Survey) survey, which received 366 responses. The survey targeted a sample size of 7 700 suppliers. The survey was distributed via an initial e-mail on 4 December 2023, addressed to suppliers registered in the Central Supplier Database (CSD). Different reminders were later distributed. To ensure that the sample was representative, it was selected



following a distribution between regions and by the size of the company already in the CSD. The survey remained open until 31 January 2024. A summary of the response analysis is made available under Annex C.

- **Findings**

- **Dialogue and partnerships between public and private sector (sub-indicator 10(a))**

Analysis of the dialogue and partnerships between the public and private sectors underscores the government's efforts to foster communication channels with private entities. Initiatives such as public consultation processes, inclusive of sectoral associations, reflect a commitment to engaging stakeholders in policy amendments, notably demonstrated during the recent public procurement bill revision.

Furthermore, the analysis highlights challenges in maintaining transparency and inclusivity within the procurement framework. Despite efforts to engage the private sector, a sizable proportion of respondents to the private sector survey feel excluded from decision-making processes, with perceptions of inadequate consideration for their contributions. The limited dissemination of information regarding regulatory changes exacerbates this issue, with the majority of respondents to the private sector survey struggling to keep pace with evolving procurement directives and instructions. Additionally, the absence of dedicated programmes for capacity building in public procurement further underscores gaps in supporting private-sector engagement in and understanding of procurement processes.

- **Private sector's organisation and access to the public procurement market (sub-indicator 10(b))**

In contrast, the analysis acknowledges certain positive strides, such as the establishment of a centralised supplier database by the OCPO, facilitating access to market opportunities for a diverse range of suppliers. However, this positive development is contrasted with the broader challenges outlined, emphasising the need for a more holistic approach to fostering dialogue, transparency, and capacity building within the procurement ecosystem.

- **Key sectors and sector strategies (sub-indicator 10(c))**

The government's recognition of critical sectors, such as infrastructure procurement and information technology, indicates an intent to adopt a sectoral approach to procurement. These sectors are recognised in existing legislation which states that the CIDB prescripts must be followed for Infrastructure Procurement, and the SITA Act that specifies the ICT services that must be procured through a centralised State Information Agency. While infrastructure procurement is meant to be done in accordance with CIDB prescripts, the procurement units tasked with conducting infrastructure procurement are often the same as those tasked with procuring non-works, hence a sectoral-focused approach often fails to materialise in practice. With regards to the mandatory use of a single agency for certain ICT services, notwithstanding its benefits, it has also introduced a number of risks and challenges associated with the performance of the prescribed entity.

Beyond infrastructure and ICT, National Treasury and the Department of Health have entered into a number of Transversal Contracts in sectors such as fleet services, Learning and Teaching Support Material (LTSM), and pharmaceuticals. While these contracts may have been successful in securing better pricing for organs of state across the government, contract management is entrusted to organs of state and it is necessary to strengthen systems and/or capacity to control the use of contracts and adherence to contract terms.



- **Gaps**

Dialogue and partnerships between public and private sector (sub-indicator 10(a)): The mechanisms for dialogue with the private sector are not perceived as effective, with economic operators expressing dissatisfaction, as indicated by a notably low average score of 2.29 out of 5 in the Private Sector Survey (Figure 15).

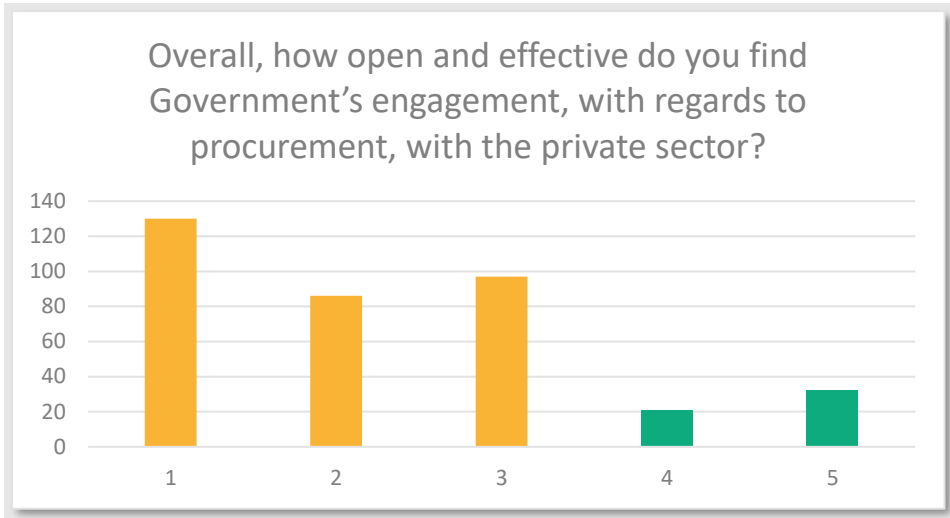


Figure 15: Economic operators' perception of openness and effectiveness of government's engagement; Source: Private Sector Survey

A significant portion of respondents to the private sector survey reported unawareness of government initiatives related to public procurement (Figure 16), with a concerning lack of involvement in consultation processes (). This highlights a disconnect between policy formulation and stakeholder engagement.

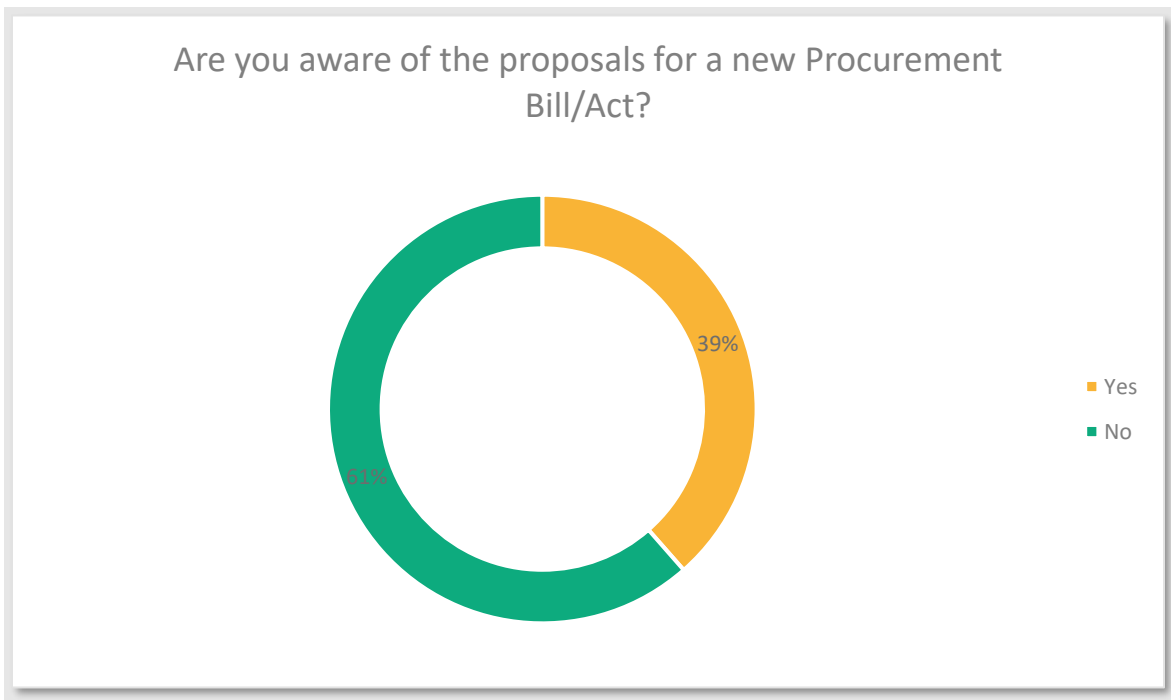


Figure 16: Economic operators' perception of the existence of a new procurement bill;



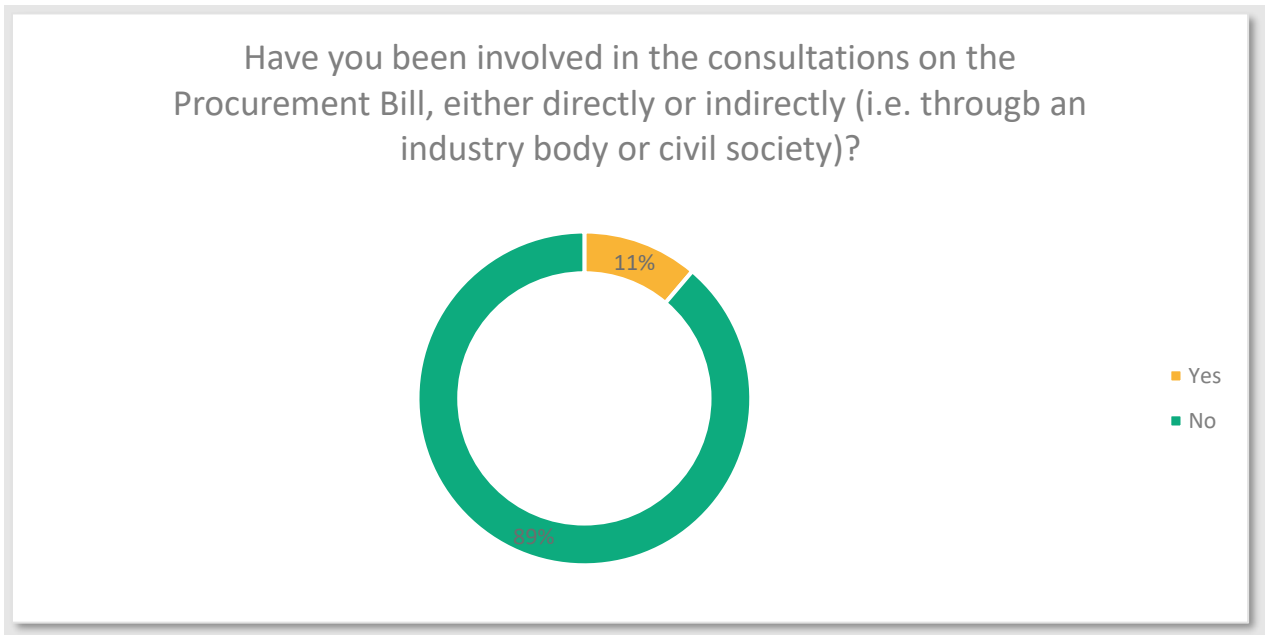


Figure 17: Economic operators' perception of the involvement of respondents in consultations on the procurement bill; Source: Private Sector Survey

Private sector's organisation and access to the public procurement market (sub-indicator 10(b)):

There is a negative perception of the ease of access to finance – 61.8% of respondents. In addition, 53.8% of respondents also perceive the existence of an independent mechanism for reviewing procurement-related decisions negatively (Figure 18).

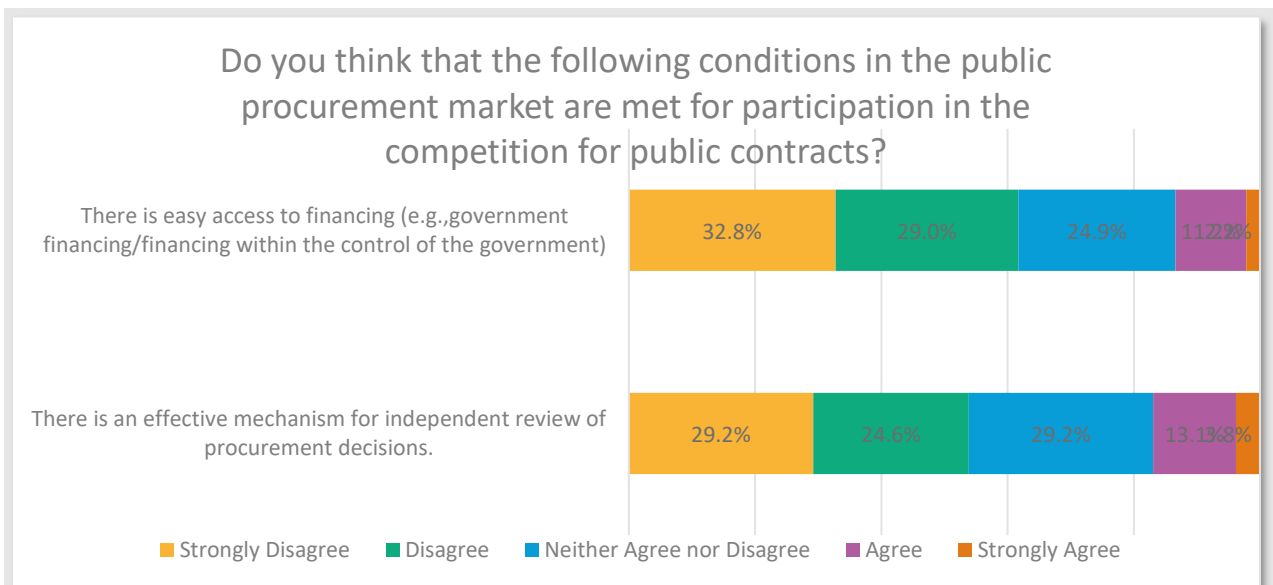


Figure 18: Economic operators' perception of access to financing and the existence of mechanisms for review of decisions; Source: Private Sector Survey



The SA procurement market entry requires several conditions to be met, including B-BBEE policies (preferential treatment), CIBD registrations and National Industrial Participation Programme (NIPP) obligatory requirements. The impact and achievements of these socio-economic imperatives may necessitate data-based analysis to conclude and recommend reform actions. Otherwise, whether the aspired policy objectives are met or whether some of these requirements are creating systematic constraints inhibiting private-sector access to the public procurement market, at least for open international procedures, is not definite.

Key sectors and sector strategies (sub-indicator 10(c)): Checks and balances are not in place to mitigate the risk of failure associated with the performance of the prescribed entity. Further, where transversal contracts are concluded, systems and capacity to effectively monitor the utilisation of these contracts are not in place.

- **Recommendations**

Dialogue and partnerships between public and private sector (sub-indicator 10(a)): It is suggested that the Office of the Chief Procurement Officer (OCPO) engage in proactive outreach programmes with the private sector to ensure transparent analysis and feedback on proposed changes to the procurement framework. This approach aims to foster collaboration and gather diverse perspectives, thereby enhancing the inclusivity and effectiveness of procurement reforms. Furthermore, it is emphasised that such outreach efforts should encompass a broad geographical and sectoral scope to ensure comprehensive stakeholder engagement and relevance to varying contexts across the country.

Private sector's organisation and access to the public procurement market (sub-indicator 10(b)): The assessment underscores the importance of developing comprehensive and tailored training programmes on procurement topics. These programmes should be designed in collaboration with other relevant institutions to leverage their expertise and reach. Monitoring the implementation of these training initiatives is also highlighted as essential to ensure their effectiveness and address any gaps or challenges that may arise during the process. By investing in capacity-building measures, the country can strengthen the skills and knowledge base of procurement professionals, thereby contributing to improved procurement practices and outcomes.

Lastly, the need is emphasised to address systemic issues affecting access to the procurement market, to funding and the effectiveness of appeal mechanisms within the procurement system. A thorough study is proposed to analyse whether the range of current local preference does not create barriers to access to procurement markets and to analyse the root causes and implications of limited access to funding, enabling policy makers to devise targeted interventions and support mechanisms where necessary. Additionally, attention is drawn to concerns raised by the private sector regarding the efficacy of appeal mechanisms, suggesting a need for reforms or enhancements to ensure fair and timely resolution of disputes. By addressing these underlying challenges, the country can enhance transparency, fairness, and accountability within its procurement framework, ultimately contributing to better governance and economic development.

Key sectors and sector strategies (sub-indicator 10(c)): A comprehensive oversight framework that includes both internal and external checks and balances should be developed and implemented. Advanced risk management practices that identify, assess, and mitigate risks associated with the



performance of the prescribed entity should be integrated. Training for staff on risk awareness and management techniques is also crucial to ensure they are well-equipped to handle potential issues proactively. Clear and detailed guidelines for the procurement, management, and monitoring of transversal contracts should be developed.

Summary of substantive gaps and recommendations of Indicator 10

	Substantive gap	Risk classification and red flags	Recommendations
10(a)	The mechanisms for dialogue with the private sector are not perceived as effective.	Medium	The OCPO should engage with the private sector in outreach programmes whenever it intends to promote changes to the public procurement framework.
10(a)	There are no programmes to help build capacity among private companies, including for small businesses and training to help new entries into the public procurement marketplace.	Medium	The OCPO must create comprehensive and specific training programmes in partnership with other institutions on procurement issues.
10(b)	The procurement market entry requires several conditions to be met, including B-BBEE policies (preferential treatment), CIBD registrations and NIPP obligatory requirements.	Medium	An assessment of whether the range of current local preferences does not create barriers to access to procurement markets is recommended.
10(c)	While the intent to adopt a sector approach is clear, the systems and capacity to fully realise the intended benefits are not fully developed and/or functioning adequately	High	Checks and balances need to be put in place to mitigate the risk of failure associated with the performance of the prescribed entity. Further, where transversal contracts are concluded, appropriate systems and capacity must be in place to effectively monitor the use of these contracts.

3.4. Pillar IV - Accountability, integrity and transparency of the public procurement system

Pillar IV includes four indicators that are considered necessary for a system to operate with integrity, that has appropriate controls that support the implementation of the system in accordance with the legal and



regulatory framework, and that has appropriate measures in place to address the potential for corruption in the system. It also covers important aspects of the procurement system, which include stakeholders, including civil society, as part of the control system. This pillar takes aspects of the procurement system and governance environment to ensure they are defined and structured to contribute to integrity and transparency.

Indicator 11. Transparency and civil society engagement strengthen integrity in public procurement

In acting as a safeguard against inefficient and ineffective use of public resources, civil society can help to make public procurement more competitive and fairer, improving contract performance and securing results. Governments are increasingly empowering the public to understand and monitor public contracting. This indicator assesses two mechanisms through which civil society can participate in the public procurement process: i) disclosure of information and ii) direct engagement of civil society through participation, monitoring and oversight.

- **Synthesis of the indicator**

South Africa presents some substantive and minor gaps with this indicator. Lack of transparency to allow for monitoring by civil society is the main challenge. Transparency gaps extend to significant limitations in data availability, as well as limited access to SCM rules of organs of state. The consultation process shows lack of clarity regarding its scope and limited consultations about secondary legislation. Finally, civil society has limited opportunities to directly participate in procurement, exercising an essential monitoring function.

- **Findings**

Enabling environment for public consultation and monitoring (sub-indicator 11 (a))

The importance of public participation is captured in section 195(1)(e) of the Constitution, which states that “people’s needs must be responded to, and the public must be encouraged to participate in policy-making”. Section 59, 72 and 118 of the Constitution further mandate both the national and provincial levels of government to facilitate public participation.

Several consultation processes related to public procurement have been ongoing in recent years, namely regarding the preparations of the Draft Public Procurement Bill 2020⁸⁰ and the Draft Preferential Procurement Regulations 2022⁸¹ as well as the Draft Municipal Finance Management Act 2015⁸². These take the form of submission of public comments on draft legislation. Specifically, the consultation process for the draft public procurement bill was open from 19 February 2020 until 31 May 2020.

⁸⁰ Government Gazette, 19 February 2020, No. 43030, Draft Public Procurement Bill, 2020: Publication of draft Public Procurement Bill for public comment

⁸¹ GOVERNMENT GAZETTE, 10 March 2022, No. 46026, Preferential Procurement Policy Framework Act, 2000 (the Act): Publication of Draft Preferential Procurement Regulations, 2022 for Public Comment.

⁸² Government Gazette, 27 November 2015, No. 39460, Local Government: Municipal Finance Management Act, 2003 – Proposed Amendment of Regulations Regarding Supply Chain Management



To initiate a consultation process, National Treasury issues media statements or notices through a dedicated portal (e.g. <https://web.treasury.gov.za/publiccomments/PublicProcurementBill/>), which publicly invite comments on the draft legislation within a closing date for submission of comments. After the closing dates, all comments received are consolidated for further consideration and deliberation by the relevant Parliamentary Committees (civil society organisations are also represented) before finalising the draft legislation. Comments received from the public are published on the National Treasury's website (www.treasury.gov.za).

Section 78 of the Public Finance Management Act 1 of 1999 calls for the publishing of draft Treasury regulations for public comments in the national Government Gazette prior to their enactment.

The government issues public notices for obtaining comments from members of the public before the finalisation of public procurement regulations/policies/acts. As part of the preparation of the draft public procurement bill, consultations took place with various stakeholders, i.e. civil society groups and businesses. Both these stakeholder groups had opportunities to comment on the draft legislation. The assessors were able to review some of the written input provided by civil society on the draft procurement bill. Hence, there is evidence that civil society participated to the policy-making process.

Adequate and timely access to information by the public (sub-indicator 11(b))

As indicated in Indicator 7, there are several sources of information available to procurement stakeholders, including civil society. Legislative and regulatory procurement information could be found on the OCPO website, which lists all applicable legislation.

Information related to the identity and status of potential bidders is available in the CSD platform where all interested suppliers must register.

Information on the tendering phase is to be found on the eTenders portal (<https://www.etenders.gov.za/>). NT SCM Instruction Note 9 of 2022/2023 reinstates the mandatory requirements about the publication on eTenders of bid opportunities, bid awards and any related bid notification. However, beyond these requirements for open competitive bids, paragraph 3.2 of the Instruction Note states that procurement through other means such as deviations or price quotation do not require the publication of procurement information on the eTenders portal. Statistical information on procurement is provided on data.etenders.gov.za.

It is possible to download monthly datasets in an open data format; however the functionality seems to be frequently inaccessible. Further, low use of e-procurement and publication of procurement data in important stages of the procurement cycle (e.g. award decision) could put into question the accuracy of statistical information.

Direct engagement of civil society (sub-indicator 11(c))

The legal framework does not explicitly allow for citizen participation throughout the procurement process. Nevertheless, citizens can theoretically participate through access to some data available on the eTenders portal and through the public opening of bids. In the planning phase, citizens are able to view published annual procurement plans on the eTenders portal. It should be noted that the publication of procurement plans is encouraged as per NT SCM Instruction No. 09 of 2022/2023 (it will be made



mandatory in a separate NT instruction). Furthermore, citizens can view bid opportunities on the eTenders portal but have to register as a supplier in order to respond or participate to bid opportunities.

Public openings of bids is foreseen according to Paragraph 4.10 of the National Treasury SCM *A Guide for Accounting Officers/Authorities*. As such, direct participation in the procurement process by civil society organisations and other interest groups is possible at this stage of the procurement process. The Guide foresees that the place for bid opening should be announced together with the invitation to bid. Bids should be opened in public, i.e. bidders or their representatives should be allowed to be present. If requested by any bidder, civil society organisation or interest group, the name of the bidders and, if practical, the total amount of each bid and of any alternative bids, should be read aloud.

Citizen participation is not foreseen by the legal framework during the evaluation and contract award phase. Members of the public, civil society organisations or interest groups are able to interrogate the outcomes of bid evaluation and contract awards as published on the eTenders portal. It should be noted, however, that such information may not always be available due to low compliance with publication requirements.

Regarding the contract management phase, citizens have limited opportunities for direct participation. For infrastructure procurements, the online portal, Vulekamali⁸³, established by National Treasury, allows for citizen participation in government budgetary and procurement planning processes. The portal focuses on budget transparency for infrastructure projects, allowing one to browse through different stages of the project implementation, including the contract implementation phase.

- **Gaps**

Limited clarity on consultation scope, process and outcomes : According to stakeholders, regulations do not undergo a rigorous consultation process similar to that for primary legislation. This risks undermining trust in the regulation. Furthermore, considering that many questions are left open in the primary legislation, the lack of strong, institutionalised consultation mechanisms for regulations poses even greater risks in terms of acceptance and adequacy of the regulatory framework.

Overall, stakeholders consider that their views have been insufficiently included in the consultation process for the new public procurement bill. Despite some constructive engagement, stakeholders lamented difficulties around the consultation process and the transparency thereof. In particular, civil society organisations denounced difficulties in their ability to build co-ordination across civil society to shape reform more effectively.

There does not seem to be a formal and publicly available process whereby National Treasury provides feedback to stakeholders on how their input has been taken into account. Hence, the assessors have limited evidence to determine to what extent feedback from civil society has been taken into account.

Lack of transparency for effective monitoring by civil society: Overall, civil society stakeholders criticise the lack of transparency and access to relevant procurement information as a key challenge to their ability to perform their role as watchdogs. In particular, stakeholders from civil society denounce a lack of transparency in terms of ability to access various SCM policies of South African departments. While they can be obtained through a request under the Promotion of Access to Information Act, there is no

⁸³ <https://vulekamali.gov.za>



systematic obligation to make SCM policies publicly accessible. SCM policies contain important details for civil society to monitor, including, for instance, how a particular organ of state addresses forms of non-competitive bidding (“procurement by other means”). Systematic access to SCM policies would allow for civil society to better scrutinise the overall regulatory framework.

Furthermore, civil society considers that access to procurement data is patchy and limited. Despite the constitutional requirement to have an open procurement system, civil society considers that such a system is failing and does not live up to an “open” standard. In fact, to obtain data that is not published by National Treasury or organs of states, CSOs would need to file a request under the Promotion of Access to Information Act.

For instance, stakeholders have limited access to tender specifications through the e-procurement system. In fact, there may be costs associated in accessing those documents, thus limiting access. Furthermore, it is well established that compliance with publication of tender information on the eTenders platform is patchy, at best. Civil society organisations consider that too few departments publish sufficient tender information to be able to conduct effective oversight. Furthermore, the available data is not always easily machine-readable and, hence, poses problems for further analysis. As such, there are too many loopholes in terms of data availability and data quality to ensure effective monitoring by civil society and the public.

Finally, the new public procurement bill raises some concerns among stakeholders about potentially decreasing transparency under certain circumstances (see more detailed analysis in the Annex to this report).

Opportunities for participating by civil society not sufficiently institutionalised: Opportunities for direct engagement by civil society are limited in the legal framework and in practice. For the most part, participation and engagement is only possible through the eTenders portal. As discussed in other parts of the assessment, access and quality of data in the eTenders portal present serious limitations, thereby reducing opportunities for direct engagement. The assessors were not able to get a sense of how often civil society monitors the procurement process through participating in the public opening of bids. As some stakeholders noted, there is uneven transparency across the country, particularly at provincial level with respect to public opening of tenders and probity audits. Similarly, some provinces have practices of collaborating with civil society to monitor integrity but this development is uneven across the country. In this context, civil society organisations observe a culture of fear in which participation is, overall, limited, in particular with respect to whistleblowing. This reinforces perceptions that reporting allegations may bring strong risks to the lives of whistleblowers.

There are no formal programmes organised by National Treasury dedicated to the capacity building of civil society in South Africa.

- **Recommendations**

Definition and expansion of scope of consultations: South African authorities could consider clearly defining the scope of consultations, and, in particular, extending them to secondary legislation since many important aspects of the SCM system are defined there. A feedback loop about how stakeholders’ feedback has been taken into account could also be strengthened.

Expand transparency of the procurement system: In line with other recommendations of this assessment, South African authorities could significantly expand the transparency of the public procurement system,



starting with ensuring that public procurement data is comprehensive, accessible, and available in a useable format. Transparency should not be limited to procurement data. It should also cover important regulatory aspects of the procurement regime, such as SCM policies of all organs of state.

Furthermore, South African stakeholders could refrain from allowing discretionary decision making to eliminate or restrict access to procurement transparency obligations, as currently foreseen in the upcoming public procurement bill.

Introduce mechanisms for direct civil society participation and oversight: Considering the significant role of corruption in public procurement, authorities could consider empowering civil society in exercising a direct monitoring function. To operationalise this recommendation, existing mechanism could be piloted (e.g. social witnesses or integrity pacts) before rolling them out more broadly. The protection of CSO actors needs to be guaranteed.

Summary of substantive gaps and recommendations of Indicator 11

	Substantive gap	Risk classification and red flags	Recommendations
11 (a)	Limited clarity on consultation scope, process and outcomes	Medium	Clearly define the scope of consultations, including expanding consultations to secondary legislation. Provide transparency with the results of consultation processes, informing participants about reasons for acceptance or disregard of comments.
11(b)	Lack of transparency for effective monitoring by civil society	High	Enhance all levels of transparency, from procurement data in machine-readable format to mandatory access to SCM policies of all organs of state.
11(c)	Opportunities for participating by civil society not sufficiently institutionalised	Medium	Introduce practices that allow for direct oversight of procurement procedures and contract implementation through civil society (e.g. social witnesses, integrity pacts). These practices could initially be piloted for high-risk projects before a wider roll-out.



Indicator 12. The country has effective control and audit systems

The objective of this indicator is to determine the quality, reliability and timeliness of the internal and external controls. Equally, the effectiveness of controls needs to be reviewed. For the purpose of this indicator, “effectiveness” means the expediency and thoroughness of the implementation of auditors’ recommendations. The assessors should rely, in addition to their own findings, on the most recent public expenditure and financial accountability assessments (PEFA) and other analyses that may be available.

- **Synthesis of the indicator**

South Africa presents severe gaps in compliance with this indicator. The Auditor General performs comprehensive audit work but great challenges are experienced with weaknesses in internal control and audit. Lack of enforcement and “consequence management” signifies that structural issues are not resolved, and accounting authorities and accounting officers (AA/AO) are not accountable in performing their function. Gaps in terms of incompleteness of records undermine important audit work.

- **Findings**

Legal framework, organisation and procedures of the control system (sub-indicator 12(a))

The control and audit system

The control framework comprises the following audit and control structures established by a number of different laws and regulations:

- 1) Accounting Officers and Accounting Authorities as established in the Public Finance Management Act⁸⁴ – responsible for setting up internal audit
- 2) National Treasury, Office of the Accountant General (OAG) – overseeing the implementation of the PFMA
- 3) The Auditor General South Africa (AGSA)⁸⁵ – performs external audit by the Supreme Audit Institution

Under PFMA, every department and every constitutional institution must have an accounting officer. They are responsible for financial and risk management, and internal control. Accounting officers are heads of national departments as per Section 38 of the Public Finance Management Act (PFMA). As part of their mandate, accounting officers set up the internal audit system under the control and direction of an audit committee. Accounting officers are also responsible for the set-up of the procurement system within their entity. Their mandate includes effective, efficient, economical and transparent use of the resources of the department. Accounting officers must report unauthorised, irregular or fruitless and wasteful expenditure to the relevant treasury. They also are mandated to take disciplinary steps against officials in case of lack of compliance or wrongdoing.

⁸⁴ PFMA - section 38 (a) (ii) and 51 (a)(ii)

⁸⁵ Auditor General Act 12 of 1995



The PFMA also provides for the establishment of accounting authorities within public entities. Accounting authorities are heads of PFMA Scheduled Public Entities/Institutions (boards of directors), according to Section 56 of the PFMA. Accounting authorities have responsibility for effective, efficient and transparent systems of financial and risk management, and internal control. They oversee the system of internal audit in compliance with the rules set out in the PFMA.

The PFMA invests accounting officers/accounting authorities with four key responsibilities⁸⁶:

- a) The operation of basic financial management systems, including internal controls in departments and any entities they control;
- b) Ensuring that departments do not overspend their budgets;
- c) Reporting on a monthly and annual basis, including the submission of annual financial statements two months after the end of a financial year; and
- d) Publishing annual reports in a prescribed format which will introduce performance reporting.

An audit committee (AC) is an independent committee constituted to review control, governance and risk management within the institution, established in Section 77 of the Public Finance Management Act (PFMA). As per PFMA, audit committees must consist of at least three people and meet twice yearly. In case of a department, one member of the AC must be outside of public service, while the majority and the chairperson must not be employed by the department. The AC assists the accounting officer (AO) in the effective execution of his/her responsibilities with the ultimate aim of the achievement of the organisation's objectives. The roles and responsibilities of AC are determined by the AO.

National Treasury is part of the control system with its oversight role regarding the implementation of the PFMA. Within NT, the Office of the Accountant General (OAG) is tasked with internal audit support, specialised audit services as well as risk management. The responsibility of the Office of the Accountant General is to promote and enforce transparency and effective management in respect of revenue expenditure, assets and liabilities of institutions in all three spheres of government. This includes the administration of the National Revenue Fund (NRF) and the Reconstruction and Development Programme Fund (RDPF), as well as banking services for national departments. The OAG is also responsible for developing policies and frameworks on accounting, internal audit and risk management⁸⁷.

The Auditor General of South Africa (AGSA) has a constitutional mandate to act as the external auditor of all national and provincial state departments and municipalities, and any other institutions or accounting entities required to be audited (at national or provincial level). The Constitution guarantees the independence of AGSA, stating that AGSA must be impartial and must exercise its powers and perform its functions without fear, favour or prejudice.

In fulfilling its mandate, the AGSA annually produces audit reports on all government departments, public entities, municipalities and public institutions. Beyond entity-specific reports, the audit outcomes are analysed in general reports that cover both the Public Finance Management Act (PFMA) and Municipal Finance Management Act (MFMA) cycles. Section 4 of the Public Audit Act (PAA) makes a further distinction between mandatory and discretionary audits.

⁸⁶ <https://www.treasury.gov.za/legislation/pfma/Default.aspx>

⁸⁷ <https://oag.treasury.gov.za/Pages/default.aspx>



AGSA also has the right to review and investigate efficiency and effectiveness of internal control and management measures (Auditor General Act, 1995). Through enhanced powers effective from 1 April 2019, the AGSA also issues material irregularities⁸⁸. If the AA/AO does not appropriately deal with material irregularities, AGSA's mandate allows to a) refer material irregularities to relevant public bodies for further investigation; b) recommend actions in the audit report to resolve the material irregularity and take binding remedial action for failure to implement the recommendation; and c) issue certificate of debt for failure to implement remedial action if financial loss is involved.⁸⁹

Framework for internal control/audit

The PFMA provides for the establishment of AO/AA with responsibilities for financial and risk management, and internal control as well as internal audit. Namely, Section 38 of the PFMA states that “the accounting officer for a department must ensure that that department has and maintains a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77”. Furthermore, NT as the custodian of the PFMA, has responsibility in overseeing the implementation of PFMA, which includes providing support with internal control and internal audit through the Office of the Accountant General.

The National Treasury may make regulations or issue instructions applicable to departments, concerning fruitless and wasteful, unauthorised and irregular expenditure (PFMA section 76 (2)(e)).

The National Treasury may make regulations or issue instructions applicable to all institutions to which this Act applies concerning (PFMA section 76 (4)):

- (a) Any matter that may be prescribed for all institutions in terms of this Act;
- (b) Financial management and internal control;
- (c) Determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;
- (d) Audit committees, their appointment and their functioning;
- (e) Internal audit components and their functioning.

As per Treasury Regulations (TR), audit committees (AC) play an important role in internal control (see TR Section 3.1)⁹⁰. Namely, they must review the effectiveness of the internal control system in addition to reviewing internal audit and risk management, among other tasks (TR Section 3.1.10). Furthermore, they must provide comments on the effectiveness of internal control, among other reporting, in the annual report of the institution (TR Section 3.1.13).

⁸⁸ A “material irregularity” is defined as “any noncompliance with, or contravention of, legislation, fraud, theft or a breach of a fiduciary duty identified during an audit performed under this Act that resulted in or is likely to result in a material financial loss, the misuse or loss of a material public resource or substantial harm to a public sector institution or the general public” (Chapter 1, Public Audit Act 2005).

⁸⁹ <https://mfma-2022.agsareports.co.za/pages/mi-explained>

⁹⁰ Treasury Regulations, for departments, constitutional institutions and public entities Issued in terms of the Public Finance Management Act, 1999 (2005)



Treasury Regulations also stipulate that accounting officers must ensure that a risk assessment is conducted regularly and a risk management strategy is used to direct internal audit efforts and priorities as well as determine the skills needed to manage identified risks (TR Section 3.2.1)⁹¹.

Treasury Regulations 3.2 also allow for internal audit activities to be outsourced (TR Section 3.2.4). Furthermore, the purpose, authority and responsibility of the internal audit function must, in consultation with the audit committee, be formally defined in an audit charter and be consistent with the Institute of Internal Auditors' (IIA) definition of internal auditing (TR Section 3.2.5). Internal audits must be conducted in accordance with the standards set by the Institute of Internal Auditors (TR Section 3.2.6).

The Office of the Accountant General within NT plays a role in harmonising the internal control/audit system. It assists and supports agencies of government and the public sector (national, provinces and entities level) and ensures that they have and operate effective internal audit functions. All auditors in government have membership in the Institute of Internal Auditors (IIA).

The Accountant General determines mandatory standards for internal audit, including the National Treasury Internal Audit Framework. This is a mandatory document as it is derived from the provisions of the Public Finance Management Act 1 of 1999 and the Municipal Finance Management Act 53 of 2003. The document is designed and implemented by the Office of the Accountant General on behalf of Internal Auditors within the South African public services.

As outlined in the NT Internal Audit Framework, AC members need to have a good understanding of the control framework. This understanding will enable the AC to evaluate the adequacy of the organisation's control environment and will be a basis from which reasonable assurance can be provided that the organisation's objectives and goals will be achieved efficiently and economically (National Treasury Internal Audit Framework).

Furthermore, internal auditors are bound by a code of ethics in internal audits⁹².

In the National Treasury's Annual Report 2022-2023⁹³, the Office of the Accountant General reports having conducted so-called state of readiness reviews to determine the effectiveness of the internal audit functions and measure the quality of work performed within them. Reportedly, surveys were conducted on the status of internal audit and audit committees in PFMA and MFMA institutions, focusing on areas such as institutional arrangements, quality control, and the resourcing of internal audit units and audit committees. These reports were used to determine focus areas for additional technical support. Various activities in support of internal auditors in the public sector were undertaken in collaboration with the Institute of Internal Auditors (IIA SA).

National Treasury SCM Instruction No 2 of 2016/2017 requires the submission to National Treasury of annual procurement plan, quarterly progress reports and periodic amendments of the procurement plan by AA/AO. Furthermore, Section 55(2)(b) of the PFMA provides that the annual report and financial

⁹¹ Ibid.

⁹² IIA, International Professional Practices Framework (IPPF), Code of Ethics Implementation Guides [ig-code-of-ethics-combined.pdf \(theiia.org\)](https://www.theiia.org/ig-code-of-ethics-combined.pdf)

⁹³ https://www.gov.za/sites/default/files/gcis_document/202310/national-treasury-annual-report.pdf



statements of a public entity must include any material losses through criminal conduct and any irregular expenditure, and fruitless and wasteful expenditure that occurred during the financial year.

Procurement “by other means” must be reported to NT within 14 days of its finalisation⁹⁴. Furthermore, the AA/AO must ensure that procurement “by other means” is recorded in the annual report of the organisation.

External audit

AGSA is accountable to the National Assembly in terms of Section 181(5) of the Constitution and Section 3(d) of the PAA. It reports to the National Assembly annually on activities and the performance of its functions by tabling two main accountability instruments, namely business plan, budget and annual report. The Standing Committee on the Auditor General (SCOAG), established in terms of the Constitution and the PAA, oversees our performance on behalf of the National Assembly⁹⁵. Records of meetings of SCOAG are posted online.⁹⁶

Section 188 of the Constitution outlines the functions of the AGSA. These are further regulated in the Public Audit Act, 2004 (Act No. 25 of 2004, PAA). As part of its constitutional functions, AGSA must audit and report on the accounts, financial statements and financial management of:

- All national and provincial state departments and administrations;
- All constitutional institutions;
- The administration of Parliament and of each provincial legislature;
- All municipalities;
- All municipal entities; and
- Any other institution or accounting entity required by other national or by provincial legislation to be audited by the Auditor General.

Similarly, the Auditor General must audit and report on the consolidated financial statements of:

- a) The national government (Section 8 of the PFMA);
- b) All provincial governments (Section 19 of the PFMA); and
- c) A parent municipality and all municipal entities under its sole or effective control (Section 122 (2) of the MFMA).

In 2019, the Public Audit Act introduced the notion of “material irregularity”, which is defined as “any noncompliance with, or contravention of, legislation, fraud, theft or a breach of a fiduciary duty identified during an audit performed under this Act that resulted in or is likely to result in a material financial loss, the misuse or loss of a material public resource or substantial harm to a public sector institution or the general public” (Chapter 1, Public Audit Act 2005).

⁹⁴ PFMA SCM Instruction No 03 of 2021/2022: Enhancing Compliance, transparency and accountability in Supply Chain Management.

⁹⁵ AGSA Strategic Plan and Budget, 2023-2026

⁹⁶ For instance: Standing Committee on Auditor General, Auditor-General on 2022/23 National & Provincial Audit Outcomes, 29 November 2023 <https://pmg.org.za/committee-meeting/38122/>



The amendment of the Public Audit Act also gave an expanded mandate to AGSA to take direct actions in reporting material irregularities if the AA/AO does not appropriately deal with them. The expanded mandate allows AGSA to 1) refer material irregularities to relevant public bodies for further investigations; 2) recommend actions in the audit report to resolve the material irregularity; 3) take binding remedial action for failure to implement recommendations; 4) issue certificate of debt for failure to implement remedial action if financial loss is involved.

The material irregularity (MI) processes expanded the Auditor General work's significantly in 2022-23 by implementing the MI process at 431 national and provincial government auditees – from 202 in 2021-22. From the time of activation of the material irregularity process in April 2019 to 30 September 2023, AGSA identified 266 material irregularities. A large share of those irregularities (60%) were connected to procurement and payments (non-compliance with PP process, uneconomical procurement, payment for goods and services not received or of poor quality/not in line with contract or to ineligible beneficiaries)⁹⁷.

AGSA has set up formal arrangements (Memoranda of Understanding (MoU)) with several public bodies to facilitate follow-up and investigation in case of suspected corruption and fraud. This includes MoU with the Special Investigations Unit (SIU), the Competition Commission, Department of Public Service and Administration, and Public Service Commission. The MoU are not a prerequisite for referral of finding, but rather aim at streamlining the process of follow-up by the relevant authorities.

The audit methodology of AGSA incorporates the International Standards on Auditing (ISA)240 which deals with the auditors' responsibilities relating to fraud in an audit. As part of ISA 240, the primary responsibility for detection of fraud lies with the those charged with governance and management of the entity in question. Nevertheless, AGSA relies on several sources of information to conduct risk assessment of certain audits. This includes:

- Inquiring from management and others within the entity (including internal audit) to determine whether they have knowledge of any actual, suspected or alleged fraud affecting the entity
- Evaluating whether unusual or unexpected relationships exist while performing analytical procedures, which could indicate possible fraud
- Evaluating other information obtained which may indicate risks of fraud; for example, external reports (e.g. State Capture Commission Report), media articles etc.
- Additionally, a mechanism for receiving complaints and requests for information from the public, which are also considered in risk assessments where applicable⁹⁸

The Public Audit Act 2005 does not seem to define clear timeframes for the implementation of recommendations. Instead, the 2018 amendment of the PPA calls for the Auditor General to follow up with AA/AO on the implementation of recommendations relating to any material irregularity “within reasonable time after the issuing of an audit report”. AGSA's stringent mandate for follow-up applies only for material irregularities.

⁹⁷ AGSA, Consolidated General Report on National and Provincial Audit Outcomes 2022-2023, <https://www.agsa.co.za/Portals/0/Reports/PFMA/2022-23/Updates/PFMA%20Report%202022-23%20FINAL%20INTERACTIVE%20PDF.pdf?ver=JW4XlsvSZPV6Okai588yaA%3d%3d>

⁹⁸ AGSA, Presentation Integrity in public procurement



Co-ordination of controls and audits of public procurement (sub-indicator 12(b))

Internal audit framework

The National Treasury Internal Audit Framework is the reference document for internal audit and internal control. The Framework is a mandatory document as it is derived from the provisions of the Public Finance Management Act 1 of 1999 and the Municipal Finance Management Act 53 of 2003. The document is designed and implemented by the Office of the Accountant General on behalf of internal auditors in the South African public service.

As per the National Treasury Internal Audit Framework, the operation of internal control systems is the responsibility of the relevant line managers. Internal controls are not limited to financial matters but apply to operations as well. Essentially, it is a management system, culture and set of values designed to ensure that the organisation is managed efficiently and effectively, with the appropriate policies and procedures that promote the achievement of its overall goals and objectives.

As outlined in the PFMA and Treasury Regulations, the audit committee plays a role with respect to internal control. It is an independent governance structure whose function is to provide oversight of the systems of internal control, risk management, and governance.

AGSA developed *Preventive Control Guides* as part of an effort to assist oversight structures to diagnose weaknesses in preventative mechanisms and focus their oversight efforts.⁹⁹

Audit standards

In line with PFMA Act 38(1)(a)(ii), Treasury Regulations 2005 Section 3.2.6) mandate the use of standards set by the Institute of Internal Auditors (IIA), namely the SA Professional Practice Framework (IPPF). All auditors in government have membership in the IIA and are therefore bound to compliance with standards set by the IIA.

Furthermore, AGSA's audit methodology incorporates the International Standards on Auditing (ISA)240, which deals with auditors' responsibilities relating to fraud in an audit.

The National Treasury Internal Audit Framework is also designed to ensure a minimum guideline for the development and operation of internal auditing in the public service, including compliance with the Institute of Internal Auditors' (IIA) International Standards for the Professional Practice of Internal Auditing (ISPPA).

Guidance for audits to be performed on behalf of AGSA foresees the following: "In terms of section 13(1)(a) of the PAA, the AGSA has determined that the International Quality Control, Auditing, Review, Other Assurance and Related Services Pronouncements issued by the International Auditing and Assurance Standards Board of the International Federation of Accountants have to be applied in performing the audits conducted by the AGSA."¹⁰⁰

State-owned enterprises (SOEs) also follow corporate governance frameworks, namely the King IV Report. In particular, King IV principle 15 deals with ensuring that assurance services and functions enable an

⁹⁹ <https://www.agsa.co.za/AuditInformation/PreventativeControlGuides.aspx>

¹⁰⁰ IRBA, AGSA, (2015) GUIDANCE ON PERFORMING AUDITS ON BEHALF OF THE AGSA



effective control environment, and that these support the integrity of information for internal decision making and of the organisation's external reports.

The Independent Regulatory Board of Auditors (IRBA) provides a Code of Professional Conduct for Registered Auditors.

Audit reports

There is ample evidence of external audits conducted at regular intervals by the AGSA, which cover the following:

- Audit reports (not accessible to the public)
- General reports covering audit outcomes of the PFMA
- General reports covering audit outcomes of the MFMA
- Special reports including those on Material Irregularities

Reports by AGSA are easily available through the website of the Auditor General and are downloadable free of charge. In addition to the above, internal audit reports are produced by organs of state. Internal audit documents are not publicly available.

Reporting lines

The Auditor General of South Africa has a constitutional mandate to report to the Standing Committee on the Auditor General as established in Section 10(3) of the Public Audit Act. Furthermore, the Auditor General has established several MoU to facilitate exchanges with other public bodies, such as the Special Investigations Unit (SIU), Competition Commission, Department of Public Service and Administration, and Public Service Commission. The MoU are not a pre-condition for sharing findings and referring matters to competent bodies but facilitate the process and ensure that findings are treated more effectively.

Under Section 45 of the Auditing Professions Act 26 of 2005, the concept of reportable irregularity is defined. It refers to an unlawful act or omission committed by someone in a management position, which has caused or is likely to cause material financial loss to the entity, or which is fraudulent, or which involves a material breach of a fiduciary duty. In such a case, the auditor has a legal obligation to immediately notify the Independent Regulatory Board for Auditors (IRBA) with details of the reportable irregularity and then, three days thereafter, to report to management and give them an opportunity to explain what happened. The auditor is then required to report back to IRBA and specify their opinion on whether there was such an irregularity.

Enforcement and follow-up on findings and recommendations (sub-indicator 12(c))

The Public Audit Act 2005 does not seem to define clear timeframes for the implementation of recommendations. Instead, the 2018 amendment of the PPA calls for the Auditor General to follow up with AA/AO on the implementation of recommendations relating to any material irregularity "within reasonable time after the issuing of an audit report". AGSA's stringent mandate for follow-up applies only to material irregularities. Failure by AA/AO to take action on material irregularities gives AGSA power to take remedial action (Section 5A). In case of failure to comply with remedial action, AGSA must issue a certificate of debt requiring the AA/AO to repay the amount specified in the certificate of debt to the State (Section 5B).



As per Treasury Regulations 3.1, the audit committee must meet at least once a year with the AGSA to ensure that “there are no unresolved issues of concern”. However, the audit committee does not have formal powers for implementation of audit recommendations. It must report annually on the effectiveness of 1) internal control, 2) the quality of in-year management and monthly/quarterly reports, and 3) evaluation of annual financial statements.

The audit committee may advise management on an action plan in response to findings from the Auditor General, as reported by the NGO Parliamentary Monitoring Group (PMG)¹⁰¹. It is not clear to the assessors whether this is a standard practice or an isolated example.

AGSA’s mandate regarding material irregularities provides it with powers to take action in case accounting officers or authorities do not deal with these types of irregularities appropriately.

Qualification and training to conduct procurement audits (sub-indicator 12(d))

Auditor training

The Independent Regulatory Board of Auditors’ Continuing Professional Development Policy is aimed at improving and developing audit professionals across the spheres of government.¹⁰² The Independent Regulatory Board of Auditors is established in Section 3 of the Auditing Professions Act 26 of 2005. It is a statutory body established to protect the financial interests of the public by ensuring registered auditors and their firms deliver services of the highest quality.

Section 6(1)(a) of the Auditing Profession Act, 2005 (Act No. 26 of 2005(as amended)) (“the Act”), mandates the IRBA to prescribe minimum qualifications, competency standards and requirements for the registration of auditors. In addition to this duty to ensure competence at entry point to the profession, the IRBA ensures that registered auditors continue to develop and maintain their professional competence throughout their professional lives¹⁰³.

AGSA also implements its training programmes and conducts one of the largest graduate training programmes in the world. It supports staff through Leader Training, Executive and Leadership Development Programmes (EDP and LDP), and young professional development (SAICA trainee programme). Furthermore, regular internal training is provided to audit teams. Further activities to professionalise AGSA’s workforce consist of:

- Product Champion training – monthly training sessions for training officers in each business unit within AGSA
- Technical committee meetings – monthly meetings involving all staff in each audit business unit
- FAQs – available to all AG staff
- Technical consultation – accessible to the entire audit team
- Technical updates – provided to all AG staff

¹⁰¹ <https://pmg.org.za/committee-meeting/34499/>

¹⁰² IRBA (2020) CONTINUING PROFESSIONAL DEVELOPMENT POLICY, <https://www.irba.co.za/upload/CPD%20Policy%20Final.pdf>

¹⁰³ Ibid.



Training is not specifically designed for public procurement audits. Nevertheless, public procurement constitutes one of the main areas of activity for South Africa’s Auditor-General.

Selection of auditors

AGSA reports the following regarding the selection of auditors: AGSA’s office is made of a diverse team of auditors with wide-ranging skills, expertise and experience. Among other certified fraud examiners and accountants, these include engineers, specialist data and information system analysts, and chartered accountants. Almost 60% of AGSA’s audit professionals are chartered accountants and belong to the accounting professional body, SAICA.

Audit teams are allocated through a risk-based approach: experienced auditors are allocated to high-risk audits with increased supervision. Audit teams are supported by specialised data analytics teams, investigations business unit and the technical audit support business unit, among others. All audit work undergoes strict quality reviews by the Quality Control Business unit and some audit files also include independent reviews (pre-issuance etc.)

- **Gaps**

Systemic weaknesses of the control system: The decentralised nature of the PFMA hands over significant responsibility and accountability for the functioning of the SCM system to accounting officers and accounting authorities, building a system that rests in large part on the integrity and capacity of those entities. In the context of procurement, AA/AO are granted important discretionary powers, notably with respect to procurement “by other means”. The full responsibility and accountability for deviations of competitive procurement has been devolved to AA/AO with the introduction of SCM Instruction 3 of 2021/2022. Previously, National Treasury had to grant approval for such deviations, including for expansions and variations of contracts. AA/AO are also charged with follow-up on irregularities identified at audit.

However, it is evident that AA/AO present severe weaknesses in upholding their role as guarantors of the PFMA – not least due to the fact that AGSA repeatedly singles out the “lack of consequence management” as an issue, i.e. inaction by AA/AO in implementing recommendations in response to findings about irregularities. The strengthening of the role of the AGSA is a step in the right direction but it is also illustrative of systemic weaknesses of the overall control system. Increasing the responsibility of AA/AO, on the other hand, takes away a layer of safeguard that existed with NT’s approval. The lack of effectiveness of the regime introduced by SCM Instruction 3 of 2021/2022 is documented by Treasury’s report to SCOPA. In fact, under the previous regime (SCM IN 3 of 2016/17) ZAR 5.5 billion were reported as deviations from competitive bidding. Under the current regime, this figure amounts to ZAR 248 million. As noted by Treasury, it is unlikely that this stark reduction is due to a reduction in practices; rather, it stems from a lack of reporting. Similar shifts have been documented for contract modifications¹⁰⁴. As such,

¹⁰⁴ National Treasury (2022), Enhancing Compliance, Transparency & Accountability: Update on the provisions of the National Treasury SCM Instruction No. 03 of 2021/2022. Presentation to the Standing Committee on Public Accounts (SCOPA). https://pmg.org.za/files/221122INSTRUCTION_3_OF_2021-22_ENHANCING_TRANSPARENCY_-SCOPA_presentation_Final.pptx



the new regime seems to undermine its stated goal, namely, to increase transparency and accountability in supply chain management.

Finally, a paradox is observed by the assessors: despite strong evidence of poor outcomes in service delivery, high number of irregularities, severe challenges in addressing recommendations by AGSA etc., an overly controlled environment is lamented by some stakeholders. Control by the Auditor General may lead to inaction due to fear of audits.

This gap is assigned a red flag given the fact that it pertains to systemic weaknesses of the control system and hence lies outside the sphere of public procurement.

Lack of capacity in internal control/audit highlighted by State Capture Commission Report: The State Capture Commission Report documents glaring failures of internal (and external) audit, particularly evidenced by the case of South African Airways (SAA). The report highlights that “the auditors appointed to SAA for the 2012 to 2016 financial years failed dismally to detect any of this fraud and corruption. The internal audit function within SAA was also hopelessly ineffective in identifying or limiting these criminal acts”. Strong weaknesses in capacity contributed to the weak control environment in which key executive management positions were vacant and the Chief Procurement Officer was suspended. Furthermore, SAA officials also lacked appropriate competencies, particularly in the preparation of financial statements and SCM. As reported in testimonies, the legal department “was incapable of ensuring that tenders were awarded in accordance with process [...] This represented an enormous risk to SAA because there was no way to hold suppliers accountable. Nevertheless, these suppliers were simply paid by SAA”.

Furthermore, severe problems with record-keeping and poor internal controls are particular points highlighted in the State Capture Commission Report¹⁰⁵. Testimony from the case shows that no consequences were imposed for transgression around compliance with legislation, including with instances around irregular, fruitless and wasteful expenditure.

While the State Capture Commission documents, in detail, extremely ineffective internal controls at SAA, the assessors consider that it exemplifies the severe weaknesses in the control environment across organs of state, as reported by stakeholders and widely documented by AGSA.

Weak control environment documented by AGSA: In addition to the findings of the Judicial Commission of Inquiry into Allegations of State Capture, the AGSA’s 2021-2022 Report on National and Provincial Audit Outcomes confirms findings around weak control environment and overall problems with the accountability value chain¹⁰⁶. Specifically, the 2021-2022 report highlights systemic weaknesses in senior management and accounting officers’ slow (or lack of) responsiveness to improve internal controls and root causes for poor audit outcomes. According to AGSA, only 20% of auditees had effective senior management in place. Similarly, the function of accounting officers and authorities shows instability,

¹⁰⁵ “The record keeping problem at SAA was so bad that it would sometimes take three months for SAA to comply with a request and this resulted in a significant limitation in the scope of the audit that could be performed – without critical source documents. This was particularly so with respect to SCM and assets.”

¹⁰⁶ AGSA, PFMA 2021-2022, CONSOLIDATED GENERAL REPORT ON NATIONAL AND PROVINCIAL AUDIT OUTCOMES <https://pfma-2021-2022.agsareports.co.za/wp-content/uploads/2022/12/22253B-2021-22-PFMA-General-Report-interactive-V3.pdf>



with consequences for its effectiveness, such as completion of action plans, projects and initiatives, and implementation of consequence management for identified shortcomings.

AGSA further notes that while internal audit units and audit committees are established and largely functional, the impact of their work is not fully visible, given the poor quality of financial statements and annual performance reports reviewed by the external auditor. In fact, the value of the internal audit function is often not achieved because management does not implement recommendations.

Furthermore, the overall accountability value chain suffers from poor annual performance reporting and credibility of reporting. In fact, AGSA finds that auditees in the key service delivery portfolios struggled to produce useful and reliable reports, with 45% receiving material findings on the quality of their performance reporting while 40% included information that was not reliable and 25% included information that was not useful. Poor monitoring of performance and reporting has an impact throughout the accountability value chain. Namely, accounting officers and authorities, and oversight bodies (such as portfolio committees) also use in-year reporting for monitoring purposes; without reliable information, their monitoring process is ineffective.

Despite the existence of performance management and reporting frameworks that clarify requirements, most departments and public entities are not able to produce such reporting with sufficient levels of quality to assure credibility, usefulness and reliability.

The AGSA considers that ineffective reporting severely impacts the entire accountability value chain: “At the level of senior management, internal audit units and audit committees (responsible for designing and implementing required performance management controls), problems emerge with a lack of prevention and detection of misstatements, enabled by a poor control environment. Such misstatements are not corrected promptly. Accounting officers and authorities do not always create a conducive environment for performance management controls and continue to sign off on annual performance reports that are not credible. Those responsible for support, oversight, accountability and governance (executive authorities; Department of Planning, Monitoring and Evaluation; offices of the premier; legislatures; and portfolio committees) make decisions based on annual performance reports that are not credible because they a) do not always pay sufficient attention or ask the right questions by interrogating information to identify the issues b) do not follow up on identified issues.”¹⁰⁷

Further, it should be noted that surveys conducted by the Institute of Internal Audit in 2018 highlight a culture of fear in which internal auditors do not feel protected enough to bring up issues at the time of inquiry by judicial and presidential commissions. The IIA reports “internal auditors claiming they were victimised, intimidated and coerced into sweeping findings under the carpet”.¹⁰⁸ This applies both to internal auditors in the private and public sector.

¹⁰⁷ AGSA, PFMA 2021-2022, CONSOLIDATED GENERAL REPORT ON NATIONAL AND PROVINCIAL AUDIT OUTCOMES <https://pfma-2021-2022.agsareports.co.za/wp-content/uploads/2022/12/22253B-2021-22-PFMA-General-Report-interactive-V3.pdf>.

¹⁰⁸ IIA (2018), Internal Audit Must Help Rebuild SA as Country Presses Reset Button https://cdn.ymaws.com/www.iiasa.org.za/resource/collection/6F759FA7-2F04-4A2D-8F69-C94A6F4044D9/Internal_Audit_Must_Help_Rebuild_SA__24_May_2.pdf.



Finally, as highlighted in Indicator 7, the lack of integration between organs of state’s internal financial management systems such as LOGIS and BAS may pose a further challenge to an effective internal control/audit environment capable of producing accurate reporting.

This gap is assigned a red flag given the fact that it pertains to systemic weaknesses of the internal control system and hence lies outside the sphere of public procurement.

Growing irregular expenditure: Over the past decade, irregular expenditure¹⁰⁹ has ballooned from ZAR 20.63 billion in 2011-12 to ZAR 423.63 billion in 2021-22, according to the Government Technical Advisory Centre (GTAC), which is an entity dedicated to improving public finance management and is overseen by National Treasury. However, there is contradictory data by AGSA, which reported irregular expenditure at ZAR 166.85 billion for 2021-22¹¹⁰. According to stakeholders, reporting irregular expenditure in Annual Financial Statements is burdensome and does not contribute to a nuanced understanding of its root causes, which may lie in administrative non-compliance. Organs of state may be at odds with the Auditor General as to what is considered irregular expenditure. Overall, stakeholders consider that the external audit function is punitive regarding minor irregularities and does not sufficiently address substantive issues such as corruption red flags that would require more intensive scrutiny at audit.

Limited visibility of internal audit capacity by NT: National Treasury implements yearly strategies to assess the outcomes of internal audit work (state of readiness reports), as highlighted in the NT’s annual report. It should be noted that assessors were not able to access the state of readiness reports conducted by the Office of the Accountant General on the strength and weaknesses of internal audit functions. Furthermore, NT appears to have a limited overview on the overall effectiveness of internal audit work despite its efforts. In part, limited visibility may be due to lack of data analytics or limited data to determine trends in internal audits. At the same time, South Africa’s highly decentralised system also makes it challenging to have an overview of shortcomings across the system. Similarly, ensuring harmonised practices may be a challenge in a decentralised system in which each audit committee may operate under potentially different mandates.

Reporting on deviations: It is not clear to the assessors how such reporting takes place in practice. As highlighted in Indicator 7, deviations are currently not managed through an electronic system; instead, they are individually reported by organs of state to relevant treasuries or the Auditor General.

This raises several issues and questions: namely whether NT or AGSA consider the scope of reporting to be complete and how effective analysis about the nature of deviations can be conducted without electronic reporting.

National Treasury conducts bid review processes based on deviation reports or procurement “by other means” that appear unjustified or where there is an element of abuse of the procurement system.

¹⁰⁹ As per PFMA, “irregular expenditure” means expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation- a) this Act; or b) the State Tender Board Act, 1968 (Act No. 86 of 1968), or any regulations made in terms of that Act; or c) any provincial legislation providing for procurement procedures in that provincial government;

¹¹⁰ <https://pfma-2020-2021.agsareports.co.za/wp-content/uploads/2021/12/Audit-Outcomes-Tab-005-Compliance-G011.svg>



However, no additional information on processes and actions taken by National Treasury related to reporting of deviations has been provided to the assessment team. The outcomes of such reviews and their recommendations are then presented to the AA/AO for implementation. AGSA further conducts a Reasonability Test on all unjustified procurement-by-other-means reports and issued findings. Similarly, these results by AGSA have not been shared with the assessment team for review.

While greater transparency about deviations through reporting may be considered a safeguard against abusing these provisions, it may offer little safeguard if NT/AGSA are not able to properly treat this data and take action in case of potential abuse. This is especially critical given the fact that AA/AO have recently been given increased discretion in deciding on procurement “by other means”, with significantly diminished reporting of deviations recorded by National Treasury as a result.

Challenges in balancing operational effectiveness with necessary external audit scrutiny: While evidence points to severe issues in the implementation of effective internal controls, stakeholders also report being strongly constrained in their day-to-day operations by restrictive audit practices. As reported by stakeholders, there is a generalised fear of external auditors, which leads to inefficient operations and inaction. Receiving a so-called “clean audit” is perceived as out of reach. This finding appears paradoxical to assessors. In a context where corruption is perceived as rampant and accountability in case of non-compliance is still a severe issue, limiting the external scrutiny of organs of state does not appear to be an effective way forward.

Weak parliamentary oversight: As a general note, the State Capture Commission Report devotes several recommendations to the improvement of parliamentary oversight, including more forceful rules to ensure attendance by ministers; monitoring of corrective action proposed in reports adopted by Parliament; commitment of additional resources to oversight; as well as protecting parliamentarians engaged in oversight activities. The scope of the recommendations as well as the recommendation to enact stricter rules for parliamentary oversight suggests an overall weak parliamentary oversight system¹¹¹.

That said, parliament did initiate the process to enhance the Auditor General’s powers in 2016, following growing unauthorised, irregular, and fruitless and wasteful expenditure being reported at all levels of government¹¹².

Limited practical guidance for implementation of Internal Audit Framework: The National Treasury Internal Audit Framework refers to international standards applicable for internal control such as Committee of Sponsoring Organisations (COSO)¹¹³ and Institute of Internal Auditors (ISPPA 2130). At the same time, the document is high-level and describes best practice in theoretical ways without providing any practical examples for implementation. It does not specify any written procedures for internal control. No other manual for internal control has been identified by the assessors.

Importantly, Treasury Regulation (Section 3.2) on Internal Controls and Internal Audit barely give any consideration to the function of internal controls and do not refer to international good-practice standards, highlighting a potential gap in the regulatory framework.

¹¹¹ Judicial Commission of Inquiry into State Capture Report: Part IV All the recommendations

¹¹² <https://www.agsa.co.za/Reporting/SpecialAuditReports/MaterialIrregularities.aspx>

¹¹³ Committee of Sponsoring Organisations (COSO) <https://www.coso.org/>



The ‘Three Lines of Defence Model’¹¹⁴, an established governance tool for internal control and internal audit, is not referred to in any official documentation reviewed by the assessors. The ‘Three Lines of Defence Model’ highlights the role of functions that own and manage risks (first line of defence) for implementing day-to-day risk management activities and applying controls. The level of implementation and effectiveness of AGSA’s Preventive Control is not clear to assessors.

Outsourcing of audits: Under certain circumstances audits (external and internal) can be outsourced to private-sector firms. While there is guidance by AGSA on how these audits should be conducted, the quality of these audits may be compromised in certain instances. This is a particular finding of the Zondo Commission Report when reviewing the SAA case¹¹⁵. The appointed private-sector external auditor missed critical red flags, which were identified by AGSA in subsequent examinations. It is not clear to the assessors what reasons prompt organs of state or AGSA to choose external providers for audits.

Gaps in completeness of records for audits: There are significant limitations in the completeness of these audits due to lack of records or missing information. AGSA reports that it was not able to audit contracts worth ZAR 2.53 billion because of missing or incomplete information. Similar occurrences are also reported in internal audit findings.

This gap merits a red flag because its consequences are severe and solving the issue goes beyond the scope of public procurement.

Lack of enforcement and consequence management: There are systems in place to follow up on implementation of audit recommendations, consisting of the audit committee within an organisation and the material irregularities process by AGSA in case of inaction. Despite these mechanisms, implementation and enforcement of audit recommendations remain poor.

Lack of consequence management has been reported by AGSA on numerous occasions as a critical weak point of South Africa’s control system, necessitating the expansion of the Auditor General’s powers to address rampant inaction. Furthermore, it is important to note that Section 5A of the Public Audit Act on remedial action is part of the amended version inserted in 2018, indicating that less clear rules about follow-up were in place previously.

AGSA documents many instances of lack of implementation of recommendations and highlights poor consequence management as an issue: “However, 44% of auditees did not comply with legislation on implementing consequences. For 35% of auditees, this non-compliance was material. As a result, the year-end balances of these types of unwanted expenditure continue to grow. A culture of consequence management has not materialised because the right tone has not been set to encourage a behavioural change at the highest levels.”¹¹⁶

¹¹⁴ IIA Policy Paper, Internal audit, risk and corporate governance – the Three Lines of Defence Model <https://www.iaa.org.uk/media/1042665/three-lines-of-defence-march-2015.pdf>

¹¹⁵ Judicial Commission of Inquiry into State Capture Report: Part 1, Volume 1: South African Airways and its Associated Companies

¹¹⁶ AGSA, PFMA 2021-2022, CONSOLIDATED GENERAL REPORT ON NATIONAL AND PROVINCIAL AUDIT OUTCOMES <https://pfma-2021-2022.agsareports.co.za/wp-content/uploads/2022/12/22253B-2021-22-PFMA-General-Report-interactive-V3.pdf>.



Resorting to the material irregularities process is necessary to introduce some action; the lack thereof seems insufficient to lead to any kind of action. In 2021-2022, AGSA reported that “until we issued notifications, no actions were being taken to address 82% of these matters”¹¹⁷. Overall, the new amendments and expanded powers of AGSA seem to bear some fruits as the 2022-2023 PFMA report shows improved audit outcomes¹¹⁸.

Overall, the language in the Public Audit Act is not specific regarding timeframes for implementation of recommendations.

This gap is assigned a red flag because the disregard of audit recommendations undermines the functioning of public procurement control, i.e. ensuring lawful implementation of public procurement. Furthermore, addressing this gap lies outside the direct sphere of public procurement.

Gaps in formal qualification and reporting arrangements of internal audit: According to a 2014 NT survey on internal audits, lack of competences often leads to outsourcing of the internal audit function to private-sector providers. The survey highlights difficulties in filling vacant posts with the competences required. Furthermore, the Chief Audit Executive (CAE) often does not have the formal qualifications recommended by the Institute of Internal Audit. The level of internal audit experience (the number of years of first-hand experience) is too low for the demands of the job¹¹⁹.

Important skills gaps related to internal audit in the public sector have been documented since the 2000s and identified repeatedly throughout the years (e.g. 2014, 2015)¹²⁰. Beyond the public sector, internal audit skills are considered among the top five scarcest skills in the 2023 FASSET report¹²¹. The skills gap appears to be consistent with other findings in this report about the limited effectiveness of the internal audit function.

Furthermore, the 2014 NT survey highlights limited concerns about reporting lines of the internal audit function not in line with best practice, potentially limiting the independence of the internal audit¹²². More recent information would be valuable to determine whether such concerns are still applicable.

- **Recommendations**

¹¹⁷ Ibid.

¹¹⁸ AGSA (2023) CONSOLIDATED GENERAL REPORT ON NATIONAL AND PROVINCIAL AUDIT OUTCOMES 2022-2023 https://www.agsa.co.za/Portals/0/Reports/PFMA/2022-23/Updates/PFMA%20Report%202022-23%20FINAL%20FULL%20REPORT.pdf?ver=9md_i1D0jJp2wdnQEeYbA%3d%3d

¹¹⁹ The Status of And Demand for Internal Auditing in South African National Government Departments <https://www.treasury.gov.za/publications/other/2014%20The%20Status%20of%20and%20Demand%20for%20Internal%20Auditing%20in%20SA%20National%20Government%20Departments.pdf>

¹²⁰ Kato Plant (2017), Improving skills development in the South African public sector : an internal audit perspective, Southern African Journal of Accountability and Auditing Research Vol 19: 2017 (35-48)

¹²¹ FASSET (2023) Trends in Employment & Training in the FASSET Sector, https://www.fasset.org.za/downloads/FINAL%20REPORT_FASSET%20Sector%20Trends%202024.pdf

¹²² The Status of And Demand for Internal Auditing in South African National Government Departments <https://www.treasury.gov.za/publications/other/2014%20The%20Status%20of%20and%20Demand%20for%20Internal%20Auditing%20in%20SA%20National%20Government%20Departments.pdf>



Mitigate risks posed by systemic weaknesses of control system: The challenges of addressing a decentralised system go beyond this report (and hence warrant a red flag) but some actions may reduce the inherent risks posed by a decentralised system that relies on accounting authorities/officers for its lawful functioning. For instance, further attention could be paid to these entities having the qualifications, skills and capacity needed to perform their jobs. South African authorities could also consider areas in which limiting discretion may prove beneficial (e.g. rules on procurement “by other means”).

Address weaknesses in internal control and audit: Strong action to address weaknesses in control and audit are needed to ensure that this internal function performs in a way that supports the lawful execution of public procurement. First, NT should have clear visibility about the issues faced and develop targeted actions. Harmonisation of practices through a central hub is important in this context. Greater focus could be paid to making available resources much more practical and developing user-friendly manuals.

Importantly, managers should also be aware of the role of internal control and audit. Dedicated capacity-building activities could also address management’s role.

Address the root causes of irregular expenditure: South African authorities could aim at having a very clear understanding of the root causes for growing irregular expenditure; in particular, in cases in which it constitutes administrative non-compliance and when it constitutes deliberate non-compliance (hence exposing risks of corruption, fraud or other prohibited practices).

As noted in several parts of this assessment, South Africa’s complex regulatory framework is very likely to contribute to difficulties in ensuring compliance with laws and regulations, particularly if SCM practitioners are not fully professionalised. The starting point for increased compliance and, therefore, less irregular expenditure is a streamlined and simplified regulatory framework, which avoids internal discrepancies and contradictions.

A second way to reduce irregular expenditure is to increase capacity in the SCM system. Increased capacity and professionalisation are needed for SCM practitioners but also for the internal control function, which could put in place routine mechanisms aimed at reducing irregular expenditure. Capacity should be supported by digital systems that reduce the margin for human error and improve the quality of data (i.e. address issues regarding missing audit trail).

A better understanding of frequent patterns and causes of non-compliance would give better indications to NT regarding the support it can provide SCM practitioners, such as dedicated guidance. By improving issues related to administrative non-compliance, auditors would be able to focus on more substantive issues related to the performance of the SCM system and areas that are considered at particular risk.

Increase the effectiveness of compliance reporting: NT could consider using the data it receives as part of mandatory compliance exercises (reporting on deviations) for analysis of potential lack of compliance. To do so, the reporting data needs to be automated and digitalised. Such an analysis could guide future restrictions and greater harmonisation of rules regarding procurement deviation with a view to creating a single regulatory system that moves away from ad hoc approvals by AA/AO. In the interim period, NT could ensure that any suspicious deviation is analysed and referred to competent institutions.

Promote an increased understanding of AGSA’s audit methods: In the short term, while irregularities are high and the internal controls and audit of the procurement system are weak, reliance on external audits to minimise unlawful practices is essential. Over time, once significant improvements are experienced,



external audits could focus on a more targeted risk-based approach. In the meantime, continuous communication between the AGSA and auditees is necessary to reduce lack of clarity and define common pathways for ensuring compliance based on AGSA’s standards.

Strengthen parliamentary oversight in procurement and audit matters: Weak parliamentary oversight does not apply only to public procurement or audit practices. However, MAPS methodology asks for the handling of audit findings by the legislative. Hence, increased attention in ensuring that procurement and audit matters are addressed is vitally important. This would allow for necessary legislative reform action to take place.

Support capacity building and harmonisation of internal audit practices: South African authorities could consider expanding the capacity of internal audit units, building on currently available instruments and structures. The OAG could play a harmonisation role by setting the standards for compliance, developing training and capacity building, and routinely identifying challenges and related solutions.

Investigate potential shortcomings in the practice of outsourcing of audits: While conditions for outsourcing audits are well-defined, there should be clarity about when this is the case and why. Audits by the private sector should be equivalent in quality and scope, addressing not only financial reporting but compliance with PFMA measures. South African authorities could get increased visibility about how widespread this practice is, how the audit quality compares to AGSA, and whether any regulatory changes are necessary to address potential shortcomings.

Ensure all records are available for audit purposes: It is vitally important that auditors have all records available to carry out their work. There should be significant and enforceable consequences for the lack of such records.

Monitor the impact of AG reform on enforcement and accountability: Recent reforms of AGSA’s mandate have shown improvements in enhancing accountability of AA/AO for not addressing audit recommendations. South African authorities could monitor the evolution of the implementation of material irregularities and take additional action if necessary. Introduce specific timeframes for implementation of recommendations.

Gather visibility of current qualifications and reporting arrangements of internal audit: Given the critical role of internal audit, NT could update work carried out a decade ago in gathering visibility of the qualification and reporting arrangements of internal audit, with a view to strengthening capacity and addressing any shortcomings.

Summary of substantive gaps and recommendations of Indicator 12

	Substantive gap	Risk classification and red flags	Recommendations
12 (a)(a)	Systemic weaknesses of control system	High risk, red flag	Mitigate risks posed by systemic weaknesses of control system by ensuring adequate capacity of AA/AO and limiting discretionary powers.



12 (a)(b)	Weak control environment documented by AGSA	High risk, red flag	Address weaknesses in internal control and audit through clear visibility of challenges, harmonisation of practices, awareness-raising for management, and offering practical support (e.g. manual).
12 (a)(b)	Limited visibility of internal audit capacity by NT	High risk	Address weaknesses in internal control and audit through clear visibility of challenges, harmonisation of practices, awareness-raising for management, and offering practical support (e.g. manual)
12 (a)(b)	Reporting on deviations	High risk	Increase the effectiveness of compliance reporting.
12 (a)(c)	Challenges in balancing operational effectiveness with necessary external audit scrutiny	Low risk	Promote an increased understanding of AGSA's audit methods.
12 (a)(d)	Growing irregular expenditure	High risk	Address the root causes of irregular expenditure.
12 (a)(e)	Weak parliamentary oversight	Medium risk	Strengthen parliamentary oversight in procurement and audit.
12 (b)(a)	Limited practical guidance for implementation of Internal Audit Framework	High risk	Support capacity building and harmonisation of internal audit practices.
12 (b)(c)	Outsourcing of audits	Low risk	Investigate potential shortcomings in the outsourcing of audits.
12 (b)(c)	Gaps in completeness of records for audits	High risk, red flag	Ensure all records are available for audit purposes; introduce enforceable penalties for the lack thereof.
12 (c)	Lack of enforcement and consequence management	High risk, red flag	Monitor the impact of AG reform on enforcement and accountability.
12 (d)	Gaps in formal qualification and reporting arrangements of internal audit	Medium risk	Gather visibility of qualifications and reporting arrangements of internal audit with a view



			to addressing identified capacity challenges.
--	--	--	---

Indicator 13. Procurement appeals mechanisms are effective and efficient

Pillar I covers aspects of the appeals mechanism as it pertains to the legal framework, including creation and coverage. This indicator further assesses the appeals mechanisms for a range of specific issues regarding efficiency in contributing to the compliance environment in the country and the integrity of the public procurement system.

Note: As explained in the analysis at 1(h), independent review of decisions of organs of state in relation to public procurement is through the court system, with applications for judicial review being made to the relevant High Court. As is common in systems which use the courts to conduct independent review of public procurement, there is limited or no national-level data/information available to assess the mechanisms for procurement appeals in the manner required by the MAPS methodology. This means that Indicator 13 has been only partially completed.

Synthesis of the indicator & Findings

Rights to challenge and grounds for challenge are based on administrative and common law rights and principles using judicial review applications direct to the relevant Division of the High Court. The rules for submission of challenges, timelines, process to be followed, submission and consideration of evidence and decision making are thus governed by the statutory provisions applying to the right to apply for judicial review and rules of the court. The available procedures and related time scales do not guarantee an effective and efficient process meeting the practical and commercial imperatives of procurement-related complaints. There is a perception that the challenge and appeals system is neither effective nor trustworthy and that appeals decisions are not consistent. A substantial minority (43%) of respondents in the Private Sector Survey expressed the view that the system does not work or rarely works according to the law. Over half of respondents (53.8%) strongly disagreed or disagreed that there is an effective mechanism for independent review. Decisions are not published on a centralised online government portal and there is a lack of substantive, comprehensive data on the conduct and outcomes of appeals to the High Court.

- **Gaps**

Timeframes for submission and review of challenges: The available procedures and related time scales do not guarantee an effective and efficient process meeting the practical and commercial imperatives of procurement-related complaints. Namely, according to World Bank data (2017) the average time taken by the first-tier review body (Court) to render a decision is 228 days from filing a complaint.¹²³

The gap is assigned a red flag because the lack of an efficient review system can severely impede the objectives sought through public procurement by reducing confidence in the system, which can have a

¹²³ <https://pubdocs.worldbank.org/en/996201520270732530/South-Africa.xlsx>



negative impact on competition. In addition, necessary reforms will require a national mandate and actions going beyond those lying solely within the procurement sphere.

Lack of trust in the system: There is a perception that the challenge and appeals system is neither effective nor trustworthy and that appeals decisions are not consistent.

This gap is assigned a red flag because lack of confidence in the review system can severely impede the objectives sought through public procurement.

Publication of decisions for-consistency and fairness of the process. Court judgments are, as a general rule, public documents but High Court judgments are not published as a matter of course. There is no official central government source of all public procurement-related decisions made by the High Court.

This gap is assigned a red flag because the lack of comprehensive and reliable information on review can severely impede the objectives sought through public procurement by reducing confidence in the system.

Recommendations

Time frames for submission and review of challenges and lack of trust in the system (combined recommendation): The same recommendation as under 1(h)(d) is applied: consider undertaking a critical study of the data and information available and stakeholders’ views on the operation of the system of judicial review to assess the fitness of purpose and efficiency of the current system for procurement complaints using the route of judicial review and to gauge confidence in and effectiveness of the operation of the system in practice. This should be undertaken with the aim of identifying whether the existing route may be adapted to meet the MAPS methodology requirements for an efficient review system or whether a new approach is required, such as the establishment of a specialist independent procurement review body.

Publication of decisions: The same recommendation as under 1(h)(e) is applied: pending review and decision on the fitness for purpose of the current system and proposals for improvement or changes, consider ways to gather more information on High Court judgments in procurement matters to start to collate relevant information. One possibility may be to require organs of state to report to NT when an application for judicial review is issued in the High Court and to notify NT of the outcome, with relevant case references.

Summary of substantive gaps and recommendations of Indicator 13

	Substantive gap	Risk classification and red flags	Recommendations
13(a)(d)	Time frames for submission and review of challenges do not guarantee effective and efficient process	High risk, red flag	The same recommendation as under 1(h)(d) is applied: Consider undertaking a critical study of the data and information available and stakeholders’ views on the operation of the system of judicial review, including timeframes for



			<p>submission and decisions on challenges, to assess the fitness of purpose and efficiency of the current system for procurement complaints using the route of judicial review and to gauge confidence in and effectiveness of the operation of the system in practice. This should be undertaken with the aim of identifying whether the existing route may be adapted to meet the MAPS methodology requirements for an efficient review system or whether a new approach is required, such as the establishment of a specialist independent procurement review body.</p>
13(c)(b)	Lack of trust in the system	High risk, red flag	The same recommendation as under 1(h)(d) is applied: see 13(a)(d)
13(c)(d)	Decisions not published	High risk, red flag	The same recommendation as under 1(h)(e) is applied: pending review and decision on the fitness for purpose of the current system and proposals for improvement or changes, consider ways to gather more information on High Court judgments in procurement matters to start to collate relevant information. One possibility may be to require organs of state to report to NT when an application for judicial review is issued in the High Court and to notify NT of



			the outcome, with relevant case references.
--	--	--	---

Indicator 14. The country has ethics and anti-corruption measures in place

This indicator assesses i) the nature and scope of anti-corruption provisions in the procurement system and ii) how they are implemented and managed in practice. This indicator also assesses whether the system strengthens openness and balances the interests of stakeholders and whether the private sector and civil society support the creation of a public procurement market known for its integrity.

- **Synthesis of the indicator**

The National Anti-Corruption Strategy 2020-2030 provides a framework for efforts to tackle anti-corruption, however South Africa does not have a single body tasked with anti-corruption. Weaknesses appear through this indicator with an inadequate framework, severe weaknesses in prosecution, limited ability to prevent and detect corruption specifically in public procurement, fear of whistleblowing and gaps in the financial disclosure and analysis of conflict of interest, among others.

- **Findings**

Legal definition of prohibited practices, conflict of interest, and associated responsibilities, accountabilities, and penalties (sub-indicator 14(a))

South Africa signed the United Nations Convention against Corruption on 9 December 2003 and ratified it on 22 November 2004. As such, it is undergoing regular reviews of its implementation of the Convention (i.e. in 2013 and 2020).

Definitions

Fraud is an offence and defined as the “the unlawful and intentional making of a misrepresentation which causes actual prejudice, or which is potentially prejudicial to another”. The definition is part of Common Law Offences. Definitions are provided on the South African Police Service’s website¹²⁴.

The [Prevention and Combating of Corrupt Activities Act 12 of 2004](#) (PRECCA) is South Africa’s key implementing legislation for addressing corruption. PRECCA defines a general offence of corruption (Chapter 2, part 1, art. 3), as well as several specific corruption offences, including two related to public procurement:

- Offences in respect of corrupt activities relating to contracts (Chapter 2, part 4, art. 12)
- Offences in respect of corrupt activities relating to procuring and withdrawal of tenders (Chapter 2, part 4, art. 13)

The SCM A Guide for Accounting Officers/Authorities also contains definitions:

¹²⁴ <https://www.saps.gov.za/faqdetail.php?fid=9>



- “Corrupt practice” means the offering, giving, receiving, or soliciting of anything of value to influence the action of a public official in the selection process or in contract execution
- “Fraudulent practice” means a misrepresentation of facts in order to influence a selection process or the execution of a contract to the detriment of the accounting officer/authority, and includes collusive practices among bidders/contractors (prior to or after submission of proposals) designed to establish prices at artificial, non-competitive levels and to deprive the accounting officer/authority of the benefits of free and open competition

Regarding conflict of interest, the directive on other remunerative work outside the employee’s employment in the relevant department as contemplated in Section 30 of the Public Service Act, 1994 defines conflict of interest as “a conflict between the public duties and private interests of an employee, in which the employee has private interests which could improperly influence him/her, and/or negatively impact on his/her official obligations or official duties, and/or negatively impact on the public interest”.

¹²⁵

Furthermore, general provisions about potential conflicts are contained in PRECCA Section 17 “Offence relating to acquisition of private interest in contract, agreement or investment of public body”.

According to NT Treasury Regulation (16A8.3), supply chain management officials or other role players:

- must recognise and disclose any conflict of interest that may arise
- must ensure that they do not compromise the credibility or integrity of the supply chain management system through the acceptance of gifts or hospitality or any other act

Also, Treasury Regulation 16A8.4 provides that if a supply chain management official or other role player, or any close family member, partner or associate of such official or other role player, has any private or business interest in any contract to be awarded, that official or other role player must:

- Disclose that interest; and
- Withdraw from participating in any manner whatsoever in the process relating to that contract

As part of SCM No.3 of 2021/2022 Section 7 Treatment of Disclosures and Declarations, “institutions must, as part of their SCM processes, identify and manage potential conflicts of interest and other disclosures made by a person participating in procurement processes to enable the AO/AA to make informed decisions about the person participating in the SCM process”.

In particular, conflicts of interest within the South African public procurement system are regulated and monitored through the mandatory use of the standard bidding document (SBD 4) to verify if bidders and their directors doing business with the state are not in the employ of the state and/or are not related to any person working within the state.

Individual responsibilities, accountability and penalties

¹²⁵ Directive on other remunerative work outside the employee’s employment in the relevant department as contemplated in section 30 of the Public Service Act, 1994

http://www.dpsa.gov.za/dpsa2g/documents/iem/2016/directive_rwops_30_09_2016.pdf



Under PRECCA, penalties apply to any person convicted of a corruption offence defined in the Act (part 1, 2, 3 or 4, or Section 18 of Chapter 2). The penalties include fine and imprisonment up to a lifetime if the sentence is imposed by a High Court; fine and imprisonment up to 18 years if a sentence is imposed by a regional court; and fine or imprisonment up to five years if the sentence is imposed by a magistrate's court (Chapter 5, Section 26).

The PFMA also specifies offences and penalties, as follows:

(1) An accounting officer is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years if that accounting officer wilfully or in a grossly negligent way fails to comply with a provision of Section 38, 39 or 40.

(2) An accounting authority is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of Section 50, 51 or 55.

(3) Any person, other than a person mentioned in Section 66 (2) or (3), who purports to borrow money or to issue a guarantee, indemnity or security for or on behalf of a department, public entity or constitutional institution, or who enters into any other contract which purports to bind a department, public entity or constitutional institution to any future financial commitment, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years.

According to the amendments of the Competition Act 1998, as of 01 May 2016, directors and managers face jail time for participation in a cartel, introducing personal criminal liability for cartel conduct.¹²⁶

Provisions on prohibited practices in procurement documents (sub-indicator 14(b))

TR 16A6.3(a) requires the AO/AA to ensure that bid documentation and general conditions of contract are in accordance with instructions of National Treasury or prescripts of the CIDB in the case of a bid relating to the construction industry.

The General Conditions of Contract (GCC) developed by NT forms part of all bid documents and may not be amended. In the GCC, "fraudulent practice" and "corrupt practice" are defined. The GCC also specifies that a person convicted under PRECCA offences (Sections 12 and 13) may be endorsed on the Register for Tender Defaulters (if the court rules so). If a person is endorsed on the Register, they will be prohibited from doing business with the public sector for a period not less than five years and not more than 10 years. In condition 34 ("Prohibition of restrictive practice") collusive bidding or bid-rigging is cited as a prohibited practice.

For construction procurement, the CIDB provides Standard Conditions for Tender, which includes reference to conflict of interest, "corrupt practice", and "fraudulent practice". Collusive practices are included as fraudulent practice.¹²⁷

¹²⁶ UNODC (2020) Country Profile South Africa

¹²⁷ CIDB, CIDB Standard Conditions of Tender 2009, <https://www.cidb.org.za/download/100/procurement-documents-templates-and-guidelines/6128/cidb-standard-conditions-of-tender.pdf>



Section 23 of the General Conditions of a Contract 2010 (GCC) as issued by the National Treasury defines conditions for termination for default: The purchaser *may* terminate the contract in whole or in part if the supplier, in the judgment of the purchaser, has engaged in corrupt or fraudulent practices in competing for or in executing the contract (23.1 (c))

Section 34 of the GCC as issued by the National Treasury and Office of the Chief Procurement Officer outlines prohibition of restrictive practices by bidders/suppliers and provides for penalties to be imposed by the organs of state on transgressing suppliers/bidders.¹²⁸

NT Practice Instruction on the Prohibition of Restrictive Practices provides preventative measures to counter bid-rigging.¹²⁹ Accounting officers and accounting authorities are required to use the standard bidding document (SBD 9) "Certificate of Independent Bid Determination" when inviting price quotations, advertised competitive bids, and limited bids or proposals. The SBD 9 form should be used with minimum changes that are necessary to address contract and project-specific issues.

Effective sanctions and enforcement systems (sub-indicator 14(c))

Reporting allegations

PFMA Sections 6 and 18 prescribe obligations to ensure that proper norms and standards are set to prevent abuse of the SCM and enforce the prescribed measures.

As per NT TR 16A9.1 the accounting officer or accounting authority must:

- (a) Take all reasonable steps to prevent abuse of the supply chain management system;
- (b) Investigate any allegations against an official or other role player of corruption, improper conduct or failure to comply with the supply chain management system, and when justified:
 - (i) Take steps against such official or other role player and inform the relevant treasury of such steps; and
 - (ii) Report any conduct that may constitute an offence to the South African Police Service

TR Section 16A9.3 requires the National Treasury and each provincial treasury to establish a mechanism:

- (a) To receive complaints regarding alleged non-compliance with the prescribed minimum norms and standards;
- (b) To make recommendations for remedial actions to be taken if non-compliance of any norms and standards is established, including any recommendations of criminal steps to be taken in case of corruption, fraud or other criminal offences.

¹²⁸ National Treasury General Conditions of Contract, July 2010

¹²⁹ Instruction NO NUMBER_2010/11 Prohibition of Restrictive Practices: Certificate of Independent Bid Determination

http://ocpo.treasury.gov.za/Resource_Centre/Legislation/20100721%20NT%20Practice%20Note.pdf



According to TR 16A8.5, an official in the supply chain management unit who becomes aware of a breach of or failure to comply with any aspect of the supply chain management system must immediately report the breach or failure to the accounting officer or accounting authority, in writing.

SCM Instruction No.3 of 2021/22 details measures for preventing and combating abuse in the SCM system and Sections 34.2 and 34.3 of the GCC provide organs of state with procedures to follow to report and deal with prohibited practices by suppliers.

Several institutions are involved in the follow-up investigations related to corrupt practices. This includes the Special Investigative Unit (SIU), the South African Police Service with its Directorate for Priority Crime Investigation (DPCI, referred to as “The Hawks”), and NT’s investigate unit, the Investigative Directorate (ID) within the National Prosecuting Authority.

It is not clear to the assessors which entity has specific responsibilities for follow-up and how the process for follow-up on allegation is set in motion (i.e. which institution is in charge under which circumstances). In fact, Treasury Regulations only mandate referrals to the South African Police Service. Stakeholders report follow-up on all allegations received.

There is evidence that the National Treasury database of Restricted Suppliers and Tender Defaulters is used.

Suspension/debarment

South Africa has a system for debarment of bidders, which consists of three separate systems:

- 1) The Register of Tender Defaulters (where convicted of corruption-related offences under PRECCA);
- 2) The Restricted Supplier List; and
- 3) The CIBD sanctions regime

Debarment on conviction for corruption-related offences is subject to due process of the courts, which make an order to endorse an offender’s particulars on the Register of Tender Defaulters. The CIDB operates a system to investigate complaints, which may result in a sanction being applied to a registered contractor of restriction or prohibition from participating in public-sector construction works procurement for a period of up to 10 years.

The Prevention and Combating of Corrupt Activities Act 2004 provides for the establishment and operation by the Minister of Finance of the Register for Tender Defaulters¹³⁰, with the Minister of Finance issuing regulations regarding the register¹³¹. PRECCA Section 28 gives power to a court convicting a person of an offence of corrupt activities relating to contracts (PRECCA Section 12) or procuring and withdrawal of tenders (PRECCA Section 13) to issue an order that the particulars of the convicted person, conviction, sentencing and any other related order be endorsed on the Register for Tender Defaulters. The endorsement may be widened by order of the court to cover any other enterprise owned or controlled by a convicted person and to any partner, manager, director or other person who wholly or partly exercises, or may exercise, control where they were involved in the offence or knew or ought to

¹³⁰ Chapters 6 (ss.29 to 33)

¹³¹ R.194, 11 March 2005



reasonably have known or suspected the offence. The endorsement may also apply to the future establishment of an enterprise.

There is a system of debarment with a process to be followed prior to listing of a supplier on the Restricted Supplier List. SCM Instruction No.3 of 2021/22 sets out the process leading to debarment of suppliers from doing business with government by inclusion in the Restricted Supplier List published by National Treasury. The process is led by the AO/AA of an institution, who is required to notify in writing the relevant supplier of (a) the intention to restrict, (b) grounds for restriction, (c) intended period of restriction, not exceeding 10 years, (d) right of supplier to make representations within 14 days as to why should not be restricted. The AO/AA is required to: consider any representations made; consult National Treasury and consider any views provided by the National Treasury prior to making a final decision. If the AO/AA makes a decision to restrict a supplier, they must inform National Treasury, which adds the supplier to the published list and the AO/AA must inform the restricted supplier as soon as the restriction is recorded. The level of discretion available to the AO/AA is high and this raises risks of inconsistency of application of grounds for restrictions on participation unless robust control and review measures are in place.

The Restricted Supplier List and Tender Defaulter report are available (in a consolidated document) on the NT/OCPO website.¹³² However, it should be noted that no supplier is currently listed on the Register of Tender Defaulters¹³³. As reported by Corruption Watch, this register appears to be empty as far back as 2004 or at least 2009¹³⁴.

CIDB Regulations, Part V provides for a process for investigation of a complaint or suspicion of an act or omission in respect of the CIDB Code of Conduct. If the complaint or suspicion implicates a person employed by an organ of state, the CIDB must refer it to the relevant AO/AA or Audit Committee for investigation. If the complaint or suspicion concerns a registered contractor, the matter is investigated according to due process, including a formal inquiry with a right for the contractor to attend and be represented, which is set out in detail in the CIDB Regulations. Sanction can include “restricting or prohibiting the respondent from participating in public sector construction works procurement for a period of time, which period may not exceed 10 years”. Decisions are published in the Gazette and on the CIDB’s register of contractors. They do not appear to be included in the Restricted Supplier List and Tender Defaulter Report published on the NT/OCPO website. There is a right of appeal for judicial review of a finding or sanctions.

PRECCA Section 28(3) provides for the National Treasury to impose “restrictions” when the Register of Tender Defaulters is endorsed. In summary, the National Treasury:

- (1) May terminate any agreement with the convicted person or enterprise, taking into account listed factors and subject to consultation with the purchasing authority or government department concerned. Where the National Treasury terminates an agreement, it may in addition recover damages, as defined.
- (2) Must determine the period of prohibition, to be between 5 and 10 years.

¹³² <http://ocpo.treasury.gov.za/RestrictedSupplier/RestrictedSuppliersReport.pdf>

¹³³ <https://www.treasury.gov.za/publications/other/register%20for%20tender%20defaulters.pdf>

¹³⁴ <https://www.corruptionwatch.org.za/criminal-justice-partly-responsible-for-empty-tender-defaulters-register/>



The National Treasury must notify the concerned party of the restriction and also has power to vary or rescind a restriction.

During the prohibition period the National Treasury, purchasing authority or any government department must ignore an offer tendered by the relevant person or enterprise or disqualify them from making an offer in relation to a specific supply or service.

Enforcement

The National Prosecuting Authority (NPA) is South Africa's prosecuting authority in terms of the constitution and legislation. It has a mandate to institute criminal proceedings and carry out incidental functions. Other than the Investigative Directorate, the NPA is not responsible for investigating crime – that responsibility lies with law enforcement authorities (e.g. South African Police Service or Directorate for Priority Crime Investigation). Criminal matters are referred to the NPA once investigations are completed.

The NPA presented data to the assessors regarding the ongoing activities it was conducting, in particular, those of the Investigative Directorate. This was instituted in the wake of state capture to investigate and prosecute high-profile corruption. The activities of the NPA are also documented in its annual report. No data about convictions were shared with the assessors.

Anti-corruption framework and integrity training (sub-indicator 14(d))

Overarching framework

South Africa signed the United Nations Convention against Corruption (UNCAC) on 9 December 2003 and ratified it on 22 November 2004. Entities with mandates relevant to the prevention and countering of corruption include the Department of Public Service and Administration (DPSA), Public Service Commission (PSC), National Treasury, Office of the Chief Procurement Officer (OCPO), Special Investigating Unit (SIU), Financial Intelligence Centre (FIC) and other agencies. Co-ordination is exercised through the Anti-Corruption Task Team (ACTT)¹³⁵.

In addition to the United Nations Convention Against Corruption (UNCAC), South Africa has ratified several international conventions and treaties, and participates in forums that require the country to implement measures to prevent and combat corrupt activities. These include:

- The Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
- The African Union's Convention on Preventing and Combating Corruption
- The SADC Protocol Against Corruption
- The Financial Action Task Force (FATF).



- The Group of 20 (G20) Anti-Corruption Working Group, where South Africa participates and regularly provides its accountability report.¹³⁶

Prosecution of crime is the primary role of the National Prosecuting Authority (NPA) in the anti-corruption framework, which is derived from Section 179(2) of the Constitution of the Republic of South Africa, 1996, read with Section 20(1) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998 NPA Act), which legislation gives effect to Section 179 of the Constitution. Section 179(2) of the Constitution provides: "The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings." This is the core function of the NPA as the single national prosecuting authority in the Republic, in combating corruption and other commercial or financial crime.

The South African National Anti-Corruption Strategy 2020-2030 provides a framework and action plan for the country as a whole and seeks to create a society in which the government's administrative and procurement processes are reinforced to allow for greater monitoring, accountability and transparency.¹³⁷

Identification of risks in public procurement

The PFMA provides for the establishment of AO/AA, with responsibilities for financial and risk management, and internal control as well as internal audit. Treasury Regulations (TR 27.2.1) stipulate that accounting authorities must conduct regular risk assessment to identify risks to the public entity. This entails the set-up of risk management strategy and must include a fraud prevention plan. Treasury Regulations further mandate that these tools "must be used to direct internal audit effort and priority and to determine the skills required of managers and staff to improve controls and to manage these risks. The strategy must be clearly communicated to all employees to ensure that the risk management strategy is incorporated into the language and culture of the public entity".

More specifically, the *SCM A Guide for Accounting Officers/Accounting Authorities* provides a brief example of what risk management entails in the SCM (1.2.3). The guide further details that award and management of contracts where fraud and corruption has been found in the past should be reflected in the institution's Fraud Prevention Plan, and through cost-effective use of control measures and procedures and an ethical culture (1.2.4)¹³⁸.

Strategic Pillar Four of the National Anti-Corruption Strategy defines actions to "improve the integrity and credibility of the public procurement system". It aims to create a credible, transparent procurement system and to ensure that the public procurement bill is supported, its enactment expedited, and transparency and accessibility of the public procurement system's data are improved. Measures to enable enforcement and oversight are supported, and professionalisation of the procurement and supply chain management functions is prioritised. Implementation is based around a) enhancing oversight and enforcement in public procurement; b) improving transparency and data management; and c) supporting professionalism in SCM¹³⁹.

¹³⁶ National Anti-Corruption Strategy 2020-2030

¹³⁷ National Anti-Corruption Strategy 2020-2030

¹³⁸ SCM Guide for Accounting Officers / Accounting Authorities (2004)

http://ocpo.treasury.gov.za/Resource_Centre/Legislation/SCM%20Jan900-Guidelines.pdf

¹³⁹ National Anti-Corruption Strategy 2020-2030



Strategic Pillar Six of the National Anti-Corruption Strategy (“Protect vulnerable sectors that are most prone to corruption and unethical practices with effective risk management”) identifies the following sectors as most vulnerable to corruption: health; local government; state-owned entities; construction; transport; the financial sector; energy; mining; water; real estate; education; information and communication technology (ICT); small, medium and micro enterprises (SMMEs); border management and defence/armaments. Several factors are listed as to why these sectors are particularly vulnerable; however, no specific interventions related to procurement practices are foreseen in the strategy with respect to vulnerable sectors¹⁴⁰.

Integrity training

The National School of Government has a mandate to offer compulsory Ethics and Integrity Management Trainings and Workshop for all public servants. The e-learning course “Ethics in the Public Service” is compulsory.

The National Treasury Regulations 16A8 outlines the obligation for SCM practitioners to adhere to the National Treasury’s Code of Conduct for Supply Chain Management practitioners.

The National Prosecuting Authority (NPA) presently conducts awareness on ethics matters, which mainly includes the Public Service Code of Conduct, Code of Conduct for Prosecutors, NPA Code of Ethics and Public Service Regulations. Within the NPA this role has been entrusted to the Integrity Management Unit, which is based in the head office. The Integrity Management Unit conducts awareness sessions mainly onsite at the various offices of the NPA throughout the country while some sessions are conducted virtually via Microsoft Team.

Currently there is no integrity training provided for NPA’s Investigative Directorate (ID). However, the NPA-ID amendment bill provides for integrity testing of investigators. Once it becomes law, integrity training will be provided. The ID currently uses the general public service code of conduct and the code of conduct applicable to the NPA.

Stakeholder support to strengthen integrity in procurement (sub-indicator 14(e))

Civil society

Section 16(1) of the South African Constitution guarantees freedom of expression for individuals, the media and academic thought. Access to information rights is found in the Constitution and is supported by the Promotion of Access to Information Act 2 of 2000. According to Transparency International, freedom of information requests are generally respected despite certain administrative challenges. Refusal to grant access to information required by the relevant laws can prompt intervention by the courts.

¹⁴¹

¹⁴⁰ National Anti-Corruption Strategy 2020-2030

¹⁴¹ Transparency International (2020) Implementing and Enforcing the African Union Convention on Preventing and Combating Crime: A Comparative Review https://images.transparencycdn.org/images/2020_Report_African-Union-Convention-Review_English.pdf



South Africa's media and civil society are considered vibrant. The media is capable of robustly engaging with society as well as with powerful stakeholders in both government and the private sector. Specialist investigative journalists, such as AmaBhungane and Scorpio, play a vital role in exposing political and private-sector corruption¹⁴².

Non-profit civil action organisations such as the Organization Undoing Tax Abuse (OUTA), AFRIFORUM and Afri-business focus on exposing government corruption and the abuse of taxes and public funds.

As discussed under Indicator 11, civil society has participated actively in the consultation process of the preparation of the new public procurement bill, evidence of their role in contributing to shaping the integrity of public procurement. That said, CSO stakeholders denounced several aspects of the process, and voiced specific concerns about the new public procurement bill, i.e. that the new bill may limit the access of civil society to procurement information instead of increasing it.

Private-sector practices

The Companies Act, 2008, is South Africa's overarching regulation for businesses, providing for incorporation, registration, organisation and management of companies. With respect to corruption and integrity, the Companies Act mandates basic requirements for state-owned, listed and public companies as well as companies of a certain size to enhance accountability, transparency and internal monitoring through social and ethics committees.¹⁴³

Audit of private companies is only mandatory for companies above certain thresholds regarding scope of activities, number of employees and turnover. This is determined by "public interest scores" and is prescribed in the Companies Regulations, 2011.

Several sections of the Companies Act are relevant in the context of corruption prevention and detection.

Namely, Section 22 of the Act prohibits reckless trading and fraudulent activities by companies. Section 28 requires companies to keep and maintain accurate accounting records even when companies are not subjected to audit requirements. Contraventions are punishable by administrative fine or imprisonment.

In line with the Companies Act, companies can either be audited or independently reviewed. All public and state-owned companies above a certain size must be audited while all private companies falling below the 350 public-interest-score threshold may be independently reviewed. The Companies Act does not require internal auditing controls to assist in preventing and detecting acts of corruption.

The Companies Act prescribes that companies maintain security registers reflecting shareholders, holders of beneficial interests and the extent of the interests in the securities (Section 50). Prior to 2023, this information was not shared with the regulator. The establishment of the Beneficial Ownership Register in 2023 mandates sharing information with Companies and Intellectual Property Commission (CIPC) on an annual basis. Non-compliance constitutes an offence under the Companies Act.

In addition to complying with the Companies Act, companies listed on the Johannesburg Stock Exchange are mandated to implement the King IV Code on Corporate Governance. The King Code provides guidance for improving transparency and stability of financial management of listed companies, including

¹⁴² Ibid.

¹⁴³ UNODC Country Report South Africa (2020)



guidelines on risk management, the composition of boards of directors, and the performance of board members.

Secure mechanism for reporting prohibited practices or unethical behaviour (sub-indicator 14(f))

The Protected Disclosures Act 2000 (Act No. 26 of 2000) provides protection for both public- and private-sector whistleblowers. The Act makes provisions for procedures whereby public- and private-sector employees may disclose information concerning unlawful or irregular conduct by an employer or an employee of that employer.

The Act protects whistleblowers from occupational detriment¹⁴⁴.

As per UNODC review, South Africa was found to be in compliance with articles 32 (“Protection of witnesses, experts and victims”) and 33 (“Protection of reporting persons”) of the UNCAC during the first cycle of implementation review.

Several hotlines are available to the public to report information that is linked to any fraud or corruption (non-exhaustive list):¹⁴⁵

- South African Anti-Corruption hotline
- Special Investigating Unit Whistle-blower Hotline (anonymous)
- Presidential hotline
- Public Protector hotline
- Directorate of Priority Crime Investigation (Hawks)
- Independent Police Investigative Directorate
- Anti-Corruption Hotline

The National Anti-Corruption Hotline (NACH) is a national system for reporting any form of corruption by members of the public or public-sector employees. It is managed by the Public Service Commission (PSC), which is responsible for investigating, monitoring and evaluating the organisation and administration, and personnel practices of the public service.

The National Anti-Corruption Strategy includes a dedicated Strategic Pillar One (“Citizen Participation”), which focuses on promoting and encouraging active citizenry, whistleblowing, integrity and transparency in all spheres of society. The implementation programme entails measures to protect and support whistleblowers and resource whistleblowing mechanisms. As part of the outcomes of the Strategic Pillar Four (“Credible, Transparent Procurement System”), whistleblowing relevant to corruption in procurement is incentivised and supported.¹⁴⁶

Codes of conduct/codes of ethics and financial disclosure rules (sub-indicator 14(g))

Code of Conduct

The Code of Conduct for Public Servants is included Chapter 2, part 1, of the Public Service Regulations 2016 (amended by Public Service Amendment Regulations, 2023) issued pursuant to the Public Service

¹⁴⁴ UNODC Country Report South Africa (2020)

¹⁴⁵ <https://www.gov.za/anti-corruption/hotlines>

¹⁴⁶ National Anti-Corruption Strategy 2020-2030



Act, 1994. It requires public servants to adhere to the Constitution of the Republic of South Africa and other laws of the country while performing their duties.

The Code sets out standards of conduct for employees when they:

- (a) Provide services to the public;
- (b) Perform their duties; and
- (c) Relate to each other.

The Code further sets out ethical standards for employees, including rules regarding:

- (i) Receipt and acceptance of gifts;
- (ii) Conducting business with an organ of state (prohibition);
- (iii) Conflict-of-interest management; and
- (iv) Performance of other remunerative work.

Furthermore, the Code of Conduct for Supply Chain Management Practitioners (SCM Code of Conduct), issued in PN SCM Instruction No.4 of 2003 applies to all SCM officers. It includes provision on conflict of interest, accountability, openness, confidentiality, and “combative practices”, i.e. unethical and illegal practices in public procurement. Provisions for bid evaluation and adjudication teams are also specified in the Code of Conduct¹⁴⁷.

The SCM Code of Conduct includes general provisions around accountability (Sections 3.1 and 3.2) but also specific accountability for AA/AO (Section 3.3):

- (a) Practitioners are accountable for their decisions and actions to the public.
- (b) Practitioners should use public property scrupulously.
- (c) Only AA/AO or their delegates have the authority to commit the government to any transaction for the procurement of goods and services.
- (d) All transactions conducted by a practitioner should be recorded and accounted for in an appropriate accounting system. Practitioners should not make any false or misleading entries into such a system for any reason whatsoever.

Conflict of interest and financial disclosure

Regarding financial disclosure requirements, the Code of Conduct for Public Servants includes provisions for annual financial disclosure by Senior Management Service (SMS). Disclosure by other public-sector employees has to be specified by the Minister (Section 17). The system for financial disclosure belongs to the Department of Public Service and Administration (DPSA). Accounting officers are notified of the disclosure and can act on it, if necessary.

In March 2017, the Minister for the Public Service and Administration issued a determination and directive on other categories of employees to disclose their financial interests. In terms of Regulation 18(5) which came into effect on 01 August 2016, designated employees must use the electronic (eDisclosure) system to disclose their financial interests.

¹⁴⁷ Code of Conduct for Supply Chain Management Practitioners, PN SCM Instruction No.4 of 2003 http://ocpo.treasury.gov.za/Resource_Centre/Legislation/SCM-PracNote%2003%204.pdf



As discussed in Indicator 5(d), various instructions and notes have been developed by National Treasury to help devise a framework for preventing conflict of interest in supply chain management. Namely, section 16A8.3(a) of the Treasury Regulations of 2005, as amended, states that a supply chain management official or other role player must recognise and disclose any conflict of interest that may arise. Also, Treasury Regulation 16A8.4 provides that if a supply chain management official or other role player or any close family member, partner or associate of such official or other role player has any private or business interest in any contract to be awarded, that official or other role player must:

- (a) Disclose that interest; and
- (b) Withdraw from participating in any manner whatsoever in the process relating to that contract

In line with Treasury Regulations, the SCM Code of Conduct specifies that “SCM practitioners, to the extent required by their position, should declare any business, commercial and financial interests and activities undertaken for financial gain that may raise a possible conflict of interest (2.1)”. A code of conduct for bid adjudication committees (BAC) also includes provision about conflict of interest.

The practice note¹⁴⁸ issued by National Treasury in October 2009 also provides for guidance to accounting officers on how to prevent and manage conflicts of interest. Furthermore, conflicts of interest are monitored through the mandatory use of the standard bidding document (SBD 4) to verify if bidders and their directors doing business with the state are not in the employment of the state and/or are not related to any person working within the state. These declarations are kept by the institution in charge of the procurement. Internal control and internal audit are responsible for verification while the AGSA would conduct the external audit.

As of 2023, South Africa amended the Companies Regulation (Companies Amendment Regulations, 2023) to require “affected companies” to establish and maintain a beneficial interest register (“BI Register”) containing information about natural persons holding a beneficial interest of 5% or more of the total number of securities issued by a company. Companies are also responsible for keeping this register up to date.

The analysis by UNODC reports the following: “Failure to disclose financial interest is a misconduct. The Executive Authorities and Heads of Departments have to take disciplinary action against such employees. Depending on the severity of the transgression, sanctions include:

- A final written warning;
- Suspension without pay;
- Demotion as an alternative to dismissal; and
- Dismissal.”¹⁴⁹

- **Gaps**

Definition of conflict of interest: According to stakeholders, the definition of conflict of interest, while not specific to public procurement, is sufficiently clear, though it does not encompass the commonly accepted definition of actual, perceived and potential conflict of interest. Further, the assessors note that

¹⁴⁸ National Treasury Practice Note Number 7 of 2009/2010

¹⁴⁹ UNODC Country Report South Africa (2020)



conflict of interest is not defined in PRECCA while it appears to be only defined in secondary legislation. Hence, a gap is assigned.

Cooling-off period: As highlighted in Pillar II (sub-indicator 5(d)), there are no specific provisions for cooling-off periods for former public officials who are involved in future award processes representing an economic operator.

No mandatory requirements and instructions for prohibited practices in procurement documents: As assessed under Pillar I, there is a substantive lack of clarity with respect to detailed provisions about eligibility and exclusion of suppliers (see sub-indicator 1(d)). Hence, the assessors conclude that there are no sufficiently precise instructions on how to deal with prohibited practices that would exclude bidders.

For instance, the list of grounds for exclusion does not cover terrorist-related offences, money-laundering or terrorist-financing, child labour, or human trafficking as prescribed by the MAPS methodology. Again, as highlighted under sub-indicator 1(d), there is a high level of discretion afforded to AO/AA in deciding upon debarment of a supplier from doing business with government by inclusion in the Restricted Supplier List. Also, the wording of grounds upon which an AO/AA may disregard a bid in TR16A9.2 is vague and not well-aligned with the anti-corruption regime.

Furthermore, General Conditions of Contract (GCC) gives substantive discretion to contracting authorities regarding the consequences of identified corrupt or fraudulent practices during bidding or contract execution. Termination of a contract may occur in part or in full but is not an obligation.

Similarly, as per GCC, referral to the Competition Commission in case of suspected bid-rigging is not mandatory for the contracting authority. Termination of a contract, restriction of the bidder from doing business with government or claiming for damages may occur if the bidder has been found guilty by the Competition Commission but there is no obligation to take any of these actions.

It should be noted that GCC should be used with minimum changes but still allows for potential changes.

Gaps in suspension/debarment

As assessed in sub-indicator 1(d), this analysis identifies three distinct gaps, as follows:

- (1) There is no list of grounds for exclusion covering terrorist-related offences, money-laundering or terrorist-financing, child labour, or human trafficking as prescribed by the MAPS methodology.
- (2) There is a high level of discretion afforded to AO/AA in deciding upon debarment of a supplier from doing business with government by inclusion in the Restricted Supplier List. This raises risks of inconsistency and/or bias in the application of grounds for restrictions on participation.
- (3) The wording of grounds upon which an AO/AA may disregard a bid in TR16A9.2 is vague and not well-aligned with the anti-corruption regime. This raises concerns as to the efficacy of the process, where significant discretion is exercised at a local level.
- (4) The list of CIDB-restricted/prohibited suppliers, the Restricted Supplier List and Tender Defaulter Report published by NT/OCPO are not linked, creating complexity and reducing clarity.

Analysis by Corruption Watch shows that both the Register of Tender Defaulters and the Restricted Supplier List are heavily underused, especially compared to the amount of abuse of the procurement



system. In fact, the Register of Tender Defaulters appears to have been empty for the past decade. Reasons for such low use may lie in the fact that the prosecution of criminal conduct may not be brought under PRECCA's general corruption or fraud definitions while entry in the register is only possible if the crime of procurement corruption is being prosecuted. Furthermore, AA/AO must instruct NT to enter supplier names into the register after a decision by the court¹⁵⁰. It is not clear whether there is an issue with the flow of such information.

It is also important to consider the comparatively low entries in the Restricted Supplier List, including the fact that in an analysis by Corruption Watch in 2022, 138 submissions to the list came from a small subset of organs of state (34) while a total of 584 entities could have potentially provided entries to the list. All in all, CSO stakeholders consider that debarment is not effective.¹⁵¹

Finally, having two mechanisms with different modalities of functioning but, ultimately, the same goal, creates unnecessary duplication and the potential for inconsistency. At a minimum, these systems should be linked to provide a single interface for organs of state to identify excluded suppliers.

Severe weaknesses in prosecution: In the wake of state capture, media and CSO have reported serious flaws in the ability of the prosecution to effectively bring cases to court. Notably, the first state-capture trial ended in acquittal by the defendants and severe criticism of the police and prosecution as “woefully inept”.¹⁵² In fact, the NPA has been deliberately targeted and weakened during the state-capture years. In particular, the NPA's so-called Directorate of Special Operations (Skorpions), which was dealing with corruption cases, was dismantled in 2008-09. Consequently, the NPA has lost investigative capacity for high-level, complex fraud. The weakness of the National Prosecuting Authority (NPA) in credibly prosecuting state capture has been highlighted by non-governmental organisations (NGOs).¹⁵³

A particular weakness of the NPA's current set-up lies in the fact that the Investigative Directorate (ID) tasked with prosecuting state capture-related crimes is not a permanent entity (it exists further to the President Proclamation No.20 of 2019) and, hence, does not guarantee tenure to the fullest extent to its employees. These issues are meant to be addressed with the establishment of a permanent investigative authority for dealing with high crime and complex corruption, known as the Investigating Directorate against Corruption (IDAC). The primary focus of the IDAC will be on the investigation and prosecution of state capture-related crime. It should also be bestowed with full criminal investigatory powers. The National Prosecuting Authority Amendment Bill, 2023, which includes the proposal for IDAC, was adopted by Parliament and is waiting to be signed into law at the time of writing this report¹⁵⁴.

¹⁵⁰ <https://www.corruptionwatch.org.za/criminal-justice-partly-responsible-for-empty-tender-defaulters-register/>

¹⁵¹ <https://www.corruptionwatch.org.za/criminal-justice-partly-responsible-for-empty-tender-defaulters-register/>

¹⁵² See for instance: <https://mg.co.za/news/2023-04-21-state-capture-nulane-trial-ends-in-acquittal/>

¹⁵³ Open Secrets (2022), Bad Cops, bad Lawyers: The officials at the NPA and the Hawks delaying justice for State Capture, <https://www.opensecrets.org.za/investigation-bad-cops-bad-lawyers/>

¹⁵⁴ <https://pmg.org.za/bill/1174/>



The severe weaknesses of the criminal justice system are also acknowledged in South Africa's National Anti-Corruption Strategy¹⁵⁵. Stakeholders confirm lack of capacity as a critical issue.

The private sector survey indicates that over half of surveyed suppliers consider corruption to be necessary to acquiring public contracts, undermining the perception of enforcement related to corrupt and criminal activities.

This gap is assigned a red flag because it severely undermines accountability in the public procurement system but lies entirely outside the sphere of public procurement.

Inadequate anti-corruption framework: As noted by the United Nations Office on Drugs and Crime (UNODC) analysis of South Africa's compliance with the UN Convention Against Corruption (UNCAC), there is no single body with prime responsibility for preventing corruption despite a multitude of actors involved in anti-corruption.¹⁵⁶

South Africa's anti-corruption system proved ineffective in deterring systemic political corruption, referred to as "state capture" in the Public Protector's "State of Capture Report", No 6 of 2016-17. This refers "to alleged improper and unethical conduct by senior state functionaries relating to alleged improper relationships and involvement of private individuals in the removal and appointment of ministers and directors of state-owned entities (SOEs) resulting in the improper and possibly corrupt awarding of state contracts and benefits to private businesses"¹⁵⁷. As part of the state-capture scheme, undue influence was exercised on SOEs and other government entities through the replacement of leadership or board positions. Law enforcement was also 'captured' by replacing key personnel and significantly weakened.

As noted in the National Anti-Corruption Strategy, South Africa is facing particular challenges in the wake of state capture, which entailed the hollowing out of the state's law enforcement agencies, requiring building up lost capacity and skills.¹⁵⁸ Similar concerns about limited capacity were expressed by stakeholders. The effects of loss of skills is tangible when looking at recent prosecution efforts of high-profile corruption cases related to state capture. According to commentators in the news and judicial system, police and prosecution have been "woefully inept" in presenting their case.¹⁵⁹

The National Anti-Corruption Strategy also points to structural flaws in the current institutional set-up of anti-corruption bodies: "...numerous challenges [...] experienced with the current multi-agency approach and some of these were deliberately created or exacerbated by individuals seeking to weaken these entities". Furthermore, co-ordination within the "multi-agency system" has also suffered due to undue influence.¹⁶⁰

¹⁵⁵ National Anti-Corruption Strategy 2020-2030

¹⁵⁶ UNODC Country Profile South Africa, <https://www.unodc.org/unodc/en/corruption/country-profile/countryprofile.html#?CountryProfileDetails=%2Funodc%2Fcorruption%2Fcountry-profile%2Fprofiles%2Fzaf.html>

¹⁵⁷ National Anti-Corruption Strategy 2020-2030

¹⁵⁸ National Anti-Corruption Strategy 2020-2030

¹⁵⁹ <https://mg.co.za/news/2023-04-21-state-capture-nulane-trial-ends-in-acquittal/>

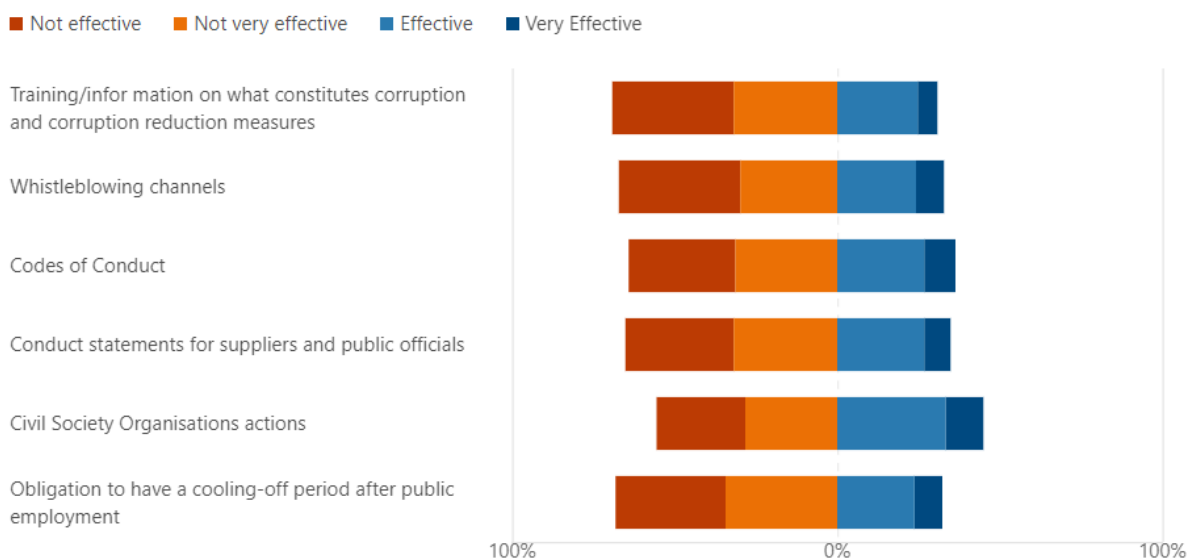
¹⁶⁰ National Anti-Corruption Strategy 2020-2030



The survey results further underscore perception of limited effectiveness of anti-corruption measures. More than 50% of respondents rate anti-corruption measures as either “not effective” or “not very effective”.

Figure 19: Percentage of favourable opinions by the public on the effectiveness of anti-corruption measures (in % of responses); Source: Private Sector Survey

42. Considering the anti-corruption measures and related offences listed below, please rate them on the basis of what you consider to be their likely effectiveness:



This gap is assigned a red flag because it shows systemic weaknesses in the anti-corruption system but lies outside the sphere of public procurement.

Limited effectiveness in detecting and preventing corruption risks: It is evident that the current system is inadequate in detecting and preventing corruption associated with public procurement. Fundamental shortcomings lie in the weakened capacity of law enforcement agencies, reducing the ability to investigate and prosecute corruption linked to procurement. As laid out in the analysis of Indicator 12, major shortcomings are also linked to weak internal control and internal audit capacity, and overall limited accountability in case of irregularities (lack of consequence management) while, at the same time, there is substantive discretion of AA/AO for “procurement by other means”. Limited transparency of procurement data and difficulties in using procurement data for data analytics and identification of red flags also contribute to a weak system of corruption prevention and detection.

More broadly, detection and prevention of corruption is undermined by lack of clarity in the system of reporting allegations and severe risks to one’s life in case of whistleblowing. Not least, the lack of a specialised mandate for a single anti-corruption authority and challenges related to the co-ordination of this multi-agency system fundamentally undermine strong and credible action to implementing anti-corruption measures.



The Judicial Commission of Inquiry into State Capture introduces several recommendations specifically targeted at public procurement, highlighting the need for further measures to detect and prevent corruption. A recommendation calls for the introduction of a National Charter Against Corruption in public procurement, including defining a code of conduct and ethical standards applicable for procurement. A second recommendation calls for the establishment of an independent agency against corruption in public procurement.¹⁶¹

The effectiveness of actions by AA/AO (i.e. risk management strategy and fraud prevention plans) appears limited, given findings throughout this report of lack of compliance, and wasteful and irregular expenditure. The state capture experience shows that it is possible to entirely neutralise the actions of AA/AO and internal audit structures regarding corruption prevention by inserting complicit personnel in these positions of responsibility. No actions limiting the risks of such ‘capture’ of internal accountability function seem to have been taken.

Guidance on risk management specific in the SCM Guide for AA/AO is quite limited regarding public procurement risks. The National Anti-Corruption Strategy does not tackle the identification of risks in public procurement, although it addresses corruption risks in vulnerable sectors.

This gap is assigned a red flag because the lack of effective mechanisms to detect, prevent or deal with corruption in public procurement severely undermines the goal of ensuring integrity in public procurement – in particular, in a context where corruption is rampant.

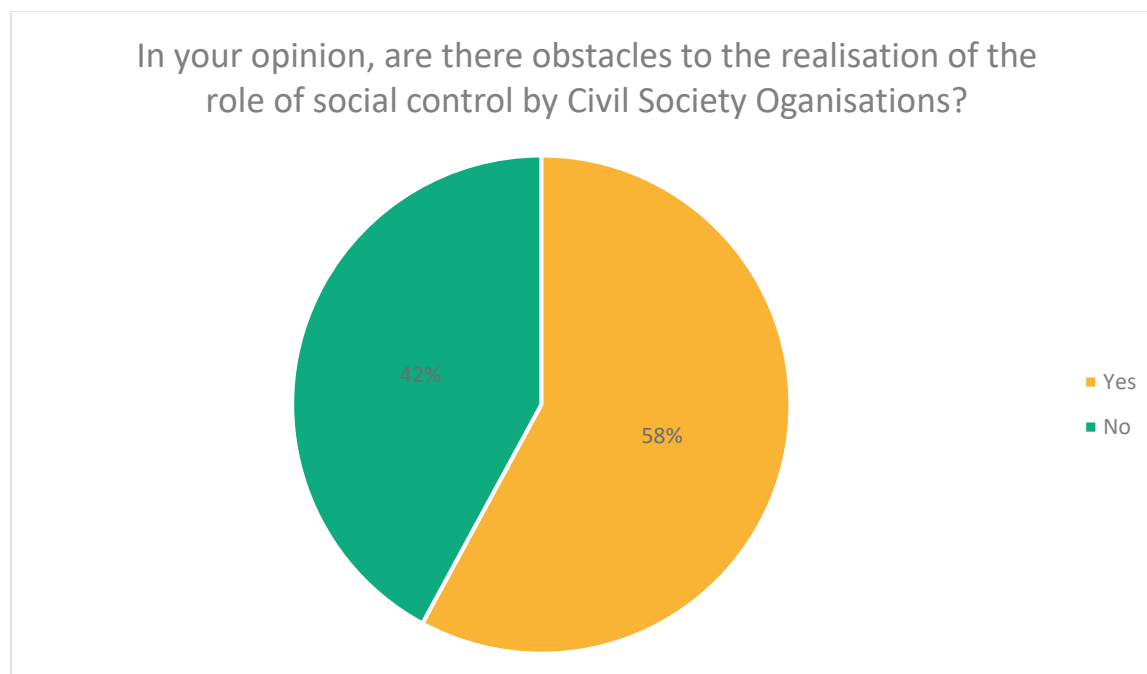
Limited confidence in CSO’s ability to conduct oversight of public procurement: The business sector appears to have limited confidence in civil society’s ability to exercise social control, as reported by the survey. Namely, 58% of respondents believe that there are obstacles to CSO ability to exercise social control. Furthermore, awareness of CSOs performing watchdog functions in public procurement is very limited: only 27% declare knowing any such civil society organisation.

Concerns by CSOs revolve around access to information for civil society in the new bill. Another area of concern expressed by CSO (and already highlighted in other parts of this assessment) is the lack of transparency of procurement data for more advanced monitoring and analytics.

Figure 20: Number of domestic civil society organisations (CSOs), including national offices of international CSOs actively providing oversight and social control in public procurement; Source: Private Sector Survey

¹⁶¹ Judicial Commission of Inquiry into State Capture Report Part VI, Vol 4: All the Recommendations





Gaps with integrity practices in the private sector, including SOEs: Important gaps concern the lack of requirements for internal audit control to support prevention and detection of corruption as well as the lack of provisions about post-employment of public-sector employees. These findings have been also highlighted in the UNODC’s “Review of South Africa’s compliance with the UNCAC Convention”¹⁶².

Furthermore, as highlighted under the UNCAC review, state-owned enterprises (SOEs) have not been a primary focus of anti-corruption mechanisms despite the sector being primarily vulnerable to fraud and corruption, as identified in the National Anti-Corruption Strategy¹⁶³.

A Beneficial Ownership Register was introduced recently but it is not clear to the assessors whether the information contained in the register is being used by SCM officials and oversight bodies for corruption-prevention and detection purposes.

Strong fears of whistleblowing: As reported by stakeholders, civil servants who are ethical are very scared to expose unlawful actions and come forward as whistleblowers. The risks include very real threats to their lives. The UNODC Country Report of South Africa provides background as to why whistleblowing is included in the National Anti-Corruption Strategy: “The current whistleblowing legislation provides limited protection and is perceived to be inadequate.”¹⁶⁴

The Judicial Commission of Inquiry into State Capture further underscored limitation in the current system of whistleblowing. Namely, it included recommendations around the protection of whistleblowers, according to Article 32(2), as part of its recommendations related to public procurement. This would mean granting whistleblowers the same protection as offered to witnesses¹⁶⁵.

¹⁶² UNODC South Africa Country Profile

¹⁶³ Ibid.

¹⁶⁴ UNODC Country Report South Africa (2020)

¹⁶⁵ Judicial Commission of Inquiry into State Capture Report Part VI, Vol 4: All the Recommendations



The assessors conclude that the anonymity of whistleblowers may not be sufficiently protected in practice since whistleblowers appear to be threatened personally. Once the identity of a whistleblower has been identified, further mechanisms to grant protection by law enforcement authorities should be in place.

This gap is assigned a red flag because the lack of effective whistleblower protection robs the procurement system of an important safeguard against corruption. This gap lies outside the sphere of public procurement.

Limitations of Code of Conduct: The assessors could not locate a consolidated version of the Code of Conduct for Public Servants that takes into account the amendments of 2023. Considering that employees must be aware of the Code of Conduct and act according to its provisions, it is important to ensure easy access to it.

Training and available guidelines about financial disclosure have not been issued for members of the executive (cabinet members, deputy ministers, premiers and members of executive councils)¹⁶⁶. The assessors lack details about the kind of training, its frequency and quality. No information is available on specific training related to any code of conduct.

Incomplete provisions for financial disclosure: Financial disclosure declarations are not sufficiently comprehensive (only senior civil servants, no family coverage). It is not clear in practice how accessible the information is and how it used to prevent conflict of interest *ex ante* (internal control) or *ex post* (internal and external audit).

In fact, financial disclosure requirements as per Code of Conduct for Public Servants cover only the employee in question but not interest related to family members. It is not clear to what extent non-SMS are covered by requirements to disclose financial interests. The SCM Code of Conduct does not provide more detailed provisions in this regard.

Conflict of interest declarations rely on civil servants' willingness to disclose but could be managed more proactively (see Indicator 5(d) for broader discussion).

- **Recommendations**

Consider streamlining the definition of conflict of interest: While no issue has been expressed by stakeholders about the lack of a unified definition, South African authorities could consider introducing a streamlined definition for easy access and understanding, including expanding it to include actual, perceived and potential conflict of interest (as discussed in Indicator 5(d)).

Introduce cooling-off period for public-sector employees: Provisions about integrating the private-sector workforce after employment in the public sector should be introduced to limit the integrity risks associated with previous public-sector activities.

Support SCM practitioners in addressing prohibited practices: The legal framework should make it very clear which practices are prohibited in public procurement and this information must be included in tender documents. SCM practitioners could be supported in this regard with comprehensive standardised tender document that include clauses about prohibited practices, including exclusion grounds.

¹⁶⁶ UNODC Country Report South Africa (2020)



More specifically, GCC could be more precise in mandating organs of state to refer any identified corrupt or fraudulent practices to responsible agencies. Discretion in the consequences (e.g. termination of contract) could also be reviewed.

Streamline provisions for suspension/debarment: As identified in sub-indicator 1(d), increase the list of grounds for exclusion to cover terrorist-related offences, money-laundering or terrorist-financing, child labour, or human trafficking. Review or limit the discretionary powers offered to AA/AO in restricting suppliers. This could be implemented after a thorough review of current practices. Ensure that provisions in this matter are worded clearly.

Investigate barriers to low use (or lack thereof) of Register for Tender Defaulters and Restricted Supplier List.

Connect the list of CIDB-restricted/prohibited suppliers, the Restricted Supplier List and Tender Defaulter Report for a unified view and consider merging these instruments for a single, clear, coherent mechanism for debarment of suppliers.

Strengthen the capacity of prosecution, in particular, for investigation of high and complex corruption crimes: South African authorities need to ensure sufficient capacity is available to effectively prosecute those involved in criminal activities, most notably the high-level corruption of the state-capture years. The lack thereof provides a sense of impunity and lack of accountability, severely tampering the credibility of South African anti-corruption efforts.

Introduce a single body tasked with anti-corruption: South Africa would benefit from a strong, independent, capable anti-corruption body, as opposed to the current system that relies on a multitude of agencies. An anti-corruption body increases clarity in the roles of responsibilities around corruption prevention and detection. In the interim, clarify reporting lines for follow-up on allegations in Treasury Regulations or other SCM guidance.

Support AA/AO in identification of corruption-related risks, including in vulnerable sectors: Greater support, tools and guidance could be provided to AA/AO in their risk management processes. If needed, additional reporting should be required. Risk management activities should focus on sectors that are particularly vulnerable to corruption, as identified in the National Anti-Corruption Strategy.

Enhance CSO's oversight role through direct participation: Empower CSO in conducting their functions through capacity building, if necessary, and introduction of practices that enhance CSO oversight role through direct participation (see Indicator 11).

Address gaps with integrity practices in the private sector, including SOEs: Introduce provisions to ensure that private-sector rules make use of internal control and audit for the purposes of preventing and detecting corruption.

Strengthen whistleblower protection: Introduce legal protections for whistleblowers similar to those afforded to witnesses, as prescribed by the United Nations Convention Against Corruption (UNCAC). Ensure the anonymity of disclosures.

Facilitate access to Code of Conduct: Facilitate access to a streamlined up-to-date Code of Conduct. Introduce regular trainings to ensure that civil servants are well acquainted with it.



Enhance provisions for financial disclosure and conflict of interest: Provisions for routine financial disclosure should be broader in scope, i.e. cover family members and apply to all SCM officers, not only senior management.

Summary of substantive gaps and recommendations of Indicator 14

	Substantive gap	Risk classification and red flags	Recommendations
14(a)	Definition of conflict of interest	Medium risk	Consider streamlining the definition of conflict of interest.
14(a)	Cooling-off period	High risk	Introduce cooling-off period for public-sector employees.
14(b)	No mandatory requirements and instructions for prohibited practices in procurement documents	Medium risk	Support SCM practitioners in addressing prohibited practices.
14(c)	Gaps in suspension/debarment	High risk	Streamline provisions for suspension/debarment and investigate low use.
14(c)	Severe weaknesses in prosecution	High risk, red flag	Strengthen the capacity of prosecution, in particular for investigation of high and complex corruption crimes.
14(d)	Inadequate anti-corruption framework	High risk, red flag	Introduce a single body tasked with anti-corruption.
14(d)	Limited effectiveness in detecting and preventing corruption risks	High risk, red flag	Enhance anti-corruption measures in vulnerable sectors; support AA/AOs.
14(e)	Limited confidence in CSO's ability to conduct oversight of public procurement	Medium risk	Enhance CSO's oversight role through direct participation.
14(e)	Gaps with integrity practices in the private sector, including SOEs	High risk	Introduce provisions to ensure that private-sector rules make use of internal control and audit for the purposes of preventing and detecting corruption.
14(f)	Strong fears of whistleblowing	High risk, red flag	Introduce legal protections for whistleblowers similar



			to those afforded to witnesses, as prescribed by UNCAC. Ensure the anonymity of disclosures.
14(g)	Limitations of Code of Conduct	Low risk	Facilitate access to a streamlined up-to-date Code of Conduct. Introduce regular trainings to ensure that civil servants are well acquainted with it.
14(g)	Incomplete provisions for financial disclosure	High risk	Provisions for routine financial disclosure should be broader in scope, i.e. cover family members and apply to all SCM officers, not only senior management

4. Consolidated recommendations

Legal framework

There is no single, clear and unambiguous list or definitions of available procurement methods with associated conditions for use applicable to the procurement of goods, services, consulting services and construction-related procurement (works and works-related). This reduces the overall coherence of the system and increases the likelihood of inconsistent application, which is not in the overall interest of achieving an efficient and effective procurement regime.

To improve clarity, coherence and certainty, introduce legislative provisions listing in a clear and unambiguous manner all available procurement methods to include competitive and less competitive procurement procedures.

No minimum timeframes for the submission of bids are specified for procurement methods other than open competitive bidding, again opening up the possibilities of inconsistency in application. There is no provision specifically requiring the 21-day period for open competitive bidding to be extended when international competition is solicited which may have a negative impact on procurement outcomes in markets where foreign participation may prove to be beneficial.

To enhance consistency, introduce legislative provisions specifying minimum timeframes for less competitive procurement methods and establish criteria for setting the minimum time, including factors such as the complexity of the procurement and the level of expected competition and location of bidders.



There is a high level of discretion afforded to accounting officers/accounting authorities (AO/AAs) in deciding upon debarment of a supplier from doing business with government, by inclusion in the Restricted Supplier List. This raises serious concerns in that there are risks of inconsistency and/or bias in the application of grounds for restrictions on participation.

To enhance clarity, include in the legal framework a clear, consolidated list of rules on (1) exclusion; and (2) eligibility, and in each case with grounds and conditions clearly prescribed and supported by practical guidance.

Rights to challenge and grounds for challenge are based on administrative and rights and principles using judicial review applications direct to the relevant Division of the High Court. The available procedures and related time scales do not guarantee an effective and efficient process meeting the practical and commercial imperatives of procurement-related complaints. Furthermore, there is lack of trust in the system and limited transparency about publication of decisions.

Consider undertaking a critical study of the data and information available and stakeholders' views on the operation of the system of judicial review, including timeframes for submission and decisions on challenges.

The procurement regime applying to goods and services does not clearly provide for the use of price and non-price attributes and/or consideration of life cycle cost or total cost of ownership. Where functionality criteria are used, the prescribed methodology means that the value for money assessment will not always fully reflect the full value of qualitative aspects of tenders.

Consider the ways in which non-price functionality criteria can be best assessed to ensure that the qualitative benefits can be differentiated and, potentially, higher marks awarded for offers which exceed baseline requirements.

There is no single sustainable public procurement policy/strategy and implementation plan to draw together and address all aspects of sustainable public procurement – economic, social and environmental or green issues – as a coherent whole and in line with national priorities and policy objectives, which also translates into the daily practice of supply chain management professionals.

Develop a single, consolidated, sustainable public procurement policy (SPP)/strategy to draw together and implement all elements of SPP – economic, environmental (including climate considerations) and social (including gender equality and aligned with B-BBEEA and PPPFA frameworks).

Transparency

Increased transparency in several areas identified by the four MAPS pillars would strongly enhance the South African public procurement system, thereby contributing to integrity and accessibility of the system.

There is no comprehensive list of procurement records to be retained at operational level by organs of state. This potentially affects the ability to look at implementation performance, which is important information for the functioning of both internal and external control systems.



Consider publishing a checklist for use by organs of state at an operational level that sets out which procurement documents are to be retained to ensure complete procurement records.

Extremely limited insights on procurement activity are caused to a great extent by the very low compliance of organs of state with mandatory publication requirements. Despite transparency initiatives such as procurement information displayed in open data format, technical flaws often prevent users from accessing the corresponding datasets. But, an even more worrying situation is the level of compliance of organs of state with publication requirements. Only 12% of organs of state registered on eTenders have uploaded procurement plans in the financial year 2023-2024 while 73% of organs of state have published tenders. Only 3% of these institutions published related contract notices.

The National Treasury could identify organs of state with the lowest adherence to publication obligations and investigate further reasons why these organs of state do not comply with such obligations. Further, the OCPO could expand the scope and assess the reach of training sessions so as to address the systemic issue of low compliance with publication requirements in the e-procurement systems.

Challenges in confidentiality, insufficient bid preparation time, and transparency in the evaluation process suggest areas for significant improvement.

It is recommended to adopt e-procurement solutions with standardised forms and encrypted tender submissions to secure confidentiality and bolster transparency.

Weaknesses in contract execution, including frequent delays and limited information transparency, underscore the urgency for better contract delivery monitoring and stakeholder engagement. The implementation of comprehensive monitoring mechanisms and adherence to payment terms in contract management can promote timely delivery and accountability.

Persistent transparency issues and insufficient capacity building for the private sector highlight critical gaps in stakeholder inclusivity.

Strengthening stakeholder relations through proactive outreach and training programmes, aimed at boosting engagement and comprehension of procurement processes, is recommended.

Limited transparency of the procurement system hampers civil society's role in providing effective oversight. The lack of transparency can be traced back largely to limited digitalisation of public procurement transactions and a poor track record in use of the e-procurement system, which does not allow for comprehensive data analytics of procurement transactions. Direct participation of civil society in public procurement activities is very limited and would contribute to strengthen integrity if institutionalised. Civil society is active in consultations regarding the new regulatory framework but considers that authorities do not sufficiently take into account their inputs.

Authorities could consider empowering civil society in exercising a direct monitoring function. To operationalise this recommendation, existing mechanisms could be piloted (e.g. social witnesses or integrity pacts) before rolling them out more broadly.

Finally, financial disclosure rules are not sufficiently comprehensive as they only target senior civil servants and do not cover family interests. Combined with a narrow definition of conflict of interest, this anti-corruption tool appears underused in practice. Similarly, the code of conduct is not presented in a user-friendly format and no mandatory training is conducted for civil servants.



Provisions for routine financial disclosure should be broader in scope, i.e. cover family members and apply to all supply chain management (SCM) officers, not only senior management.

Governance

A key recommendation for South Africa's public procurement system is to increase the efficiency and effectiveness of the normative and regulatory function for public procurement.

The reinforcement of the authoritative standing of the regulatory function can only be addressed with sufficient human resources. While the mere structure of the South African public procurement system already brings challenges to the authoritative standing of the regulatory role of OCPO, its exposure to severe human resources gaps further adds difficulties. Of the 140 approved positions, only 80 positions are filled and 60 positions remain vacant, showing a vacancy rate of 43%, almost three times National Treasury's average. Considering the various mandates of the OCPO, from policy making to monitoring and managing the e-procurement system, the institution cannot effectively function without the necessary human resources.

National Treasury needs to address the severe issue of vacancy rates in the OCPO to provide the institution with the human capacity necessary to carry out its mandate.

There are systemic weaknesses in the control system. Important responsibilities are placed on accounting officers/accounting authorities but there are shortcomings in their execution of control functions (e.g. follow-up on audit findings). Furthermore, the control environment, in particular, regarding external audit, is considered as burdensome yet ineffective by stakeholders. At the same time, audit findings point to lack of consequence management, i.e. unresponsiveness to identified audit recommendations. Growing levels of irregular expenditure over the past decade are an indication of a complex regulatory framework and limited capacity among internal control functions. In fact, several systemic weaknesses have also been observed in the performance of internal control and internal audit functions, including limited capacity. SCM practitioners are not supported with practical hands-on manuals for the implementation of the Internal Audit Framework.

Some actions may reduce the inherent risks posed by a decentralised system that relies on accounting authorities/officers for its lawful functioning. For instance, further attention could be paid to these entities having the qualifications, skills and capacity needed to perform their jobs. South African authorities could also consider areas in which limiting discretion may prove beneficial (e.g. rules on procurement "by other means").

Recent rules and ongoing practices could put at risk the attractiveness of competitive tenders in South Africa. National Treasury recently loosened rules around availability of funds before issuing competitive procurement procedures. This introduces a significant risk that procurement procedures carried out will not translate into a signed contract because of the absence of funding. Depriving bidders of budget certainty and legal security would negatively impact their interest in participating in competitive processes. In addition, the issue of late payment of invoices seems excessively widespread. The exact extent of invoices not paid on time remains unknown; however, estimates suggest that it could be as high as 18,5% of the total amount of invoices.



The National Treasury could reintroduce a formal obligation to ensure sufficient budget availability before issuing tenders or price quotation, inspired by provisions existing for major capital projects. In addition, National Treasury should further reinforce its oversight around timely payments within the prescribed timelines by collecting information on the total number of and amount of invoices processed by organs of state and expanding reporting requirements to large organs of state such as public entities.

Procurement stakeholders fear whistleblowing, given credible threats to the lives of those who have come forward with allegations.

Introduce legal protections for whistleblowers similar to those afforded to witnesses, as prescribed by the United Nations Convention Against Corruption (UNCAC), and ensure the anonymity of disclosures.

Digitalisation

The assessment reveals severe gaps in the digitalisation of procurement processes mostly caused by systemic weaknesses of the digital infrastructure.

The absence of vertical integration with other e-government systems and minimal horizontal integration contribute to a very fragmented e-procurement landscape. The current systems only cover the tendering phase of the procurement cycle and leave out critical information both upstream and downstream. This is partly explained by the fact that financial management and information management are supported by disparate core systems due to a longstanding failure to implement an integrated financial management system in the public administration. Moreover, the e-procurement systems in place only cover competitive bidding, excluding information on exceptions, which defeats the objectives of transparency and accountability.

The coverage of the e-procurement system should be expanded to cover exceptions and deviations, and should seemingly integrate with organs of state's internal financial management systems to provide for an end-to-end e-procurement system. Further, it needs to expand the use of an open contracting data standard to engage citizens and businesses during procurement and contract execution.

Further, there are limited mechanisms to detect and prevent corruption risks in public procurement. In addition to gaps in the overall anti-corruption framework, South Africa presents gaps in effective mechanisms to prevent and detect red flags, which is connected to low levels of digitalisation and use of analytics, weak internal control and internal audit capacity as well as lack of clarity in the system of reporting allegations.

Greater support, tools and guidance could be provided to AA/AO in their risk management processes. If needed, additional reporting should be required and should leverage increased use of e-procurement systems to prevent and detect red flags.



Professionalisation

The professionalisation of the supply chain management function remains limited and principally lacks stewardship. The Interim Supply Chain Management Council, which was created in 2018 to steer the professionalisation of public procurement officials, has not been active since its inception. Further, the existing training requirements do not apply to supply chain management professionals in entities listed in Schedule 2 and 3B of the PFMA, which include SOCs, presenting both a significant share of procurement spend and systemic weaknesses, according to investigation findings.

National Treasury should reactivate the Interim SCM Council so a professionalisation roadmap can be developed and effectively implemented across the South African public procurement system. Further, it is critical that dedicated training is regulated and provided to SOCs' supply chain management function.

The anti-corruption system is inadequate to face the challenges it is confronted with. First and foremost, South Africa lacks a single body with the primary responsibility of preventing corruption. Instead, it is governed by a fragmented “multi-agency” approach, which proved ineffective during the state-capture years. Furthermore, law enforcement and prosecution authorities have been severely weakened during state capture and have not yet fully recovered their standing in terms of skills and institutional set-up. This contributes to an environment of impunity, which is underscored by the private sector's perception (50% of respondents) that anti-corruption measures are not effective.

South Africa would benefit from a strong, independent, and capable anti-corruption body, as opposed to the current system, which relies on a multitude of agencies. An anti-corruption body increases clarity in the roles and responsibilities around corruption prevention and detection. In the interim, clarify reporting lines for follow-up on allegations in Treasury Regulations or other SCM guidance.

Guidance

Standard contract conditions are not suitable for all types of purchasing and have not been updated recently. The General Conditions of Contract (GCC) for goods and services is not well suited for purchase of stand-alone services or consultancy services and has not been updated for some years to ensure that it remains fit for purpose.

Review the GCC published by NT/OCPO and revise or update as necessary to ensure that it is fit for purpose. Prepare additional standard contract conditions. At a minimum there should be standard contract conditions tailored to purchase of stand-alone services and for consultancy services.

There is no comprehensive, up-to-date user's guide or procurement manual for organs of state, detailing all procedures for the correct implementation of procurement regulations and law. This should explain in an easily understandable way legal and regulatory requirements, and give information on how these requirements are implemented in practice, including references to relevant standard documents and templates. Lack of a comprehensive user manual is likely to reduce overall consistency of application within the procurement system.



Prepare a comprehensive manual for use by procurement staff that incorporates law, policy and procedures; helps turn policy into practice; and enhances consistency within the procurement system.

Gaps in market research and environmental considerations indicate a need for a more robust approach to initial procurement stages.

Enhanced procurement planning through the utilisation of advanced analytical tools and the development of green public procurement guidelines to ensure sustainability is recommended.

5. Strategic planning

In the table below, the MAPS assessment team has identified priority actions for the government to consider, encompassing a mix of short-term achievable goals and medium- to long-term undertakings. The actions below draw on the detailed analysis and recommendations laid out in the assessment in Section 3 of this report.

Proposed action	Timeline	Responsible institutions
<p>Procurement methods and appropriate standards for competitive procedures: Introduce legislative provisions listing in a clear and unambiguous manner all available procurement methods to include competitive and less competitive procurement procedures, together with circumstances and conditions for use. To ensure consistency, the single list of methods shall apply to the procurement of goods, services, consulting services and construction-related procurement.</p>	Short	NT/OCPO CIDB
<p>Streamline provisions for suspensions and debarment: Review processes and outcomes of the system for adding suppliers to the Restricted Supplier List. If inconsistencies, biases or other issues are flagged, identify measures to remedy these issues to ensure that the system is fit for purpose. As part of this review, it is also recommended to investigate the reasons for limited use of the Restricted Supplier List. It would be helpful to investigate why tenderers convicted of offences that may lead to entry on the Register for Tender Defaulters are not identified and listed on the register, which is currently empty. Link lists of CIDB-restricted/prohibited suppliers, Restricted Supplier List and Tender</p>	Medium	NT/OCPO CIDB



Defaulter Report published by NT/OCPO to provide a single source of reference.		
Sustainable public procurement (SPP): Develop a single, consolidated, sustainable public procurement policy/strategy to draw together and implement all elements of SPP – economic, environmental (including climate considerations) and social (including gender equality and aligned with the B-BBEEA and PPPFA frameworks). The SPP policy/strategy should support broader national policy objectives, reflect national priorities, and be underpinned by a critical review of effectiveness of current measures.	Medium/Long	NT/OCPO CIDB Other stakeholders
Authoritative standing of the regulatory function: Reinforce the authoritative standing of the regulatory function by increasing its functional independence and addressing systemic human resources challenges to fill in all approved positions to allow the institution to fulfil its broad mandate.	Short	NT/OCPO
Electronic procurement (e-procurement): Overhaul the current digital environment of the procurement system by reviewing the legal framework to permit and facilitate the introduction and implementation of upgraded or new e-procurement systems. The coverage of the e-procurement system should be expanded to cover exceptions and deviations, and should integrate with organs of state’s internal financial management systems to provide for an end-to-end e-procurement system. Further, it needs to expand the use of an open contracting data standard to engage citizens and businesses during procurement and contract execution.	Medium	NT/OCPO SITA
Transparency on public procurement activity: Review mechanisms to ensure compliance of organs of state with publication requirements, especially for award decisions and contracts amendments. Identify organs of state with systemic low publication rate and carry out detailed investigations as to why they do not publish required information.	Short	NT/OCPO AGSA



<p>Professionalisation of the supply chain management function: Carry out a detailed assessment of the capacity of the supply chain management function, including in SOCs, to devise a tailored training action plan which would reinforce the capacity of the supply chain management workforce.</p>	Medium	NT/OCPO
<p>Harmonisation of public procurement practices: Engage in efforts to implement national-level standardisation initiatives of procurement practices including national-level standard procurement documents (SPDs), good practices procurement manual or guidance, and Procurement M&E system.</p>	Short	NT/OCPO CIDB
<p>Governance of the supply chain management function: The current model created two silos – Pre-award and Post-award. Challenges identified can be addressed by improving the governance model. Creating communication lines between supply chain management and business units can improve contract performance and management. This should include greater integration of data stored in acquisition, logistics, contract and payment management systems. Collectively, these should be part of a single e-procurement system, as mentioned above, providing end-to-end visibility over the entire procurement lifecycle.</p>	Long	NT/OCPO
<p>Framework for control and audit: Systemic weaknesses of the control and audit framework can be tackled through a simplification of the SCM regulatory framework, thereby reducing the risks of administrative non-compliance with procurement rules.</p> <p>Furthermore, supporting capacity building and harmonisation of internal audit and control practices is another critical building block of an effective framework for control and audit.</p> <p>Finally, capacity could be supported by digital systems that reduce the margin for human error and improve the quality of data.</p>	Long	NT/OCPO/OAG AGSA



<p>Anti-corruption and integrity: South Africa would benefit from a strong, independent, and capable anti-corruption body, as opposed to the current system, which relies on a multitude of agencies. An anti-corruption body increases clarity in the roles and responsibilities around corruption prevention and detection. In the interim, reporting lines for follow-up on allegations in Treasury Regulations or other SCM guidance could be clarified.</p>	<p>Long</p>	<p>Government of South Africa</p>
---	-------------	-----------------------------------

6. Validation

This assessment was launched in July 2023. The fact-finding meetings were conducted 5 - 8 September 2023 in Pretoria, South Africa. Additional stakeholders were met through online meetings in October 2023. A list of stakeholders that were interviewed as part of the fact-finding mission or otherwise consulted is included in Annex B.

A validation workshop was held in Pretoria 19 – 20 March 2024. It convened key stakeholders including:

- National Treasury
- AGSA
- Civil Society representatives
- ESKOM
- CIDB
- Transnet
- Development Bank of South Africa
- SARS
- SITA
- National Department of Health
- National Department of Basic Education
- Western Cape Province
- Gauteng Province

Stakeholders had the opportunity to share their comments during the workshop and in writing. Written comments were received by:

- National Treasury
- Corruption Watch
- AmaBhungane
- Public Service Accountability Monitor

Comments were duly integrated in the report or addressed with a written response.



The report was also peer reviewed by colleagues within the OECD and the World Bank.

The final version of the assessment report was prepared in May 2024.

Annexes/Appendices

Annex A – Assessment of the provisions of the draft public procurement bill (B18B-2023) in selected sub-indicators.



Annex B – Stakeholders involved in the assessment

Type of function or institution	Name of Institution in the country
Authority in charge of the assessment (typically the regulatory authority, ministry, or center of government)	<ul style="list-style-type: none"> • Office of the Chief Procurement Officer (OCPO) • National Treasury
Institution in charge of the normative/regulatory function for public procurement	<p>OCPO / National Treasury</p> <p>Additional stakeholders:</p> <ul style="list-style-type: none"> • Department of Trade, Industry and Competition • South African Police Services • Department of Water and Sanitation • South African Revenue Service • SITA • Department of Mineral Resources and Energy
Administrative/judicial review (appeals) body for procurement	National Treasury
Selected number of organs of state, including state-owned enterprises (selection can be made based on regional or thematic focus of assessment)	<ol style="list-style-type: none"> 1. Eskom 2. Transnet 3. National Treasury OCPO Transversal Contracting Unit 4. Development Bank of South Africa (DBSA) 5. Department of Public Works and Infrastructure (DPWI); 6. South African Revenue Services (SARS) 7. State Information Technology Agency (SITA) 8. Council for Scientific and Industrial Research (CSIR) 9. National Department of Health (NDOH) 10. PDOH - Western Cape 11. PDOH - Gauteng 12. National Department of Basic Education (NDBE) 13. PDE - Eastern Cape 14. PDE – Limpopo 15. Department of Correctional Services (DCS)
Centralised procurement body, if any	<ul style="list-style-type: none"> • Unit responsible for transversal contracts in NT



	<ul style="list-style-type: none"> • National Department of Health • Provincial Departments of Health (Gauteng and Western Cape) • Department of Public Works and Infrastructure and Development Bank of South Africa
Authorities responsible for budgeting, payment and financial procedures	National Treasury
Authorities in charge of internal and external controls and audits	<ul style="list-style-type: none"> • Auditor General of South Africa (AGSA) • Internal Audit Units of a sample of organs of state (ESKOM, SARS, SITA) • National Treasury, Office of the Accountant General
Anti-corruption agencies	<ul style="list-style-type: none"> • Special Investigating Unit (SIU) • National Prosecuting Authority (NPA) • DoJ, Fusion Centre
Procurement professional body / training institutions	<ul style="list-style-type: none"> • Supply Chain Management Interim Council • National School of Government
Representatives of private sector	<ul style="list-style-type: none"> • Chamber of Commerce of South Africa • Business Leadership South Africa • Black Business Council • NEDLAC • Consulting Engineers South Africa (CESA)
Representatives of civil society	<ul style="list-style-type: none"> • Public Service Accountability Monitor • Corruption Watch • Public Affairs Research Group (PARI) • Organisation Undoing Tax Abuse (OUTA) • AmaBhungane





MAPS

Methodology for Assessing
Procurement Systems

South Africa MAPS Report

Annex A: Public Procurement Bill

Notes on whether and to what extent the Public Procurement Bill (PPB) [version B18B-2023, 08 December 2023]* addresses substantive gaps which contain recommendations for legislative change.

Gaps and Recommendations from the full MAPS report are presented, with additional notes on Public Procurement Bill [v.B18-2023] at the conclusion of each Recommendation.

** B18B-2023 is the version of the Public Procurement Bill approved by National Assembly in December 2023 and available to the MAPS Assessment Team at the close of the MAPS data collection period, 30 April 2024.*

Over the course of the first five months of 2024, the Public Procurement Bill B18B-2023 went through the consultation and Finance Committee process at the National Council Of Provinces (NCOP). On 9 May 2024 an amended version of the Public Procurement Bill (B18D-2023) was passed by the NCOP and returned to the National Assembly for concurrence. This is an ongoing process and it is unclear when the final version of the Bill will come into force as an Act.



Pillar I. Legal, Regulatory, and Policy Framework

Indicator 1. The public procurement legal framework achieves the agreed principles and complies with applicable obligations

Sub-indicator 1(a) Scope of application and coverage of the legal and regulatory framework

The legal and regulatory body of norms complies with the following conditions:

Assessment criterion 1(a)(a):

Is adequately recorded and organized hierarchically (laws, decrees, regulations, procedures), and precedence is clearly established.

(1) Complexity of the legal and regulatory body of norms applying to public procurement

Gap analysis

The legal and regulatory body of norms applying to public procurement is extensive, complex and fragmented. The multitude of legislative provisions impacting on planning, conduct and delivery of procurement outcomes presents significant challenges in identifying and understanding the procurement system as a coherent whole. The PFMA regime comprises numerous documents, is not comprehensive in coverage and is not presented in a consolidated manner. Due to limits on powers under the PFMA for NT to mandate compliance by organs of state in a detailed manner, provisions are sometimes vague or expressed in a manner which leads either to uncertainty or permits exercise of discretion which can negatively impact on the operation of the system as a whole. Although the PFMA regime and CIDB regime are aligned from a technical perspective, there is a lack of fit, including for example in use of inconsistent terminology and different approaches to standard tender documents so that they present as two distinct regimes, adding to complexity.

This Gap is assigned a Red Flag because it obstructs efforts to improve the public procurement system, is a deeply imbedded systemic issue and cannot be immediately mitigated solely through actions in the public procurement system. The required changes to the legislative framework at all levels of the legal hierarchy (not just primary legislation) requires significant levels of ongoing inter-institutional cooperation.

Recommendations

Wholesale changes to the legislative framework must be made to reduce the number of legislative provisions impacting on planning, conduct and delivery of procurement outcomes. The aim should be to create a far simpler, coherent framework with clear underpinning principles, common provisions, terminology and procurement methods applying to all procurement (goods, works (construction), and services, including consulting services) by all procuring entities using public funds and in accordance with requirements of the Constitution. Ideally this should be contained in a single piece of dedicated primary legislation, supported by comprehensive implementing Regulations.

Public Procurement Bill

The PPB draws together, in one primary legislative instrument, provisions on matters previously addressed in a number of separate instruments, in particular, the Public Finance Management Act, 1999, National Treasury Regulations, various National Treasury/SCM Instructions and Preferential Procurement Policy Framework Act, 2000. The PPB applies to procurement, defined to cover good, services and infrastructure, carried out by departments, constitutional institutions, municipalities/municipal entities and Schedule 2 & 3 public entities. There are various provisions referring to promotion of uniformity and standardisation.

This approach will reduce the number of legislative instruments and provisions impacting on the planning, conduct and delivery of procurement outcomes and provides a reasonable starting point for delivery of a simpler, more coherent framework for public procurement.

PPB s.1 Definitions, "procurement" subject to the PPB is defined to cover the acquisition of "goods, services, infrastructure or capital assets" and "the construction, repair or maintenance of infrastructure or capital assets"
PPB s.2 Objects of the Act, 2(1)(a) introduce uniform treasury norms and standards for all procuring institutions to implement their procurement system.

Pillar I. Legal, Regulatory, and Policy Framework

PPB s.1 Definitions, “procurement” subject to the PPB is defined to cover the acquisition of “goods, services, infrastructure or capital assets” and “the construction, repair or maintenance of infrastructure or capital assets”

PPB s.1 Definitions, “Procuring Institution” is defined by reference to PPB s.3(1) to cover: a department as defined in PFMA s.1; constitutional institution (listed in PFMA schedule 1); municipality or municipal entity, and; public entity (listed in PFMA Schedule 2 and 3).

PPB s.3(3) confirms that the PPB applies to “all procurement carried out by a procuring institution....”

PPB s.5(1)(e) lists as one of the Functions of the Public Procurement Office “to promote standardisation in procurement”

PPB s.5(2)(c) points to the possibility of development by the Public Procurement Office of model procurement policies, which may lead to more standardisation

PPB s.25(4) Public Procurement Office may, but not must, “determine standard bid documents”.

PPB s.30(2) Information and communication technology-based procurement system, refers to the inclusion in ICT procurement systems of a number of components including “uniform procurement procedures and processes”.

2) International funding

Gap analysis

The PFMA regime does not contain provisions specifically addressing the issue of whether or to what extent it applies to contracts arising from international agreements, international treaty or concluded under provision financed by multilateral financing institutions. In this context, it is thus not clear which provisions would take precedence in the event that use of that specific institution’s procurement rules & procedures is required.

Recommendations

Introduce provisions in the new primary legislation to address the issue of whether and/or to what extent it applies to contracts arising from international agreements, international treaty or concluded under provision financed by multilateral financing institutions. See, for example, UNCITRAL Model Law on Public Procurement, Article 3.

Public Procurement Bill

The PPB applies to procurement “through donor or grant funding” unless the Minister grants an exemption to the procuring institution, where such an exemption “will benefit the public in general or a section of the public”.

PPB s.3(3)(a) provides that the PPB applies to “all procurement carried out by a procuring institution, including procurement through donor or grant funding;”

PPB s.62(1) Exemption, provides that “The Minister may, with or without conditions, by notice in the *Gazette*, exempt a procuring institution from any provision of this Act, if - (b) the procurement is to be funded partially or in full by donor or grant funding and such exemption will benefit the public in general or a section of the public;”

PPB s.64(1)(a) provides that the Minister must make regulations regarding “(vii) procurement funded partially or in full by donor or grant funding;”

Sub-indicator 1(b)

Procurement methods

The legal framework meets the following conditions:

Assessment criterion 1(b)(a):

Procurement methods are established unambiguously at an appropriate hierarchical level, along with the associated conditions under which each method may be used.

Gap analysis

Open Competitive Bidding is the required default method for procurement above the threshold of ZAR 1 000 000 (One million Rand) for procuring entities to whom TR 16 SCM applies. The legal framework does not establish a sufficiently single clear and unambiguous list or definitions of available procurement methods, with associated conditions for use in every case, and applying to the procurement of goods, services, consulting services and construction related procurement (works and works related).

Pillar I. Legal, Regulatory, and Policy Framework

Recommendations

Combined recommendations for 1(b)(a) and 1(b)(d)

To improve clarity, coherence and certainty, introduce legislative provisions listing in a clear and unambiguous manner all available procurement methods to include competitive and less competitive procurement procedures. Each of the available methods should be clearly defined, with associated conditions for use. The procurement methods listed should apply, as relevant, to the procurement of goods, services, consulting services and construction related procurement.

The list of available procurement methods and associated conditions for use should ideally be placed in a higher-level legal instrument of universal application. This provides both stability and consistency. Lower-level instruments can be used to regulate methods and conditions at a more detailed level, including to accommodate particular sectoral requirements

Public Procurement Bill

The PPB does not include a list of available procurement methods including competitive, and less competitive procurement methods and conditions for use, although it does refer to the open competitive bidding process.

The PPB does not clearly state that the open competitive method is the required default method for procurement.

The PPB provides for these matters to be addressed in a framework prescribed by the Minister and in Ministerial Regulations.

PPB s.33(2)(a) Disclosure of procurement information, refers to one procurement method, open competitive bidding. This provision requires disclosure of specified categories of information which includes “(i) the reasons for the decision, where a decision is made not to follow an open competitive bid process.”

PPB s.25(1)(b) Procurement system and methods, provides that the Minister must prescribe a framework within which procuring institutions must implement the procuring system which includes “types of procurement methods”.

PPB s.64(1)(a) provides that the Minister must make regulations for “(v) procedures for bid specification, invitation, submission, opening, evaluation, adjudication and awarding of bids and cancellation of procurement processes;” PPB s.64(1)(a)(xii) refers to making of regulations for emergency procurement including types of emergency procurement and circumstances where they may be used.

PPB s.30(2) Information and communication technology-based procurement system, refers to the inclusion in ICT procurement systems of a number of components including “uniform procurement procedures and processes”.

Assessment criterion 1(b)(d):

Appropriate standards for competitive procedures are specified.

Gap analysis

Permitted use of “other means”, which are not exhaustively defined, affords wide discretion at a procuring entity level reducing the clarity and coherence of the system and opens up the possibility of inappropriate use of less or non-competitive procedures.

Recommendations

See combined recommendations at 1(b)(a).

Public Procurement Bill

The PPB does not does not list all available methods of procurement with standards for use nor does it reference procurement by “other means”. The PPB provides for types of procurement methods to be addressed in a framework prescribed by the Minister and Ministerial Regulations (in the case of emergency procurement in particular). It is thus possible that procurement by other means permitted under the current legislative framework may no longer be an option.

Pillar I. Legal, Regulatory, and Policy Framework

PPB s.25(1)(c) Procurement system and methods, provides for the Minister to prescribe a framework within which procuring institutions must implement the procuring system which includes “the requirements and procedures for each prescribed method”. *It is not entirely clear whether “requirements and procedures” in this context covers setting standards for competitive procedures including provisions which should result in minimal use of methods that limit competition (see MAPS Methodology).*

PPB s.64(1)(a)(xii) provides that the Minister must make regulations for emergency procurement which may include types of emergency procurement and circumstances where they may be used.

Sub-indicator 1(c)

Advertising rules and time limits

The legal framework meets the following conditions:

Assessment criterion 1(c)(b):

Publication of opportunities provides sufficient time, consistent with the method, nature and complexity of procurement, for potential bidders to obtain documents and respond to the advertisement. The minimum time frames for submission of bids/proposals are defined for each procurement method, and these time frames are extended when international competition is solicited.

Gap analysis

No minimum time frames are specified for procurement methods other than open competitive bidding. There is no provision specifically requiring the 21-day period for open competitive bidding to be extended when international competition is solicited.

Recommendations

To enhance consistency, introduce legislative provisions specifying minimum time frames for less competitive procurement methods and establish criteria for setting the minimum time, including factors such as the complexity of the procurement and the level of expected competition and location of bidders. Ideally, these provisions should be placed in a higher-level legal instrument of universal application, with lower level instrument/s used to regulate at a more detailed level, including to accommodate particular sectoral requirements.

Public Procurement Bill

The PPB does not specify minimum time frames for submission of bids/proposals for each procurement method. The PPB provides for this to be addressed in a framework prescribed by the Minister.

PPB s.25(1) Procurement system and methods, provides for the Minister to prescribe a framework within which procuring institutions must implement the procuring system which includes “types of procurement methods” (PPB and “the requirements and procedures for each prescribed method”. *It is not entirely clear whether “requirements and procedures” in this context includes specified minimum time frames for submission of bids/proposals for each procurement method.*

Sub-indicator 1(d)

Rules on participation

The legal framework meets the following conditions:

Assessment criterion 1(d)(a):

It establishes that participation of interested parties is fair and based on qualification and in accordance with rules on eligibility and exclusions

Gap analysis

The overall picture is fragmented and there is no clear, consolidated list of rules on eligibility and exclusion to be applied to determine qualification of interested parties.

Recommendations

To enhance clarity, include in the legal framework a clear, consolidated list of rules on (1) exclusion; and (2) eligibility, in each case with grounds and conditions clearly prescribed and supported by practical guidance.

Pillar I. Legal, Regulatory, and Policy Framework

Ideally, these provisions should be placed in a higher level legal instrument of universal application, with lower level instrument/s used to regulate at a more detailed level, including to accommodate particular sectoral requirements.

Public Procurement Bill

The PPB does not present a single consolidated list of requirements/rules on exclusion and eligibility to participate, with grounds and conditions clearly prescribed.

PPB s.13 Automatic exclusion from submitting a bid, provides for:

Exclusion of office holders: PPB s.13(1)(a) to (g) and (j) provides for automatic exclusion of office holders, officials employees etc. as listed in s.13(1)(a) to (g) and (j)

Exclusion of debarred bidder or supplier: PPB s.13(1) provides for automatic exclusion of a bidder or supplier debarred in terms of PPB s.15, which is the process of debarment by the procuring institution.

PPB s.27 Measures to prevent abuse of procurement system, requires the accounting officer or accounting authority to “reject a recommendation for the award of a bid if the recommended bidder has “(i) made a misrepresentation or submitted false documents in competing for a particular contract; (ii) been convicted of any offence involving corruption, fraud, collusion or coercion in competing for any contract”. *This is not expressed to be ground for exclusion and refers to the contract award stage not exclusion from participation.*

There is no reference in the PPB to the categories of requirements for registration on the Central Supplier Database and CIDB Register of Contractors which, for practical purposes, establish baseline eligibility requirements.

Assessment criterion 1(d)(c):

It details the eligibility requirements and provides for exclusions for criminal or corrupt activities, and for administrative debarment under the law, subject to due process or prohibition of commercial relations.

(1) Grounds for exclusion

Gap

There is no list of grounds for exclusion covering terrorist related offences, money laundering or terrorist financing, child labour, human trafficking as prescribed by the MAPS Methodology.

Recommendation

Include in the legal framework specific provisions listing grounds for ineligibility due to conviction by final judgment for specified organised crime, terrorist and trafficking offences (participation in a criminal organization; terrorist offences or offences linked to terrorist activities, or inciting or aiding or abetting or attempting to commit such an offence; money laundering or terrorist financing; child labour; and all forms of trafficking in human beings.)

Public Procurement Bill

See 1(d)(b)

The PPB does not list as a ground for exclusion or ineligibility, conviction by final judgment for specified organised crime, terrorist and trafficking offences (participation in a criminal organization; terrorist offences or offences linked to terrorist activities, or inciting or aiding or abetting or attempting to commit such an offence; money laundering or terrorist financing; child labour; and all forms of trafficking in human beings.).

(2) Debarment

Gap

There is a high level of discretion afforded to AO/AA in deciding upon debarment of a supplier from doing business with government, by inclusion in the Restricted Supplier List. This raises risks of inconsistency and/or bias in the application of grounds for restrictions on participation.

Recommendation

Review operation of the processes and outcomes of the system for adding suppliers to the Restricted Supplier List, in particular to establish the detailed grounds upon which a decision is made, factors which are taken into account

Pillar I. Legal, Regulatory, and Policy Framework

in decision making, the process applied, consistency of the decisions and the resulting periods of debarment. If inconsistencies, bias or other issues are flagged, identify measures to remedy these issues, including guidance if necessary. This is to ensure that the system is fit for purpose, acknowledging that each situation needs to be decided on its own merits within a clear framework for decision making.

Public Procurement Bill

Provisions are improved. Significant discretion remains but there is a right to apply for review of a debarment decision by the new Public Procurement Tribunal.

PPB s.15 Debarment, lists grounds for debarment. It also sets out the process to be followed. *As under the previous rules, the process and decision on debarment is made by the procuring institution, with the wording of grounds for debarment and process to be followed still affording significant discretion.*

PPB s.50 provides a debarred bidder or supplier with the right to apply to the Public Procurement Tribunal for review of the debarment decision.

(3) Grounds for disregarding a bid

Gap

The wording of grounds upon an AO/AA may disregard a bid in TR16A9.2, is vague and not well aligned with the anti-corruption regime. This raises concerns as to the efficacy of the process where significant discretion is exercised at a procuring entity level.

Recommendation

Review and amend, redraft or remove (as necessary) the grounds upon which bids may be disregarded, to ensure that they are aligned with anti-corruption legislation and well defined, thus limiting room for misapplication. It is advisable to provide additional Instructions or guidance, including practical examples, to inform and support officers in decision making on this issue.

Public Procurement Bill

Provisions are improved. Corruption is now defined by direct reference to the Prevention and Combating of Corrupt Activities Act, 2004.

PPB s.27 Measures to prevent abuse of the procurement system, lists grounds for rejection of a recommendation for award of a bid if the recommended bidder has:

“(i) made a misrepresentation or submitted false documents in competing for a particular contract;
(ii) been convicted of any offence involving corruption, fraud, collusion or coercion in competing for any contract;”
PPB s.1 defines “corruption” by reference to the Prevention and Combating of Corrupt Activities Act, 2004.

Assessment criterion 1(d)(d):

It establishes rules for the participation of state-owned enterprises that promote fair competition.

Gap analysis

The PFMA regime does not establish rules for participation of state-owned enterprises¹ as bidders in public procurement processes. This may jeopardise fair competition as state-owned enterprises may have an unfair advantage over other bidders because, for example, they benefit from subsidies, tax exemptions or other forms of preferential treatment.

Recommendations

Include in the legal framework specific rules applying to participation of state-owned enterprises² as bidders in public procurement processes, aimed at promoting fair competition.

¹ For the purposes of the MAPS Assessment the term “state-owned enterprises” is used to refer collectively to Major Public Entities (Sched 2) and Public Entities (3A&C), as defined by the PFMA.

² For the purposes of the MAPS Assessment the term “state-owned enterprises” is used to refer collectively to Major Public Entities (Sched 2) and Public Entities (3A&C), as defined by the PFMA.

Pillar I. Legal, Regulatory, and Policy Framework

Public Procurement Bill

The PPB does not contain specific rules applying to participation of state-owned enterprises³ as bidders in public procurement processes, aimed at promoting fair competition.

“Direct award” between organs of state: PPB s.26 Use of another organ of state, permits a procuring institution to “(a) acquire goods, services, infrastructure or capital assets from another organ of state; (b) use another organ of state to construct, repair or maintain infrastructure or capital assets.”

Assessment criterion 1(e)(b):

It requires the use of neutral specifications, citing international norms when possible, and provides for the use of functional specifications where appropriate.

Gap analysis

Treasury Regulations do not contain specific provisions requiring use of neutral specification nor do they specify use of international norms where possible or provide for use of output based (“functional” in MAPS terminology) specifications to promote innovation, where appropriate.

Recommendations

Combined recommendation for 1(e)(b) and 1(e)(c)

Introduce legislative provisions to specifically refer to use of international or other recognized equivalent norms and to the principle of equivalence for procurement of goods, services including consulting services and construction related procurement. Also consider including provisions requiring use of output-based specifications in the case of all procurements, where appropriate, to promote innovation.

Public Procurement Bill

The PPB does not contain provisions specifically referring to use of international or other recognized equivalent norms and to the principle of equivalence or use of output-based specifications.

Assessment criterion 1(e)(c):

It requires recognition of standards that are equivalent, when neutral specifications are not available.

Gap analysis

Although guidance makes it clear that procuring entities should include the words “or equivalent” where neutral specifications are not available, Treasury Regulations do not contain specific provisions making this a requirement. See combined recommendation at 1(e)(b)

Public Procurement Bill

The PPB does not contain provisions specifically referring to the principle of equivalence.

Assessment criterion 1(e)(d):

Potential bidders are allowed to request a clarification of the procurement document, and the procuring entity is required to respond in a timely fashion and communicate the clarification to all potential bidders (in writing).

Gap analysis

Although SCM Instruction provides for uploading of clarification requests and responses and guidance makes it clear that procuring entities should provide for a process for clarification of procurement documents, Treasury Regulations do not contain specific provisions making this a requirement.

Recommendations

To enable equal treatment of suppliers help them to understand clearly what is requested of them and how the procurement process is to be carried out, introduce legislative provisions to clearly provide a right for potential

³ For the purposes of the MAPS Assessment the term “state-owned enterprises” is used to refer collectively to Major Public Entities (Sched 2) and Public Entities (3A&C), as defined by the PFMA.

Pillar I. Legal, Regulatory, and Policy Framework

bidder to request clarification of a procurement document, with specified timelines for responses and a requirement for written communication of clarifications to all potential bidders.

Public Procurement Bill

The PPB does not contain provisions that specifically provide a right for bidders to request clarification of procurement documents.

Sub-indicator 1(f) Evaluation and award criteria The legal framework mandates that:

Assessment criterion 1(f)(b):

The legal framework allows the use of price and non-price attributes and/or the consideration of life cycle cost as appropriate to ensure objective and value-for-money decisions.

Gap analysis

The PFMA regime does not clearly provide for the use of price and non-price attributes and/or consideration of life cycle cost, or total cost of ownership. Where functionality criteria are used, the prescribed methodology means that the value for money assessment will not always fully reflect the full value of qualitative aspects of tenders.

Recommendations

Include provisions in the legal framework to clearly provide for the use of methods such as life cycle costing or total cost of ownership together with clear requirements on the data bidders should provide in their tenders to make the determination. Consider the ways in which non-price functionality criteria can be best assessed to ensure that the qualitative benefits can be differentiated and, potentially, higher marks awarded for offers which exceed baseline requirements.

Public Procurement Bill

The PPB does not specifically provide, in clear terms, for the use of price and non-price attributes and/or consideration of life cycle cost, or total cost of ownership.

Save in the case of functionality provisions in the context of set asides for preferential procurement, the PPB provides for evaluation, adjudication and award of bids to be addressed Ministerial Regulations.

PPB s.17 refers to assessment to include functionality in the contract of set asides for preferential procurement.

PPB s.25(1) Procurement system and methods, provides for the Minister to prescribe a framework within which procuring institutions must implement the procuring system which includes “types of procurement methods” (PPB and “the requirements and procedures for each prescribed method”.

It is not entirely clear whether “requirements and procedures” in this context includes provisions on use of price and non-price attributes or defined methods including, for example, life cycle costing or total cost of ownership

PPB s.64(1)(a) provides that the Minister must make regulations for “(v) procedures for bid specification, invitation, submission, opening, evaluation, adjudication and awarding of bids and cancellation of procurement processes;”

Sub-indicator 1(g) Submission, receipt, and opening of tenders The legal framework provides for the following provisions:

Assessment criterion 1(g)(a):

Opening of tenders in a defined and regulated proceeding, immediately following the closing date for bid submission.

Gap analysis

Although it is generally understood that bid opening is to be conducted in public, there is no procedure prescribed for public opening of tenders in Treasury Regulations or Instructions and the right of bidders or their representatives and other with legitimate interest in outcomes, such as representatives of civil society organized is not referenced in the PFMA regime.

Pillar I. Legal, Regulatory, and Policy Framework

Recommendations

To enhance transparency and accountability, introduce legislative provisions applying to procurement of goods, services, consulting services and construction related, to clearly set out the process for bid opening and specify who is permitted to attend public opening of tenders. Legislative provisions on bid opening should also require that, save in specified cases, bids are opened immediately after the deadline for submission of tenders, to reduce the possibility of loss of alteration of proposals and submissions.

Public Procurement Bill

The PPB provides for these matters to be addressed in Ministerial Regulations.

It may be helpful to include a statement of the general principle in a higher level legal instrument but leave detail to be addressed in lower level legal instruments of universal application.

PPB s.64(1)(a) provides for the Minister to make regulations regarding “(v) procedures for bid specification, invitation, submission, opening, evaluation, adjudication and awarding of bids and cancellation of procurement processes;”

Assessment criterion 1(g)(b):

Records of proceedings for bid openings are retained and available for review.

Gap analysis

The provisions on records of bid proceedings in the current legal framework are limited and should be enhanced, to ensure standard practices and enhance transparency and accountability.

Recommendations

Introduce legislative provisions applying to procurement of goods, services, consulting services and construction related, clearly setting out the information that should be recorded, which, for open tendering should include: name & address of bidders, date and condition the tender was received (for compliance), tender prices, any withdrawals or modifications to tenders duly submitted and any alternative offers requested or permitted (where relevant and permissible). Legislative provisions should also require that records of bid opening are maintained and shared with the bidders and are available for review and audit purposes.

Public Procurement Bill

The PPB provides for these matters to be addressed in Ministerial Regulations.

It may be helpful to include a statement of the general principle in a higher level legal instrument but leave detail to be addressed in lower level legal instruments of universal application.

PPB s.64(1)(a) provides for the Minister to make regulations regarding “(v) procedures for bid specification, invitation, submission, opening, evaluation, adjudication and awarding of bids and cancellation of procurement processes;”

Assessment criterion 1(g)(d):

The disclosure of specific sensitive information is prohibited, as regulated in the legal framework.

Gap analysis

Provisions on disclosure of specific sensitive information are limited and should be enhanced to take into account the legitimate needs of bidders to protect trade secrets and other proprietary information, in particular.

Recommendations

Introduce legislative provisions applying consistently to procurement of all types - goods, services, consulting services and construction relate- to ensure measures which take into account the legitimate needs of bidders to protect trade secrets and other proprietary information as well as the need to avoid disclosing information that can be used to distort competition. It can be difficult balancing act to ensure appropriate levels of transparency whilst

Pillar I. Legal, Regulatory, and Policy Framework

protecting legitimate interests and so it is advisable to support such provisions with practical guidelines to facilitate decision making on a case by case basis.

Public Procurement Bill

The PPB acknowledges the need to respect confidentiality of bidder information. Detailed requirements can be addressed in lower level legal instruments of universal application.

PPB s.1(1) Definitions, defines “confidential information” to include “commercial information, the disclosure of which is likely to damage a commercial interest of a bidder;”

PPB s.32 Access to procurement processes, provides that the Minister must prescribe measures for the public, civil society and the media to access, scrutinise and monitor procurement processes, and also requires that the this “must exclude confidential information”

PPB s.33 Disclosure of procurement information, provides that the Ministry must prescribe requirements to disclose information regarding procurement. There is a non-exhaustive list of categories of information to be disclosed to enable effective monitoring of procurement which includes “all information regarding a bid”. Information must be published in a format which enables tracking of information, is electronic and interoperable and “if it contains confidential information, only that information is severed.”

Assessment criterion 1(g)(e):

The modality of submitting tenders and receipt by the government is well defined, to avoid unnecessary rejection of tenders.

Gap analysis

The modality of submitting tenders and receipt by government is not well defined in the legislative framework, thus raising the risk of rejection of otherwise compliant proposals.

Recommendations

Introduce provisions applying to procurement of goods, services, consulting services and construction related, clearly setting out how bids are to be submitted, including number of copies, sealing and marking of envelopes and addressing security and confidentiality requirements, with necessary flexibilities to allow for e-GP electronic submission and receipt.

Public Procurement Bill

The PPB does not include provisions on the modality of submission and receipt of tenders.

It may be helpful to include a statement of the general principle in a higher level legal instrument but leave detail to be addressed in lower level legal instruments of universal application.

Sub-indicator 1(h)

Right to challenge and appeal

The legal framework provides for the following:

Assessment criterion 1(h)(d):

Rules establish time frames for the submission of challenges and appeals and for issuance of decisions by the institution in charge of the review and the independent appeals body.

Gap analysis

The rules applying to time frames for application for judicial review and covering issuance of decisions are contained in statute and Rules which are of general application to judicial review cases heard by the High Court. The available procedures and related time scales do not guarantee an effective and efficient process meeting the practical and commercial imperatives of procurement related complaints.

This Gap is assigned a Red flag because lack of an efficient review system can severely impede the objectives sought through public procurement by reducing confidence in the system which can have a negative impact on competition.

Recommendations

Pillar I. Legal, Regulatory, and Policy Framework

Consider undertaking a critical study of the data and information available and stakeholders views on the operation of the system of judicial review to assess the fitness of purpose and efficiency of the current system for procurement complaints using the route of judicial review and to gauge confidence in and effectiveness of the operation of the system in practice. This should be undertaken with the aim of identifying whether the existing route may be adapted to meet the MAPS methodology requirements for an efficient review system or whether a new approach is required, such as the establishment of a specialist independent procurement review body.

Public Procurement Bill

The PPB establishes the right to request reconsideration of a decision to award a bid by a procuring entity and to apply for independent review of a decision on reconsideration by a new Public Procurement Tribunal.

It is not entirely clear whether the right to reconsideration applies to decisions made by the institution prior to bid award.

For notes on timescales for decision making on reconsideration and review, see 13(a)(d).

PPB Chapter 6 provides with a right to submit an application for reconsideration to the procuring institution if the bidder is not satisfied with a decision to award a bid by that institution. It is not entirely clear whether the right to reconsideration applies to decisions made by the institution prior to bid award. The PPB sets out timescales for submission, consideration and decision on an application for reconsideration (in total up to 40 days), with conclusion of the contract being prohibited for the period of the reconsideration process plus 10 days after its conclusion. The additional 10 days of “standstill” is to allow the bidder to apply for review to the Public Procurement Tribunal.

PPB ss.38-48 establishes the Public Procurement Tribunal as an independent, impartial body and covers: the composition of the Tribunal; qualifications of members; functions of the chairperson and deputy chairperson; members’ disclosures of interest; term of office, reappointment, termination and conditions of service of members; finances; resources; conduct of persons involved in the work of the Tribunal: panels, and; Tribunal rules.

PPB ss.49-53 Review Process, covers: Review of decision to award a bid made by the procuring entity; review of decisions to debar; fee; review proceedings, and; Tribunal orders – which provides for a range of orders/remedies including setting aside the decision to award a bid and directing that the procurement proceedings be terminated. There is no time period specified within which the Tribunal must make its decision.

PPB s.54 provides a right for a party dissatisfied with a decision of the Tribunal to apply to the courts for judicial review.

Sub-indicator 1(j)

Electronic Procurement (e-Procurement)

The legal framework provides for the following:

Assessment criterion 1(j)(a):

The legal framework allows or mandates e-Procurement solutions covering the public procurement cycle, whether entirely or partially.

Gap analysis

The current legal framework requires updating to fully align with current use of e-procurement and allow for future developments in use of e-procurement solutions.

Recommendations

The legal framework will need to be reviewed to permit and facilitate the introduction and implementation of the upgraded or new e-GP systems. This will require consideration of changes having an impact on the whole procurement cycle, from procurement planning through to contract and performance management, delivery and payment. If substantially upgraded or new e-GP systems are foreseen, it is likely that functionalities will be progressively rolled out. Provisions in the legal framework will need to allow sufficient flexibility to take account of staged roll-out, including stages when end-to-end procurement is conducted partly using e-GP system and partly paper-based.

See 1(j)(a) and 1(j)(b) below for specific Gaps and related Recommendations, to include provisions in the revised legal framework that (1) ensure the use of appropriate tools and standards that provide unrestricted and full access

Pillar I. Legal, Regulatory, and Policy Framework

to the system (2) require interested parties to be informed which parts of the processes will be managed electronically. See also analysis and recommendations at Indicator 7.

Public Procurement Bill

The PPB acknowledges and allows for the development and progressive roll out of ICT based procurement system and use of information and communications technology in procurement.

Lower level instruments with more detail on the conduct of procurement will need to include flexibilities for the introduction and implementation of the upgraded or new e-GP systems and e-procurement tools.

PPB s.2 Objects of Act, include to “improve efficiency and effectiveness in procurement by streamlining procurement processes, amongst others, through the use of technology.”

PPB s.64 requires the Minister to make regulations regarding “(iv) the use of information and communications technology in procurement.”

PPB s.5 Functions of Public Procurement Office, include “promoting the use of technology...towards modernization of the public procurement system”.

PPB s.30 Information and communication technology-based procurement system, requires the Public Procurement Office to “develop an information and communication technology-based procurement system in order to enhance efficiency, effective-ness, transparency and integrity and to combat corruption.” The Public Procurement Office is also required to assist with the formulation of a design brief for the development of an ICT-based procurement system which must provide for listed components, to be rolled out progressively.

PPB s.31 Use of technology by procuring institutions, requires procuring institutions “to the extent possible” to use technology in the implementation of the PPB and obliges the Public Procurement Office “to determine requirements for digitisation, automation, reporting and innovations that information and communication technology” applicable to procurement processes.

Assessment criterion 1(j)(b):

The legal framework ensures the use of tools and standards that provide unrestricted and full access to the system, taking into consideration privacy, security of data and authentication.

Gap analysis

The legal framework does not include necessary provisions to facilitate effective use of e-procurement systems by ensuring that the use of tools and standards that provide unrestricted and full access to the system, taking into consideration privacy, security of data and authentication.

Recommendations

Introduce provisions in to legal framework to ensure the consistent application of electronic technologies and require standardized formats, technical equipment and connection arrangements and procedures to grant unrestricted and full access to e-procurement. These provisions will need to be comprehensive and tailored to reflect the particularities of the e-GP system/s in South Africa.

Public Procurement Bill

PPB requires the Public Procurement Office to issue instructions to determine relevant technological requirements in the context of ICT based procurement systems.

PPB s.31(2) Use of technology by procuring institutions, requires the Public Procurement Office during the development of the ICT based procurement system to “by instruction, determine requirements for digitisation, automation, reporting and innovations that information and communication technology may enable, applicable to procurement processes by procuring institutions.”

Assessment criterion 1(j)(c):

The legal framework requires that interested parties be informed which parts of the processes will be managed electronically.

Pillar I. Legal, Regulatory, and Policy Framework

Gap analysis

There are no provisions in the current legal framework that require interested parties to be informed which part of the process will be managed electronically. Bidders need to know in advance which parts of the process will be managed electronically, so they have a clear understanding of the processes to be followed.

Recommendations

Introduce provisions into legal framework to make it mandatory to inform potential bidders which parts of the processes will be managed electronically (e.g. availability of procurement documents, communication, bid submission, contract awards, billing and payments etc.). Provisions in the legal framework will need to allow sufficient flexibility to take account of staged roll-out in the event of upgraded or new end-to-end e-GP systems and will need to clarify whether conventional paper-based procurement is still allowed and at what phases of the procurement process.

Public Procurement Bill

There is no specific provision in the PPB making it mandatory to inform potential bidders which parts of the processes will be managed electronically.

It may be helpful to include a statement of the general principle in higher level legal instrument but leave detail to be addressed in lower level legal instruments of universal application.

Indicator 3. The legal and policy frameworks support the sustainable development of the country and the implementation of international obligations

Sub-indicator 3(a)

Sustainable Public Procurement (SPP)

Assessment criterion 3(a)(c):

The legal and regulatory frameworks allow for sustainability (i.e. economic, environmental and social criteria) to be incorporated at all stages of the procurement cycle.

Gap analysis

Provisions in the public procurement legal and regulatory framework allowing for sustainability to be incorporated in to all stages of the procurement cycle are limited and the main focus is on social and economic issues. There is the possibility to use “functionality” evaluation criteria which may include criteria relating to SPP, but the way in which functional criteria are currently assessed is unlikely to deliver significant benefits from an SPP perspective (see analysis at 1(f)(b)). There is no detailed guidance on when and how to incorporate sustainability at all stages of the procurement cycle.

This Gap is assigned a Red flag because of the system wide impact of the lack of sustainability provisions which will hinder achievement of broader sustainability objectives and necessity for inter-institutional cooperation to review, identify and implement required measures in a consistent manner for all procurement and in line with proposed SPP strategy and implementation plan.

Recommendations

Combined recommendations for 3(a)

Develop a single, consolidated, sustainable public procurement policy/strategy to draw together and implement all elements of SPP - economic, environmental (including climate considerations) and social (including gender equality) and aligned with the B-BBEEA and PPPFA frameworks). The SPP should support broader national policy objectives and reflect national priorities. It is recommended that a critical review of the effectiveness of current measures for empowerment and economic & industrial growth through public procurement is included as part of the SPP strategy development process.

The SPP Strategy should be supported by a clear implementation plan/road map to cover introduction of systems and tools to operationalize, facilitate and monitor the application of SPP in priority areas in particular. It should also

Pillar I. Legal, Regulatory, and Policy Framework

identify and provide for any amendments necessary to the legal/regulatory framework to allow for sustainability considerations to be fully incorporated at all stages of the procurement cycle, ensuring well-balance application of sustainability criteria from planning through to contract delivery and monitoring. SPP requirements embedded in the legal and regulatory framework should be reflected in model procurement documents, contract conditions and in supporting practical guidelines for implementation and related training.

Public Procurement Bill

Stated objects of the PPB at PPB s.2 include to “(c) advance transformation, beneficiation and industrialization;” “(d) stimulate economic development” and “(g) promote innovation and sustainable development.” Sustainable development is not, however, defined in the PPB. Provisions referencing environmental aspects of sustainable public procurement are not observed.

PPB s.22 Measures to advance sustainable development, provide that a procuring institutions “may, in accordance with prescribed conditions, provide for measures to advance sustainable development in procurement”. PPB s.22 is placed within Chapter 4 Preferential Procurement and does not specifically reference environmental measures. PPB s.22 Measures for beneficiation and innovation, advancing creation of jobs, intensification of labour absorption and development of small enterprises within particular geographical area, provides that “When procuring, a procuring institution may, in accordance with prescribed conditions, provide for measures to advance the creation of jobs, intensification of labour absorption, beneficiation, innovation and the development of small enterprises within a particular geographical area.” PPB s.22 is placed within Chapter 4 Preferential Procurement and does not specifically reference environmental measures.

PPB ss. 16 to 21 & 24 Preferential Procurement, covers preferential framework and requirement for a procuring institution to implement a procurement policy for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. There are sections addressing set aside, pre-qualification, mandated sub-contracting, designation of sectors for local production and content, other preference measures and contracting conditions.

Assessment criterion 3(a)(d):

The legal provisions require a well-balanced application of sustainability criteria to ensure value for money.

Gap analysis

Provisions for well-balanced application of all types of sustainability criteria (economic, social and environmental) throughout the procurement cycle are not evident. There is no comprehensive supporting guidance on how to apply sustainability criteria (economic, social and environmental) to ensure value for money.

This Gap is assigned a Red flag because of the system wide impact of the lack of provisions which will hinder broader sustainability objectives and necessity for inter-institutional cooperation to review, identify and implement required measures in a consistent manner for all procurement and in line with proposed SPP strategy and implementation plan.

Recommendations

See combined recommendations at 3(a)(a).

Public Procurement Bill

Provisions referencing environmental aspects of sustainable public procurement are not observed.

See notes at 3(a)(c)

Pillar II. Institutional Framework and Management Capacity

Indicator 5. The country has an institution in charge of the normative/regulatory function

Sub-indicator 5(b) Responsibilities of the normative/regulatory function
The following functions are clearly assigned to one or several agencies without creating gaps or overlaps in responsibility:
Assessment criterion 5(b)(b): drafting procurement policies
Gap analysis Because of the dual normative framework where NT/OCPO regulate the entire procurement system while CIDB has a policy making mandate in construction procurement, overlaps and conflicting provisions exist de facto. An illustration could be found in the repeal of Treasury Instruction No.4 of 2015/2016. Treasury Instruction No.4 of 2015/16 Standard for Infrastructure Procurement and Delivery (SIPD) had been developed to regulate infrastructure procurement. CIDB, being also responsible for developing construction procurement standards, developed its own regulations such as the 2019 Standard for Uniformity. The 2015/2016 Treasury Instruction was repealed and replaced by NT SCM Instruction No.3 of 2019/2020 Framework for Infrastructure Delivery and Procurement Management (FIDPM). Based on discussions with stakeholders it seems that one of the reasons for the repeal of the SIPD and replacement with FIDPM was that the former contradicted the CIDB's Standard for Uniformity. The new FIDPM is now eventually fully aligned with the CIDB SFU.
Recommendations NT/OCPO could further develop practical tools, such as guides, to explain the various procurement model policies, the different procurement methods, in which instances they shall be used and list relevant standards and bidding documents. Doing so would provide additional clarity to organs of state and would help them navigating the public procurement framework.
Public Procurement Bill While the Public Procurement Bill addresses the normative fragmentation between levels of government by harmonising the legislative framework across the three spheres of government, it does not entirely tackle the issue of different applicable provisions based on the type of goods, services or public works being procured. Section 5 (2) of the Public Procurement Bill states that the Public Procurement Office may determine a model procurement policy for different categories of procuring institutions and different categories of procurement. It can therefore be assumed that concurrent public procurement frameworks will be designed for different procuring institutions or categories of procurement. It further remains unclear if this provision will grant to the PPO the mandate which is currently held by the CIDB in terms of construction procurement.
Sub-indicator 5(c) Organisation, funding, staffing, and level of independence and authority
Assessment criterion 5(c)(a): The normative/regulatory function (or the institutions entrusted with responsibilities for the regulatory function if there is not a single institution) and the head of the institution have a high-level and authoritative standing in government.
Gap analysis The OCPO has no statutory role granted by a legislative provision. It is only in terms of the PFMA and the MFMA that the office plays an authoritative regulatory function. However, such basis does not cover all instances of procurement and the relationship between the PFMA and other regulatory instruments (e.g. SITA Act, the CIDB Act, etc...) is not clear in all instances, resulting in regulatory gaps where the OCPO cannot fulfil an authoritative

Pillar II. Institutional Framework and Management Capacity

standard-setting function. In addition, the fact that the Chief Procurement Officer is under the authority of the DG creates a barrier to ensuring the functional independence of the Office.

Besides issues around the structure and human resources of the OCPO, stewardship in the South African public procurement system is also exposed to deviations from rules and standards. Indeed, the recommendations made by the OPCO and NT to organs of State are non-binding. Under the previous SCM Instruction Note of 2016/2017 where the authorisation from National Treasury was mandatory, several hearings before the Standing Committee on Public Accounts (SCOPA) underlined the tendency of decisions taken by National Treasury regarding deviations or expansions not being followed by Accounting Officers in organs of State. With the new SCM Instruction Note of 2021/2022 which only obliges Accounting Officers of Organs of State to report on deviations or expansions to National Treasury, this problem now manifests in the questionable low number of deviations and expansions reported. Indeed, when comparing deviations in the fourth quarter of 2021/2022 (under the regime of Instruction Note of 2016/2017) to deviations in the first quarter of 2022/2023 (under the regime of Instruction Note 2021/2022), reported deviations amounted to less than 10% of those in the previous quarter (2,979,071,208 ZAR vs. 228,319,236 ZAR)⁴.

Recommendations

While it retains ultimate responsibility over the public procurement system in South Africa, the National Treasury should consider available means to reinforce the authoritative standing of the OCPO, and its Head, considering its role in steering the regulatory landscape.

Public Procurement Bill

The creation of the PPO would be a welcomed step towards greater authoritative standing of the regulatory function in the South African public procurement system. With the power to issue binding instructions to all organs of state, the PPO could drastically shape an effective use of public procurement by ensuring an harmonised application of the regulatory framework.

In its section 5.2 (d), the Public Procurement Bill version B18-2023 stated that the Public Procurement Office “if of the view that the procurement policy applied by a procuring institution does not comply with a provision of this Act”... could “review such policy and advise the institution on amendments”. This section granted significant normative role to the PPO, especially on individual SCM policy of organs of State. Yet, the revised version of the Bill B18B-2023 does not include such a provision which could severely undermine efforts to grant the PPO with a greater authoritative standing.

However, this role cannot be effectively fulfilled if the office is not granted the necessary human resources, both in numbers and skills, and if it is not enjoying effective independence. Since most of the implementation details are not dealt with directly in the Public Procurement Bill but rather left to subsequent regulations, NT could seize this opportunity to craft regulations which would ensure adequate staffing and effective independence of the PPO so that it could exercise its mandate efficiently.

⁴ [Chief Procurement Officer on Requests for contract deviations and expansions in Quarter 1 2022/23 | PMG](#)

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Indicator 11. Transparency and civil society engagement strengthen integrity in public procurement

Sub-indicator 11(b) Adequate and timely access to information by the public
<p>Assessment criterion 11(b)(a): Requirements in combination with actual practices ensure that all stakeholders have adequate and timely access to information as a precondition for effective participation.</p>
<p>Gap analysis [...] Going forward, the new Public Procurement Bill raises some concerns about potentially decreasing transparency under certain circumstances. In fact, the section around access to procurement processes states that the Minister [of Finance] “may introduce measures to ensure candid deliberations and to protect officials from undue influence and threats and to provide for disallowing or terminating access by the public or a specific category of persons or a specific person if such access resulted in, or is likely to, inhibit candid deliberations or result in undue influence of, or threats to, officials;”. This provision would allow for restriction of transparency in terms that appear overly discretionary and unjustified.</p>
<p>Recommendations Enhance all levels of transparency, from procurement data in machine-readable format, to mandatory access to SCM policies of all organs of state. Build a coalition for strengthening transparency to combat vested interests that favour an opaque system. Refrain from allowing discretionary decision-making to eliminate or restrict access to procurement obligations, as currently foreseen in the upcoming Public Procurement Bill.</p>
<p>Public Procurement Bill</p> <p><i>As noted in the gap analysis, section 32 of Bill B18B introduces discretion for the Ministry of Finance to restrict access to procurement information. The provision is quite broad and vague, citing the need to protect candid deliberations and to protect officials from undue influence and threats as grounds for disallowing or terminating access to procurement processes.</i></p> <p><i>The assessors consider these provisions too broad and overly discretionary. The rationale of protecting candid deliberations and undue influence and threats for public officials is not clear in this context. On the contrary, the provisions, as they stand, could grant powers to limit transparency obligations. It should be also noted that assessors currently lack full information for a determination, as the provisions of the Procurement Bill must be further substantiated by future regulations. Nonetheless, South Africa stands to gain from implementing full transparency without any loopholes.</i></p>

Indicator 13. Procurement appeals mechanisms are effective and efficient

Sub-indicator 13(a) Process for challenges and appeals
<p>Assessment criterion 13(a)(d): The time frames specified for the submission and review of challenges and for appeals and issuing of decisions do not unduly delay the procurement process or make an appeal unrealistic.</p>
<p>Gap analysis The available procedures and related time scales do not guarantee an effective and efficient process meeting the practical and commercial imperatives of procurement related complaints.</p>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

The Gap is assigned a Red flag because lack of an efficient review system can severely impede the objectives sought through public procurement by reducing confidence in the system which can have a negative impact on competition. In addition, necessary reforms will require a national mandate and actions going beyond those lying solely within the procurement sphere.

Recommendations

The same Recommendation as under 1(h)(d) is applied:

Consider undertaking a critical study of the data and information available and stakeholders views on the operation of the system of judicial review to assess the fitness of purpose and efficiency of the current system for procurement complaints using the route of judicial review and to gauge confidence in and effectiveness of the operation of the system in practice. This should be undertaken with the aim of identifying whether the existing route may be adapted to meet the MAPS methodology requirements for an efficient review system or whether a new approach is required, such as the establishment of a specialist independent procurement review body.

Public Procurement Bill

PPB Chapter 6, Part 1, sets out sets out timescales for submission, consideration and decision on an application for reconsideration. There is no time period specified within which the Tribunal must make its review decision. The maximum timescales allowed for decision making by the procuring entity on request for reconsideration and lack of specified timescales for decision on review by the Public Procurement Tribunal may mean that the process does not guarantee an effective and efficient process meeting the practical and commercial imperatives of procurement related complaints.

PPB Chapter 6 sets out timescales for submission, consideration and decision on an application for reconsideration (in total up to 40 days), with conclusion of the contract being prohibited for the period of the reconsideration process plus 10 days after its conclusion. The additional 10 days of “standstill” is to allow the bidder to apply for review to the Public Procurement Tribunal.

There is no time period specified within which the Tribunal must make its decision.

Assessment criterion 13(c)(d):

decisions are published on the centralised government online portal within specified timelines and as stipulated in the law.*

Gap analysis from 1(h)(e):

Publication of decisions in procurement cases allows interested parties to be better informed as to the consistency and fairness of the process. Court judgments are, as a general rule, public documents but High Court judgments are not all published as a matter of course. There is no official central government source of all public procurement related decisions made by the High Court.

The Gap is assigned a Red flag because lack of comprehensive and reliable information on review can severely impede the objectives sought through public procurement by reducing confidence in the system.

Recommendations from 1(h)(e):

Pending review and decision on the fitness for purpose of the current system and proposals for improvement or changes, consider ways to gather more information on High Court judgments in procurement matters to start to collate relevant information. One possibility may be to require organs of state to report to NT when an application for judicial review is issued in the High Court and to notify NT of the outcome, with relevant case references.

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Public Procurement Bill

PPB does not specify a timeline for publication by the Public Procurement Tribunal of its decisions.

Indicator 14. The country has ethics and anticorruption measures in place

Sub-indicator 14(a)

Legal definition of prohibited practices, conflict of interest, and associated responsibilities, accountabilities, and penalties

The legal/regulatory framework provides for the following:

Assessment criterion 14(a)(a):

definitions of fraud, corruption and other prohibited practices in procurement, consistent with obligations deriving from legally binding international anti-corruption agreements.

Qualitative analysis

South Africa signed the United Nations Convention against Corruption on 9 December 2003 and ratified it on 22 November 2004. As per the South African Constitution (section 231 (4)), international law in South Africa only becomes law when enacted through national legislation. Relevant implementing legislation includes the following: Prevention and Combating of Corrupt Activities Act, Protected Disclosures Act, Promotion of Access to Information Act, Promotion of Administrative Justice Act, Public Service Act, Public Administration Management Act, Public Finance Management Act, Prevention of Organized Crime Act, Financial Intelligence Centre Act and International Cooperation in Criminal Matters Act.

South Africa is also a signatory of the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

FRAUD

Fraud is a common law offence and defined as the "the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another." The definition is part of Common Law Offences-Definitions provided on the South African Police Service's website⁵.

CORRUPTION

The [Prevention and Combating of Corrupt Activities Act 12 of 2004](#) (PRECCA) is South Africa's key implementing legislation for addressing corruption. PRECCA defines a general offence of corruption (chapter 2, part 1, art. 3) defined as:

"Any person who, directly or indirectly,

(a) accepts or agrees or offers to accept a gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person: or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner—

(i) that amounts to the-

(aa) illegal, dishonest, unauthorised, incomplete, or biased: or

(bb) misuse or selling of information or material acquired in the course the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation:

(ii) that amounts to-

(aa) the abuse of a position of authority:

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules:

(iii) designed to achieve an unjustified result: or

⁵ <https://www.saps.gov.za/faqdetail.php?fid=9>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption.”

Further specific corruption offences are defined:

- Offences in respect of corrupt activities relating to public officers (chapter 2, part 3, art. 4)
- Offences in respect of corrupt activities relating to foreign public officials (chapter 2, part 3, art. 5)
- Offences in respect of corrupt activities relating to agents (chapter 2, part 3, art. 6)
- Offences in respect of corrupt activities relating to members of legislative authority (chapter 2, part 3, art. 7)
- Offences in respect of corrupt activities relating to judicial officers (chapter 2, part 3, art. 8)
- Offences in respect of corrupt activities relating to members of prosecuting authority (chapter 2, part 3, art. 9)
- Offences of receiving or offering of unauthorised gratification by or to party to an employment relationship (chapter 2, part 3, art. 10)
- Offences in respect of corrupt activities relating to witnesses and evidential material during certain proceedings (chapter 2, part 4, art. 11)
- Offences in respect of corrupt activities relating to contracts (chapter 2, part 4, art. 12)
- Offences in respect of corrupt activities relating to procuring and withdrawal of tenders (chapter 2, part 4, art. 13)
- Offences in respect of corrupt activities relating to auctions (chapter 2, part 4, art. 14)
- Offences in respect of corrupt activities relating to sporting events (chapter 2, part 4, art. 15)
- Offences in respect of corrupt activities relating to gambling games or game of chance (chapter 2, part 4, art. 16)
- Offence relating to acquisition of private interest in contract, agreement or investment of a public body (chapter 2, part 5, art. 17)
- Offences of unacceptable conduct relating to witnesses (chapter 2, part 5, art. 18)
- Intentional interference with, hindering or obstructing of investigation of offence (chapter 2, part 5, art. 19)
- Accessory to or after an offence (chapter 2, part 6, art. 20)
- Attempt, conspiracy and inducing another person to commit offence (chapter 2, part 6, art. 21)

Specifically, PRECCA provides for: the offence of corruption and offences relating to corrupt activities, investigative measures in respect of corruption and related corrupt activities, the establishment and endorsement of a Register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts, and extraterritorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities. PRECCA also places a duty on certain persons holding a position of authority to report certain corrupt transactions⁶.

SCM Guide for Accounting Officers/Authorities [20042.8] s. 2.8 Fraud and corruption

2.8.1 Government’s policy is to require that contractors, including consultants, observe the highest standard of ethics during the selection and execution of contracts. In pursuance of this policy, Government defines, for the purposes of this provision, the terms set forth below:

- “corrupt practice” means the offering, giving, receiving, or soliciting of any thing of value to influence the action of a public official in the selection process or in contract execution; and
- “fraudulent practice” means a misrepresentation of facts in order to influence a selection process or the execution of a contract to the detriment of the accounting officer/authority, and includes

⁶ UNODC Country Profile South Africa, <https://www.unodc.org/unodc/en/corruption/country-profile/countryprofile.html?CountryProfileDetails=%2Funodc%2Fcorruption%2Fcountry-profile%2Fprofiles%2Fzaf.html>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

collusive practices among bidders/contractors (prior to or after submission of proposals) designed to establish prices at artificial, non-competitive levels and to deprive the accounting officer/authority of the benefits of free and open competition.

2.8.2 The accounting officer/authority:

- must reject a proposal for award if he/she determines that the supplier/service provider recommended for award, has engaged in corrupt or fraudulent activities in competing for the contract in question;
- may insist that a provision is included in the contract agreement with the contractor, requiring contractors to permit the accounting officer/authority and/or relevant treasury to inspect their accounts and records relating to the performance of the contract and to have them audited by auditors appointed by the accounting officer/authority/relevant treasury.

OTHER PROHIBITED PRACTICES

PRECCA defines a series of corruption-related offences, as listed above.

Gap analysis

Stakeholders did not report issues with legal definitions. No consolidated list of prohibited practices pertaining to public procurement appears to exist beyond “corrupt practice” and “fraudulent practice”.

Public Procurement Bill

Section 61 of the Public Procurement Bill specifies offences under Section 61 that are more specific to public procurement compared to the current regime under PRECCA. This represents an improvement, providing more clarity and detail about prohibited practices in public procurement and related offences.

Assessment criterion 14(a)(c):

definitions and provisions concerning conflict of interest, including a cooling-off period for former public officials.

Qualitative analysis

General provisions about potential conflicts are contained in “Part 5: Miscellaneous offences relating to possible conflict of interest and other unacceptable conduct” of PRECCA. Section 17 “Offence relating to acquisition of private interest in contract, agreement or investment of public body” specifies:

17. (1) Any public officer who, subject to subsection (2), acquires or holds a private interest in any contract, agreement or investment emanating from or connected with the public body in which he or she is employed or which is made on account of that public body, is guilty of an offence.

(2) Subsection (1) does not apply to:

(a) a public officer who acquires or holds such interest as a shareholder of a listed company;

(b) a public officer, whose conditions of employment do not prohibit him or her from acquiring or holding such interest; or

(c) in the case of a tender process, a public officer who acquires a contract, agreement or investment through a tender process and whose conditions of employment do not prohibit him or her from acquiring holding such interest and who acquires or holds such interest through an independent tender process.

The Directive on other remunerative work outside the employee’s employment in the relevant department as contemplated in section 30 of the Public Service Act, 1994 defines conflict of interest as “a conflict between the public duties and private interests of an employee, in which the employee has private interests which

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

could improperly influence him / her, and / or negatively impact on his / her official obligations or official duties, and / or negatively impact on the public interest.”⁷

Provisions

According to NT Treasury Regulation (16A8.3), supply chain management official or other role player –

(a) must recognise and disclose any conflict of interest that may arise;

(d) must ensure that they do not compromise the credibility or integrity of the supply chain management system through the acceptance of gifts or hospitality or any other act;

Also Treasury Regulation 16A8.4 provides that: If a supply chain management official or other role player, or any close family member, partner or associate of such official or other role player, has any private or business interest in any contract to be awarded, that official or other role player must –

(a) disclose that interest; and

(b) withdraw from participating in any manner whatsoever in the process relating to that contract.

As part of SCM No.3 of 2021/2022 s.7 Treatment of Disclosures and Declarations, “institutions must, as part of their SCM processes, identify and manage potential conflicts of interest and other disclosures made by a person participating in procurement processes to enable the AO/AA to make informed decisions about the person participating in the SCM process.”

In particular, conflict of interests within the South African Public Procurement is regulated and monitored through the mandatory use of the Standard Bidding Document (SBD 4) to verify if bidders and their directors doing business with the state are not in the employ of the state and or whether not related to any person working within the state.

Gap analysis

[...]

According to stakeholders, the definition of conflict of interest while not specific to public procurement – is sufficiently clear. The assessors note that conflict of interest is not defined in PRECCA, while it appears to be only defined in secondary legislation.

Recommendations

[...]

Consider streamlining the definition of conflict of interest

While no issue has been expressed by stakeholders with the lack of a unified definition, South African authorities could consider introducing a streamlined definition for easy access and understanding, including expanding it to include actual, perceived and potential conflict of interest (as discussed in Indicator 5(d)).

Public Procurement Bill

No definition is provided of conflict of interest in the Public Procurement Bill, nor is it expanded to include actual, perceived or potential conflict of interest. Hence this gap remains unchanged.

Provisions around conflict of interest call for the recusal of the any person involved in procurement (Section 10 B18B 2023). Current provisions, however, remain vague especially in section 11 regarding persons related to an official involved in a procurement with a personal interest. According to 11(3)(b) they “may not be present at or participate in the deliberations or decision-making process of the procuring institution in relation to the

⁷ Directive on other remunerative work outside the employee’s employment in the relevant department as contemplated in section 30 of the Public Service Act, 1994

http://www.dpsa.gov.za/dpsa2g/documents/iem/2016/directive_rwops_30_09_2016.pdf

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

agenda item or the matter in question.” It is unclear who decides about such participation and based on which criteria.

Section 10 ‘Conduct of a person involved in procurement’

10. An accounting officer or other official, or a member of an accounting authority, bid committee or the Tribunal, or any other person, involved in procurement in terms of this Act must—

[...]

(d) if a conflict of interest exists in a procurement matter, disclose such conflict and recuse himself or herself from participating in the process of that procurement matter.

Section 11 of B18B 2023 deals with ‘Due diligence and declaration of interest regarding persons involved in procurement’:

11. [...]

(3) If a person related to an accounting officer or other official or a member of an accounting authority, a bid committee or the Tribunal involved in procurement in terms of this Act, has, or intends to acquire, a direct or indirect personal interest in a procurement matter, the accounting officer or other official or a member of an accounting authority, a bid committee or the Tribunal—

(a) must disclose such interest, immediately after receiving the agenda of the meeting of a bid committee of the procuring institution regarding a procurement, or on notification of a matter being brought to the attention of the bid committee or at any time during the consideration of the bid when the official or other person becomes aware of the interest; and

(b) may not be present at or participate in the deliberations or decision-making process of the procuring institution in relation to the agenda item or the matter in question.

(4) A disclosure of interest made in terms of subsection (3) must be recorded in the minutes of the meeting at which it is made, or it relates to or any document seeking a decision.

Sub-indicator 14(c)

Effective sanctions and enforcement systems

Assessment criterion 14(c)(a):

Procuring entities are required to report allegations of fraud, corruption and other prohibited practices to law enforcement authorities, and there is a clear procedure in place for doing this.

Qualitative analysis

PFMA ss6 & 18 obligations to ensure that proper norms and standards are set to prevent abuse of the SCM and enforce the prescribed measures.

As per NT TR 16A9.1 the accounting officer or accounting authority must:

(a) take all reasonable steps to prevent abuse of the supply chain management system;

(b) investigate any allegations against an official or other role player of corruption, improper conduct or failure to comply with the supply chain management system, and when justified –

(i) take steps against such official or other role player and inform the relevant treasury of such steps; and

(ii) report any conduct that may constitute an offence to the South African Police Service

TR s.16A9.3 requires the National Treasury and each provincial treasury to establish and mechanism “(a) to receive complaints regarding alleged non-compliance with the prescribed minimum norms and standards; and (b) to make recommendations for remedial actions to be taken if non-compliance of any norms and standards is established, including any recommendations of criminal steps to be taken in case of corruption, fraud or other criminal offences.”

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

According to TR 16A8.5 an official in the supply chain management unit who becomes aware of a breach of or failure to comply with any aspect of the supply chain management system must immediately report the breach or failure to the accounting officer or accounting authority, in writing.

SCM Instruction No.3 of 2021/22 details measures for preventing and combating abuse in the SCM system.

Section 34.2 and 34.3 of the General Conditions of a Contract provides Procuring Entities with procedures to follow to report and deal with prohibited practices by suppliers.

Gap analysis

AA/AO have an obligation to refer offences to the South African Police Service, though this may not be the only law enforcement agency relevant for follow-up of certain matters. No other channels or procedures are described. Also AA/AO are tasked with first-hand investigation of matters related to alleged corruption, improper conduct and failure to comply with the SCM system. This opens the question of whether AA/AO have the skills and capacity to actually investigate such matters, or whether a direct referral of allegations to relevant law enforcement would be more effective.

Compliance breaches identified by SCM officers must only be reported to the AA/AO but not to law enforcement directly.

According to the General Conditions of Contract, procuring entities may refer Competition Commission for suspected bid rigging, but have no obligations to do so.

Recommendations

Clarify procedures to refer offences to relevant oversight authorities.

Public Procurement Bill

Although the gaps identified are not further addressed with the Public Procurement Bill, some additional provisions are relevant in the context of reporting allegations of fraud, corruption and other prohibited practices. These are included in the so-called 'Directions inconsistent with Act' (section 14) and give stronger protection to officials if pressured to commit unlawful actions by their superiors, including paths to report such requests.

Specifically, as per section 14 of the Public Procurement Bill (B18B 2023) officials ('affected person') are not obliged to comply with actions related to procurement ordered by a person of authority, if they believe these actions to be unauthorized under the Public Procurement Act.

In addition, the 'affected person' must inform the Public Procurement Office or relevant provincial treasury, or may inform other actors (person with authority, supervisor, Public Service Commission). The affected person is protected from occupational detriment.

Assessment criterion 14(c)(b):

There is evidence that this system is systematically applied and reports are consistently followed up by law enforcement authorities.

Qualitative analysis

Several institutions are involved in the follow up investigations related to corrupt practices. This includes the Special Investigative Unit (SIU), the South African Police Service with its Directorate for Priority Crime Investigation (DPCI –referred to as "The Hawks"), NT's investigate unit, the Investigative Directorate (ID) within the NPA.

It is not clear to the assessors which entity has specific responsibilities for follow up and how the process for follow-up on allegation is set in motion (i.e. which institution is in charge under which circumstances). In fact, Treasury Regulations only mandate referrals to the South African Police Service. Stakeholders within law enforcement report follow up on all allegations received, but this has not been independently verified by the assessors.

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

There is evidence that National Treasury database of Restricted Suppliers and Tender Defaulters is used, even though the entries are exclusively 'restricted suppliers' and no 'tender defaulter' has been identified (see assessment criterion 14(c)(c) for detailed analysis.

Gap analysis

A gap is assigned due to the scarce evidence available to assess this criterion. Lack of clarity revolves, among other issues, about which institution is mandated for follow-up under which circumstances.

Gaps are also recorded for the use of the Register of Tender Defaulters (see 14(c)(c)).

Recommendations

Clarify reporting lines for follow-up on allegations in Treasury Regulations or other SCM guidance.

Introducing a single anticorruption body would also provide clarity on reporting of allegations (see assessment 14(d)).

Public Procurement Bill

The Public Procurement Bill may improve the status quo given that it grants substantive investigative powers to the Public Procurement Office in case of alleged non-compliance with the Act or alleged commission of offence (section 56 of the Bill). The investigation can be requested by the relevant treasury, a procuring institution, a member of the public or on its own initiative. The Public Procurement Office will also have powers to enter and search premises as part of its investigation capacity (section 57).

While the Bill introduces a new actor vested with investigative powers in a system where already many such actors exist (e.g. SIU, the Hawks), on balance, it seems to have positive effects in designating clear responsibility for follow up of any allegations regarding non-compliance, or offences related to the public procurement Act

Sub-indicator 14(d)

Anti-corruption framework and integrity training

Assessment criterion 14(d)(b):

As part of the anti-corruption framework, a mechanism is in place and is used for systematically identifying corruption risks and for mitigating these risks in the public procurement cycle.

Qualitative analysis

The PFMA provides for the establishment of AO/AA with responsibilities for financial, risk management and internal control as well as internal audit. Treasury Regulations (TR 27.2.1) stipulate that accounting authorities must conduct regular risk assessment to identify risks to the public entity. This entails the set-up of risk management strategy and must include a fraud prevention plan. Treasury Regulations further mandate that these tools "must be used to direct internal audit effort and priority and to determine the skills required of managers and staff to improve controls and to manage these risks. The strategy must be clearly communicated to all employees to ensure that the risk management strategy is incorporated into the language and culture of the public entity."

More specifically, the SCM Guide for Accounting Officers / Accounting Authorities provides a brief example of what risk management entails in the SCM (1.2.3). The Guide further details that award and management of contracts where fraud and corruption has been found in the past should be reflected in the institution's Fraud

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Prevention Plan, and through cost-effective use of control measures and procedures and an ethical culture (1.2.4)⁸.

Strategic Pillar Four of the National Anti-corruption Strategy defines actions to “Improve the integrity and credibility of the public procurement system”. It aims to create credible, transparent procurement system, and to ensure that Public Procurement Bill is supported, and its enactment expedited, transparency and accessibility of the public procurement system’s data is improved. Measures to enable enforcement and oversight are supported, Professionalization of the procurement and supply chain management functions is prioritized. Implementation is based around a) enhancing oversight and enforcement in public procurement b) improve transparency and data management c) support professionalism in SCM⁹.

Strategic Pillar Six of the National Anti-corruption Strategy (“Protect vulnerable sectors that are most prone to corruption and unethical practices with effective risk management”) identifies the following sectors as most vulnerable to corruption: health; local government; state-owned entities; construction; transport; the financial sector; energy; mining; water; real estate; education; information and communication technology (ICT); small, medium and micro enterprises (SMMEs); border management and defence/armaments. Several factors are listed as to why these sectors are particularly vulnerable, however no specific interventions related to procurement practices are foreseen in the Strategy¹⁰.

Gap analysis

The effectiveness of actions by AA/AO (i.e. risk management strategy and fraud prevention plans) appear limited given findings throughout this report on lack of compliance, wasteful and irregular expenditure. The state capture experience shows that it is possible to entirely neutralize the actions of AA/AO and internal audit structures regarding corruption prevention by inserting complicit personnel in these positions of responsibility. No actions limiting the risks of such ‘capture’ of internal accountability function seem to have been taken.

Guidance on risk management specific in the SCM Guide for AA/AO is quite limited regarding public procurement risks. The National Anti-Corruption strategy does not tackle the identification of risks in public procurement, although it addresses corruption risks in vulnerable sectors.

Recommendations

Combined recommendation with 14(d)(b) and 14(d)(d):

Support AA/AO in identification of corruption related risks, including in vulnerable sectors

Greater support, tools and guidance could be provided to AA/AO in their risk management processes. If needed, additional reporting should be required. Risk management activities should focus on sectors that are particularly vulnerable to corruption, as identified in the National Anti-Corruption Strategy.

Public Procurement Bill

Section 27 of the Public Procurement Bill defines ‘Measures to prevent abuse of procurement system’. The provisions (outlined below) are quite broad but do not specifically address the MAPS requirement and related gap regarding the identification of corruption risks in public procurement.

27. The accounting officer or accounting authority of a procuring institution must—

(a) take necessary steps to prevent non-compliance with this Act and abuse of its procurement system;

⁸ SCM Guide for Accounting Officers / Accounting Authorities (2004)

http://ocpo.treasury.gov.za/Resource_Centre/Legislation/SCM%20Jan900-Guidelines.pdf

⁹ National Anti-Corruption Strategy 2020-2030

¹⁰ National Anti-Corruption Strategy 2020-2030

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

- (b) take necessary steps to ensure that no person interferes with its procurement system or is able to amend or tamper with any bid or contract;
- (c) investigate any allegation against an official or other role player of corruption, improper conduct or failure to comply with its procurement system, and—
 - (i) where necessary, take steps against that official or other role player, and inform the Public Procurement Office and the relevant provincial treasury of those steps; and
 - (ii) report to the South African Police Service any conduct that may constitute a criminal offence;
- (d) reject a recommendation for the award of a bid if the recommended bidder has—
 - (i) made a misrepresentation or submitted false documents in competing for a particular contract;
 - (ii) been convicted of any offence involving corruption, fraud, collusion or coercion in competing for any contract; or
- (e) cancel a contract awarded to a supplier—
 - (i) if it becomes aware that the supplier has made a misrepresentation, submitted false documents or information or has been convicted of any offence involving corruption, fraud, collusion or coercion in competing for a particular bid or during the execution of the contract; or
 - (ii) if any official or other role player was convicted of any offence involving corruption, fraud, collusion or coercion act during the bidding process or during the execution of the contract.

Assessment criterion 14(g)(c):

The code is of mandatory, and the consequences of any failure to comply are administrative or criminal.

Qualitative analysis

The analysis by UNODC reports the following: “Failure to disclose financial interest is a misconduct. The Executive Authorities and Heads of Departments have to take disciplinary action against such employees. Depending on the severity of the transgression, sanctions include:

- A final written warning;
- Suspension without pay;
- Demotion as an alternative to dismissal; and
- Dismissal.”¹¹

Gap analysis

It is not clear in practice how accessible the information is and how it used to prevent conflict of interest ex ante (internal control) or ex post (internal and external audit).

Public Procurement Bill

The new Public Procurement Bill provides greater clarity with respect to the consequences for failure to comply with the Code of Conduct.

Chapter 3 of B18B 2023 introduced a Code of Conduct: 9(1) “An accounting officer or other official, a member of an accounting authority, a bid committee or the Tribunal, a bidder or a supplier or any other person, involved in procurement in terms of this Act, must comply with the prescribed code of conduct.”

Furthermore, section 9 (2) states “Any contravention of the prescribed code of conduct by an accounting officer or other official, or a member of accounting authority, a bid committee or the Tribunal constitutes misconduct and steps must be taken in terms of the applicable procedure.”

Assessment criterion 14(g)(e):

¹¹ UNODC Country Report South Africa (2020)

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Conflict of interest statements, financial disclosure forms and information on beneficial ownership are systematically filed, accessible and utilised by decision makers to prevent corruption risks throughout the public procurement cycle.

Qualitative analysis

Section 16A8.3 (a) of the Treasury Regulations of 2005 as amended states that a Supply Chain Management official or other role player must recognize and disclose any conflict of interest that may arise. Also, Treasury Regulation 16A8.4 provides that: If a supply chain management official or other role player, or any close family member, partner or associate of such official or other role player, has any private or business interest in any contract to be awarded, that official or other role player must –

- (a) disclose that interest; and
- (b) withdraw from participating in any manner whatsoever in the process relating to that contract.

Furthermore, conflict of interests are monitored through the mandatory use of the Standard Bidding Document (SBD 4) to verify if bidders and their directors doing business with the state are not in the employ of the state and or whether not related to any person working within the state. These declarations are kept by the institution in charge of the procurement. Internal control and internal audit are responsible for verification, while the AGSA would conduct external audit.

As of 2023, South Africa amended the Companies Regulation (Companies Amendment Regulations 2023) to require “affected companies” to establish and maintain a beneficial interest register (“BI Register”) containing information about natural persons holding a beneficial interest of 5% or more of the total number of securities issued by a company. Companies are also responsible for keeping this register up-to-date.

Gap analysis

Financial disclosure declarations are not sufficiently comprehensive (only senior civil servants, no family coverage). It is not clear in practice how accessible the information is, and how it used to prevent conflict of interest ex ante (internal control) or ex post (internal and external audit).

Conflict of interest declarations rely on the civil servants’ willingness to disclose.

Recommendations

Provisions for routine financial disclosure should be broader in scope, i.e. cover family members and apply to all SCM officers, not only senior management.

Public Procurement Bill

The Public Procurement Bill does not address routine financial disclosures or conflict of interest statements by public officials, instead includes provisions regarding submission of declarations by suppliers, similar to PFMA rules. Routine financial disclosures are regulated in the Code of Conduct for Public Servants as per the Public Service Regulations 2016.

Section 11 of B18B 2023:

- 11. (1) A procuring institution must take steps in accordance with prescribed procedures to identify—
 - (a) automatically excluded persons as envisaged in section 13 and their immediate family members; and
 - (b) related persons as envisaged in subsection (3).
 - (2) (a) The steps envisaged in subsection (1) include the prescribed declaration of interest to be made by—
 - (i) all bidders, in the case of bids; and
 - (ii) all applicants, in the case of applications for registration on a database created by the Public Procurement Office in terms of section 5(1)(i).
 - (b) A failure to submit a declaration or submitting a false declaration renders a bid invalid.
- [...]

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System



MAPS

Methodology for Assessing
Procurement Systems

MAPS South Africa Indicator Matrix



Table of Contents

Pillar I. Legal, Regulatory, and Policy Framework	3
Indicator 1. The public procurement legal framework achieves the agreed principles and complies with applicable obligations	4
Indicator 2. Implementing regulations and tools support the legal framework.....	47
Indicator 3. The legal and policy frameworks support the sustainable development of the country and the implementation of international obligations.....	53
Pillar II. Institutional Framework and Management Capacity	58
Indicator 4. The public procurement system is mainstreamed and well integrated into the public financial management system.....	58
Indicator 5. The country has an institution in charge of the normative/regulatory function	63
Indicator 6. Procuring entities and their mandates are clearly defined	75
Indicator 7. Public procurement is embedded in an effective information system	81
Indicator 8. The public procurement system has a strong capacity to develop and improve.....	94
Pillar III. Public Procurement Operations and Market Practices.....	102
Indicator 9. Public procurement practices achieve stated objectives	102
Indicator 10. The public procurement market is fully functional	121
Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System.....	132
Indicator 11. Transparency and civil society engagement strengthen integrity in public procurement.....	132
Indicator 12. The country has effective control audit systems.....	138
Indicator 13. Procurement appeals mechanisms are effective and efficient	159
Indicator 14. The country has ethics and anticorruption measures in place.....	167

Pillar I. Legal, Regulatory, and Policy Framework

Preliminary Explanatory Note from MAPS Assessment Team on scope of analysis under Pillar I

(1) Scope of Analysis under Pillar I (procuring entities): *The analysis under Pillar I is limited to the legal and regulatory framework governing procurement by Departments, Constitutional Institutions, National Public Entities, Provincial Public Entities [and Provincial Legislatures] (all as defined in the Public Finance Management Act and Public Service Act (“national and provincial spheres of government”).*

(2) Legal framework analysed for Pillar I: *The qualitative analysis for under Pillar 1 analyses the relevant legally binding provisions in the Constitution, Public Finance Management Act, 1999 (PFMA),¹ Preferential Procurement Policy Framework Act, 2000 (PPPFA) and Preferential Procurement Regulations 2022 (2022 PPPFA Regulations),² Broad-Based Black Economic Empowerment Act, 2003 (B-BBEEA),³ Treasury Regulations, National Treasury (NT) Instructions and Supply Chain Management (SCM) Instructions. These provisions apply, unless otherwise specified, to the procurement of goods (supplies), services and construction (works) related procurement. The CIDB Regulations and legally binding precepts applying to construction (works) procurement are included in the qualitative analysis of individual criteria under Pillar where relevant, using an additional qualitative analysis section (see below).*

NT Instruction and SCM Instructions: *The decision to include analysis of the legally binding NT Instructions and SCM Instructions under Pillar I, Indicator 1 has been made because the primary legislation, and implementing regulations including Treasury Regulations contain only limited provisions on conduct of procurement processes. In order to provide meaningful findings, analysis of the legally binding framework including NT Instructions and SCM Instructions is necessary. A general point to note in this context is that the PFMA does not empower National Treasury to prescribe a detailed framework for procurement/supply chain management.⁴ It assumes that accounting officers/authorities will address issues in their individual SCM systems. NT Instructions and SCM Instructions therefore lack the level of detail commonly seen in national public procurement implementing legislation. Analysis of the impact of this legislative approach has been included in the Analysis and findings at 1(a)(a). It is not repeated elsewhere in the analysis, although it is an underlying issue with an impact on the assessment of numerous criteria under Pillar I.*

Where relevant and helpful for better understanding, the analysis references relevant non-binding guidelines, in particular the National Treasury advisory publication, “Supply Chain Management. A Guide for Accounting Officers/Authorities” (SCM Guide).⁵

CIDB regime for construction procurement: *Construction (works) related procurement (including construction related goods and professional services) by procuring entities falling within the scope of this MAPS Assessment are covered by an additional statutory regime, sitting alongside the regime derived from the PFMA (PFMA regime). Construction related procurement by all organs of state is subject to provisions of the Construction Industry Development Board Act, 2000 (CIDB Act)⁶, CIDB implementing Regulations and legally binding precepts issued by the CIDB including the Code of*

¹ Public Finance Management Act, 1999 (Act No.1 of 1999) (as amended by Act No.29 of 1999) and as subsequently amended.

² Preferential Procurement Policy Framework Act, 2000 (Act No.5 of 2000).

³ Broad-Based Black Empowerment Act, 2003 (Act No. 53 of 2003) as amended by Act 43 of 2013.

⁴ The situation is different for municipal procurement under the Municipal Finance Management Act, where more detail is prescribed at primary legislative level.

⁵ Supply Chain Management. A Guide for Accounting Officers/Authorities, National Treasury, February 2004 http://ocpo.treasury.gov.za/Resource_Centre/Legislation/SCM%20Jan900-Guidelines.pdf

⁶ Construction Industry Development Board Act, 2000 (Act No. 38 of 2000) as amended.

Pillar I. Legal, Regulatory, and Policy Framework

Conduct⁷ and the Standard for Uniformity (SFU).⁸ The CIDB publishes standard bidding documents and Treasury Regulations mandate use of CIDB bid and contract documents for construction related procurement. The analysis in Pillar I thus presents information on construction (works) related procurement as part of the main analysis and does not classify it as “specialized” legislation. The CIDB Regulations and legally binding precepts applying to construction (works) procurement are included in the qualitative analysis of individual criteria, where relevant, under Pillar I, Indicator 1, consistent with the approach outlined above in respect of legally binding NT Instructions and SCM Instructions.

Indicator 1. The public procurement legal framework achieves the agreed principles and complies with applicable obligations

Sub-indicator 1(a) Scope of application and coverage of the legal and regulatory framework	
The legal and regulatory body of norms complies with the following conditions:	
Assessment criterion 1(a)(a): Is adequately recorded and organized hierarchically (laws, decrees, regulations, procedures), and precedence is clearly established.	
Conclusion:	Substantive gap
Red flag:	Yes
<p>Qualitative analysis The legal and regulatory body of norms applying to public procurement is extensive, complex and fragmented. The PFMA regime comprises numerous documents and is not comprehensive in coverage. Although the PFMA regime and CIDB regime may be aligned from a technical perspective, there is a lack of clarity, in particular due to the use of different terminology. In acknowledgement of the problems which the current framework presents to ensuring that the public procurement system is fair, equitable, transparent, competitive and cost-effective, the Government of South Africa is in the process of adopting a new Procurement Act.⁹</p> <p>Constitution: The starting point for understanding the complex legal and regulatory framework [<i>and institutional arrangements</i>] for public procurement is the Constitution of the Republic of South Africa¹⁰ (“the Constitution”). Specific provisions on procurement and on the distinct spheres of government and are of particular relevance. Public procurement is referred to in the Constitution. Section 216 of the Constitution provides that national legislation must establish a national treasury and “prescribe measures to ensure both transparency and expenditure control in each sphere of government [...]”. Section 217(1) of the Constitution, titled “Procurement” requires 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.” In recognition of South Africa’s history of discriminatory policies and practices, Section 217 (2) & (3) of the Constitution make provision for organs of state to use</p>	

⁷ CIDB Code of Conduct for all parties engaged in construction procurement, October 2003. 2003 BN 127, Gazette No. 25656 dated 31 October 2003. Commencement date: 31 October 2003.

⁸ CIDB Standard for Uniformity in Engineering and Construction Works Contracts, August 2019. 2019 GenN 423, Gazette No. 42622 dated 8 August 2019. Commencement date: 8 August 2019

⁹ As at 01 April 2024 the Procurement Bill is at the National Council of Provinces (NCOP) stage, having been passed by National Assembly on 06 December 2023. The NCOP may pass, amend or reject a Bill.

<https://pmg.org.za/bill/1156/>

¹⁰ Constitution of the Republic of South Africa Act No.108 of 1996 (as amended).

Pillar I. Legal, Regulatory, and Policy Framework

procurement for empowerment purposes, providing for “categories of preference in the allocation of contracts” and “protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination”, to be implemented in a framework set out in national legislation.

Section 40 of the Constitution provides that “In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.” The unitary but decentralized state structure, with three spheres of government - national, provincial and local - and respective responsibilities contributes to the complexity of the legal, regulatory and institutional framework for public procurement.

Legal System: The legal system in South Africa is based on Roman-Dutch law and English common law. In general, in the context of public procurement, the pre-award period and process is governed by public law or administrative law rules, with private law rules governing the post award period.

The following is a summary of the key primary and secondary legislation and implementing regulations for national and provincial spheres of government.¹¹ The overall picture is extensive, incoherent and fragmented. The complexity of the system is already well acknowledged, together with the resulting legal and practical problems. For example, the Judicial Commission of Inquiry into State Capture noted in its report that “[T]he sheer number of Acts and Regulations which addresses procurement issues makes it very difficult for conscientious officials to get a clear understanding of what is required of them”.¹²

The PFMA Regime

Public Finance Management Act, 1999 (PFMA)¹³ and Supply Chain Management: The PFMA is the primary legislative source for procurement conducted by national and provincial spheres of government.¹⁴ PFMA s.76(4)(c) provides that National Treasury may make regulations or issue instructions “the determination of a framework for and appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.” Treasury Regulations (TR) for departments, trading entities, constitutional institutions and public entities have been issued by the National Treasury, pursuant to powers under s.76 PFMA.¹⁵

Treasury Regulation 16A Supply Chain Management (TR 16A SCM) establishes a framework for supply chain management for the acquisition of goods and services, as well as the disposal and letting of state assets. TR16A SCM applies to Departments, Constitutional Institutions and Public Entities listed in PFMA Schedule 3A (National Public Entities) and Schedule 3C (Provincial Public Entities). It does not apply to Major Public Entities or National and Provincial Government Business Enterprises, who put their own SCM arrangements in place.¹⁶ In line with PFMA s.76(4), TR 16A SCM establishes a high level framework.¹⁷ The provisions in TR 16A SCM are thus relatively brief

¹¹ In the case of procurement by Municipalities, which is not the subject of this MAPS Assessment, the key primary legislation is the Municipal Finance Management Act, 2003 (Act No.56 of 2003) as amended.

¹² Judicial Commission of Inquiry into State Capture Report, Part 1, Vol 1,p.795.

¹³ Public Finance Management Act,1999 (Act No.1 of 1999) (as amended by Act No.29 of 1999) and as subsequently amended.

¹⁴ For the local government (municipal) sphere the key legislation from the perspective of public procurement is the Local Government: Municipal Finance Management Act 2003 (MFMA). (Act No.56 of 2003) (as amended). Procurement by local government is not covered by this MAPS Assessment.

¹⁵ Treasury Regulations for departments, trading entities, constitutional institutions and public entities. National Treasury, Republic of South Africa [May 2002] March 2005 (as amended).

¹⁶ Entities sampled under Indicator 9 to which TR 16A SM does not apply are: Major Public Entities - Development Bank of Southern Africa, ESKOM, Transnet; National Government Business Entity - Council for Scientific and Industrial Research (CSIR). These entities have their own supply chain management regimes.

¹⁷ TR 16A SCM comprises 12 subsections, TR 16A1 to TR 16A12 (6 pages in total), covering: TR 16A1 Definitions; TR 16A2 Application; TR 16A3 Supply Chain Management System; TR 16A4 Establishment of supply chain management units; TR 16A5 Training of supply chain management officials; TR 16A6 Procurement of Goods and Services; TR 16A7 Disposal and letting of state assets; TR 16A8 Compliance with ethical standards; TR 16A9 Avoiding abuse of supply

Pillar I. Legal, Regulatory, and Policy Framework

and do not go into detail in terms of, for example, types of procurement methods and conduct of procurement. More detailed provisions are left to be formulated and implemented at local (institutional) level (TR 16A3).

National Treasury issues legally binding Instructions (“NT Instruction”) and Supply Chain Management Instructions (“SCM Instruction”), pursuant to powers under s.76 PFMA, to support and clarify application of Treasury Regulations. Compliance with NT Instructions and SCM Instructions is audited. There are 40-plus procurement related NT Instructions and SCM Instructions in force, covering a range of issues.¹⁸ This is where most of the practical rules are contained and the number of Instructions and lack of consolidation add to the complexity of the procurement legal and regulatory environment which needs to be adhered to by procuring entities.

National Treasury issues Circulars and Guidelines to further support implementation of PFMA and Treasury Regulations. These are optional for procuring entities to adopt into their internal policies. In February 2004, NT issued a Guide for Accounting Officers/Authorities on Supply Chain Management,¹⁹ to assist AOs/AAs in the smooth implementation of supply chain management within their institutions. This Guide contains helpful detail on, for example, procurement methods and the conduct of procurement processes but it is an advisory document (not legally binding), has not been regularly updated and so is not fully aligned with the current legal and regulatory framework for SCM.

Provincial Treasuries may also issue legal binding instructions on supply chain/procurement related matters. These must adhere to NT Instructions and SCM Instructions as a baseline, with additional wording or conditions to make instructions more locally relevant. Additions may, for example, be made to reflect procurement technology employed locally or to lower (but not increase) the financial thresholds for application of specified methods of procurement.

Construction Industry Development Board Act, 2000 (CIDB Act):²⁰ Construction (works) related procurement (including construction related goods and services) by procuring entities falling within the scope of this MAPS Assessment are also covered by an additional more detailed statutory regime, aligned with the PFMA regime. Construction related procurement is subject to provisions of the CIDB Act,²¹ and legally binding CIDB implementing Regulations and precepts including the Code of Conduct and Standard for Uniformity (SFU).²² Both the Code of Conduct and the Standard for Uniformity are important elements in the legal and regulatory framework for construction related procurement. The Standard for Uniformity contains detailed provisions on the conduct of construction procurement, including listing standard procurement procedures and tender evaluation methods plus annexes with, for example, standard notices and conditions of tender. The CIDB publishes standard contract documents and Treasury Regulation mandate use of CIDB bidding and contract documents for construction related procurement. The CIDB issues supporting information for construction related procurement, including Practice Notes and Best Practice Guidelines. The CIDB has published Best Practice Guideline A2 Applying the Procurement Prescripts of the CIDB in the Public Sector providing an explanation of the alignment between the PFMA regime and the CIDB regime. The CIDB also operates both a Register of Contractors and Register of Projects.

Procurement for empowerment

There are two Acts of significant importance in the context of the procurement legal framework which are of general application to all spheres of government, underpinning use of procurement for empowerment purposes:

chain management system; TR 16A10 National Industrial Participation; TR 16A11 Reporting of supply chain management information, and; TR 16A12 Interim Arrangements.

¹⁸ In period 2003 to 2010 the Supply Chain Management Office of the National Treasury issued “Practice Notes” rather than SCM Instructions. Reference used in these cases is “PN SCM Instruction”.

¹⁹ Supply Chain Management. A Guide for Accounting Officers/Authorities, National Treasury, Republic of South Africa, February 2004.

²⁰ Construction Industry Development Board Act, 2000 (Act No. 38 of 2000) as amended.

²¹ Construction Industry Development Board Act, 2000 (Act No. 38 of 2000) as amended.

²² CIDB Standard for Uniformity in Engineering and Construction Works Contracts, August 2019.

Pillar I. Legal, Regulatory, and Policy Framework

Preferential Procurement Policy Framework Act, 2000 (PPPFA)²³ requires all organs of state to determine a preferential procurement policy and implement within it a preference point system, with points allocated at tender evaluation stage and described in the invitation to tender, for goals which may, according to s.2(1)(d), include (i) “contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability” (ii) “implementing the programmes of the Reconstruction and Development Programme” (“RDP”).²⁴ An organ of state must implement its preferential procurement policy within the framework specified in PPPFA s.2 which refers to use of 90/10 or 80/20 allocation according the value of the contract, provides for relative scoring applying a prescribed formula, references specific goals which must “measurable, quantifiable and monitored for compliance” and prescribes award on the basis of highest points in most cases. PPPFA s.2 also provides for cancellation of a contract at the sole discretion of the organ of state in the event that a contract is awarded on account of false information furnished by the tenderer in order to secure preference. The new regulations supporting implementation of the PPPFA are the Preferential Procurement Regulations 2022 (2022 PPPFA Regulations) which took effect from 16 January 2023.²⁵

The 2022 PPPFA Regulations define “specific goals” in line with the provisions of PPPFA s.2(1)(d) (see above). They provide for the identification of a preference point system and set out formulas to be applied in calculating scores. Unlike the previous 2017 PPPFA Regulations,²⁶ and to comply with the rationale of the Constitutional Court,²⁷ the 2022 PPPFA Regulations do not specifically address designation of sectors, sub-sectors, industries or products to which local preference (local production and local content) may be applied. The power to determine “specific goals”, which may include preference for local content and production, now vests with individual institutions. Implementation Guidelines issued by National Treasury²⁸ advise institutions “to consult the RDP document to identify specific goals relate to local content/industrialization for which points may be allocated in the invitation of tenders.”

Broad-Based Black Economic Empowerment Act, 2003 (B-BBEEA)²⁹ which, *inter alia*, establishes a legislative framework for promotion of black economic empowerment including “preferential procurement for enterprises that are owned or managed by black people”. B-BBEEA S.9(1)(b) provides that the Minister may issue codes of good practice on black economic empowerment that may include “qualification criteria for preferential purposes for procurement and other economic activities.” Every organ of state and public entity must apply relevant codes of practice issued under B-BBEEA. (s10(1)(b). Revised Codes of Good Practice were issued in October 2013. Bidders are measured for B-BBEE compliance and receive a B-BBEE Status and corresponding recognition level which can be applied in the tender evaluation process.

There is also specialised, sector focussed, primary legislation relating to procurement. Of particular note, for the purposes of this MAPS Assessment is the State Information Technology Agency Act, 1998 which is referenced at 1(l)(a). In some sectors, there are legislative provisions which reference procurement and which need to be aligned with the PFMA regime. See, for example, the analysis at 1(a)(c) of procurement for PPP which is covered by Treasury Regulations but also specific sectoral legislation.

The PFMA regime does not contain provisions specifically addressing the issue of whether or to what extent it applies to contracts arising from international agreements, international treaty or concluded under provision

²³ Preferential Procurement Policy Framework Act, 2000 (Act No.5 of 2000).

²⁴ Reconstruction and Development Programme, Government Gazette No. 16085 dated 23 November 1994.

²⁵ The 2022 PPPFA Regulations repealed the Preferential Procurement Regulations 2017 (2017 PPPFA Regulations) following a judgment of the Constitutional Court on 16 February 2022. Minister of Finance v Afribusines NPC 2022(4) SA 362 (majority judgment) & see also National Treasury Media Statement on 2022 PPPFA Regulations. https://www.treasury.gov.za/comm_media/press/2022/2022110801%20Media%20Statement%20-%20PPP%20Regulations%202022.pdf

²⁶ 2017 PPPFA Regulations, s.8.

²⁷ Minister of Finance v Afribusines NPC 2022(4) SA 362

²⁸ Implementation Guide: Preferential Procurement Regulations, 2022. Version 1: March 2023.

²⁹ Broad-Based Black Empowerment Act, 2003 (Act No. 53 of 2003) as amended by Act 43 of 2013.

Pillar I. Legal, Regulatory, and Policy Framework

financed by multilateral financing institutions. In this context, it is thus not clear which provisions would take precedence in the event that use of that specific institution's procurement rules & procedures is required.

Gap analysis

(1) The legal and regulatory body of norms applying to public procurement is extensive, complex and fragmented. The multitude of legislative provisions impacting on planning, conduct and delivery of procurement outcomes presents significant challenges in identifying and understanding the procurement system as a coherent whole. The PFMA regime comprises numerous documents, is not comprehensive in coverage and is not presented in a consolidated manner. Due to limits on powers under the PFMA for NT to mandate compliance by organs of state in a detailed manner, provisions are sometimes vague or expressed in a manner which leads either to uncertainty or permits exercise of discretion which can negatively impact on the operation of the system as a whole. Although the PFMA regime and CIDB regime are aligned from a technical perspective, there is a lack of fit, including for example in use of inconsistent terminology and different approaches to standard tender documents so that they present as two distinct regimes, adding to complexity.

This Gap is assigned a Red Flag because it obstructs efforts to improve the public procurement system, is a deeply imbedded systemic issue and cannot be immediately mitigated solely through actions in the public procurement system. The required changes to the legislative framework at all levels of the legal hierarchy (not just primary legislation) requires significant levels of ongoing inter-institutional cooperation.

Note: The need for wholesale changes to the legislative framework is identified as a Gap here at 1(a)(a) and is one of the reasons for assignment of a Red Flag to this criterion. The need for changes to the legislative framework and consequent identification of Gaps occurs frequently under Pillar I and is a pervasive issue. In order to avoid double counting, where a requirement for legislative change is identified as a Gap under another criterion in Pillar I it has not been assigned a Red Flag.

(2) The PFMA regime does not contain provisions specifically addressing the issue of whether or to what extent it applies to contracts arising from international agreements, international treaty or concluded under provision financed by multilateral financing institutions. In this context, it is thus not clear which provisions would take precedence in the event that use of that specific institution's procurement rules & procedures is required.

Recommendations

(1) Wholesale changes to the legislative framework must be made to reduce the number of legislative provisions impacting on planning, conduct and delivery of procurement outcomes. The aim should be to create a far simpler, coherent framework with clear underpinning principles, common provisions, terminology and procurement methods applying to all procurement (goods, works (construction), and services, including consulting services) by all procuring entities using public funds and in accordance with requirements of the Constitution. Ideally this should be contained in a single piece of dedicated primary legislation, supported by comprehensive implementing Regulations.

(2) Introduce provisions in the new primary legislation to address the issue of whether and/or to what extent it applies to contracts arising from international agreements, international treaty or concluded under provision financed by multilateral financing institutions. See, for example, UNCITRAL Model Law on Public Procurement, Article 3.

Note: In acknowledgement of the problems which the current framework presents to ensuring that the public procurement system is fair, equitable, transparent, competitive and cost-effective, the Government of South Africa

Pillar I. Legal, Regulatory, and Policy Framework

is in the process of adopting a new Procurement Act.³⁰ Comment on whether and to what extent this proposed legislation remedies identified Gaps is included at Annex A.

Assessment criterion 1(a)(b):

It covers goods, works and services, including consulting services for all procurement using public funds.

Conclusion: No gap

Red flag: No

Qualitative analysis

The legal and regulatory framework covers goods, works (construction), and services, including consulting services for procurement by procuring entities falling within the scope of this MAPS assessment, using public funds. As noted in 1(a)(a), the provisions are high level and coverage differs according to the type of procuring entity. The legislative framework derived from PFMA and led by National Treasury tends to refer to “goods and services” (using language from the Constitution) and thus coverage of works (construction) is to be implied. A wider reading, including definitions in the CIDB Act, confirms that the reference to “goods and services” is to be read to include works (construction).

Section 217(1) of the Constitution, titled “Procurement”, refers to contracts for goods or services and it is the term “goods and services” which is encountered most commonly in Treasury Regulations and Instructions. TR 16A SCM refers to “acquisition of goods and services”. It is not immediately clear from these procurement related provisions, at least to a reader unfamiliar with the system, whether the term “goods and services” used in these contexts covers includes construction/ infrastructure related “works”. General reading of the legal and regulatory framework confirms that that Treasury Regulations and other legally binding documents issued by NT as part of the PFMA regime are intended to apply to construction/infrastructure related “works”.

NT SCM Instruction No.3 of 2019/2020 Framework for Infrastructure Delivery and Procurement Management (FIDPM) (repealing NT SCM Instruction No.4 for 2015/2016 which was poorly aligned with CIDB prescripts), establishes the governance for infrastructure delivery and infrastructure procurement “within the ambit of Clause 217 of the Constitution....”. It is not entirely clear how “infrastructure procurement” is to be understood in the wider context and terminology is not well aligned with language used in the CIDB regime.

CIDB

The Construction Industry Development Board Act, 2000 defines both “construction industry” and “construction works” falling within its remit. CIDB Act s.1 defines as “construction works” as “the provision of a combination of goods and services arranged for the development, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of a fixed asset including building and engineering infrastructure”. As with the PFMA regime, the definition includes reference to “goods and services” (derived from the Constitution) but the overall definition clearly covers “works” as they are commonly understood in procurement regimes. The Construction Industry Development Board Regulations define “construction procurement” as “procurement in the construction industry, including the invitation, award and management of contracts.”

Gap analysis

Recommendations

³⁰ As at 01 April 2024 the Procurement Bill is at the National Council of Provinces (NCOP) stage, having been passed by National Assembly on 06 December 2023. The NCOP may pass, amend or reject a Bill.

<https://pmg.org.za/bill/1156/>

Pillar I. Legal, Regulatory, and Policy Framework

Assessment criterion 1(a)(c):

PPPs, including concessions, are regulated.

Conclusion: No gap

Red flag: No

Qualitative analysis

PPPs are regulated by Treasury Regulation s.16 Public Private Partnerships plus relevant sector specific legislation.

There is no separate PPP law. PPPs are regulated through Treasury Regulations issued pursuant to the PFMA. Treasury Regulation s.16 Public private partnerships, provides a high-level framework covering planning, procurement and management of public private partnerships. It applies to Departments, Constitutional Institutions and Public Entities listed in PFMA Schedules 3A (National Public Entities), 3B (National Government Enterprises), 3C (Provincial Public Entities) and 3D (Provincial Government Enterprises). National Treasury has published draft amendments to TR 16 and subject to public consultation.³¹

Sector specific legislation may also apply to a particular PPP project, such as the Electricity Regulation Act (Independent Power Producers) or Correctional Services Act (Prison PPPs).³²

Gap analysis

Recommendations

Assessment criterion 1(a)(d):

Current laws, regulations and policies are published and easily accessible to the public at no cost.

Conclusion: No gap

Red flag: No

Qualitative analysis

The current laws, Treasury Regulations, and legally binding NT Instructions and SCM Instructions are published and available to download free of charge from the OCPO pages by following the “legislation” tabs in Buyer’s Area and Supplier’s Area. There is a link to the OCPO Dashboard for Instructions, Circulars and Guidance which lists those documents in Excel spreadsheet format with cross referencing and flagging required reporting and record keeping requirements. The content of the OCPO Dashboard is not fully up to date³³ and this aspect of maintenance could be improved (see Recommendation at 2(a)(b)).

CIDB

The CIDB Act, implementing Regulations and other legally binding documents/precepts including the Code of Conduct and Standard for Uniformity (SFU) are published and available to download free of charge from the CIDB website “resources” tab.

Gap analysis

³¹ Press Release, National Treasury, 23 February 2024 & Gazette, 19 February 2024.

<https://www.treasury.gov.za/public%20comments/MPPP%20Regulations/PFMA%20treasury%20Regulations.pdf>

³² “In addition to the legislation detailed above, sector-specific legislation may also apply to the relevant PPP. Often, this legislation sets out procurement requirements and principles that apply in addition to the requirements set out in Treasury Regulation 16 and need to be reconciled with the requirements of Treasury Regulation 16.” Lexology, A general introduction to public-private partnerships in South Africa, Herbert Smith Freehills LLP, 25 March 2022.

<https://www.lexology.com/library/detail.aspx?g=53749261-0103-47c2-b667-24704aaf37b9>

³³ OCPO Dashboard (October 2022, accessed and downloaded 15 September 2023.)

Pillar I. Legal, Regulatory, and Policy Framework

Recommendations

Procurement Bill

Sub-indicator 1(b) Procurement methods

The legal framework meets the following conditions:

Assessment criterion 1(b)(a):

Procurement methods are established unambiguously at an appropriate hierarchical level, along with the associated conditions under which each method may be used.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

Open Competitive Bidding is the default method for procurement above the threshold of ZAR 1 000 000 (One million Rand) for procuring entities to whom TR 16 SCM applies. PFMA regimes does not establish a single clear, and unambiguous list of available procurement methods with associated conditions, for the procurement of goods and services. In the case of construction related procurement there is a list of standard procurement methods.

According to SCM Instruction No. 2 of 2021/22, Open Competitive Bidding is the default method for procurement above the threshold of ZAR 1 000 000 (One million Rand) for procuring entities to whom TR 16 SCM applies. Procurement methods (procurement by “other means”) are described in SCM Instructions as: limited bidding; written price quotations not within thresholds, and; procurement that occurs in emergency situations and urgent cases. Emergency situations and urgent cases are adequately defined. The list of “other means” is not exhaustive. This is because additional “other means” of procurement may be provided for in an institution’s own SCM policy and thus discretion afforded is potentially wide. The CIDB Standard for Uniformity (SFU) lists standard procurement procedures for procurement of construction and engineering contracts, using three main headings: PP1 Negotiation procedure (single source); PP2 Competitive Selection Procedure, and; PP3 Competitive Negotiation Procedure. SFU does not set out conditions for use of each of the standard procurement procedures. The terminology used in PFMA regime and CIDB regime to describe procurement methods is not well aligned.

TR 16A6.1 refers to procurement of goods and services “either by way of quotations or through a bidding process”. According to SCM Instruction No. 2 of 2021/22, Open Competitive Bidding is the default method for procurement above the threshold of ZAR 1 000 000 (One million Rand) for procuring entities to whom TR 16 SCM applies. There are also designated financial thresholds for Petty Cash purchases and Written price quotations (see table below). TR 16A6.4 provides for procurement “other means” if “in a specific case it is impractical to invite competitive bids” and subject to recording reasons for doing so and approval by the AO/AA. SCM Instruction No.6 of 2007/8 was prepared in the light of inappropriate use of TR16A6.4 to circumvent competitive bidding including as a vehicle to minimize unspent funds at the end of the financial year. This Instruction requires that TR 16A6.4 is “utilized strictly to procurement goods and services of critical importance and only in specific cases when it is impractical to invite competitive bids.” Accounting officers and accounting authorities are required to report within 10 working days to the relevant treasury and Auditor-General where goods and services above the value of R 1 million (including VAT) were procured under TR 16A6.4

SCM Instruction No.3 of 2021/22 (as amended) lists three “other means” of purchasing, in summary: (a) limited bidding, which is defined in the instruction and allows for sole source, single source and multiple sources, subject to conditions; (b) written price quotations not within thresholds specified by the National Treasury; (c) Emergency situations and urgent cases.

SCM Instruction No.3 of 2021/22 defines “emergency situation” as “a serious and unexpected situation that poses an immediate risk to health, life, property or environment which calls for urgent action and there is insufficient time

Pillar I. Legal, Regulatory, and Policy Framework

to follow a competitive bidding process". It defines "urgent case" as "cases where early delivery is critical and the invitation of competitive bids is either impossible or impractical, not due to improper planning".

Additional "other means" may be provided for in an institution's own SCM policy. The institution's SCM policy must provide for a plan to curtail reliance on other means for procurement and detail the permitted circumstances for use of other means for procurement.

Procurement by "other means" is, according to SCM Instruction No.3 of 2021/22, classified as a deviation, requiring reasons to be recorded and approved by AO/AA, with report on deviation sent to relevant Treasury and AGSA (within 14 days after finalization of the procurement) and recorded in the annual report of the institution.

SCM Instruction No.2 of 2021/22 Threshold Values for the procurement of Goods and Services by means of Petty Cash, Written Price Quotations or Competitive Bids, sets threshold values for procurement methods as follows.

These thresholds apply to all procurement including construction:

Estimated value (including all applicable taxes)	Procurement method
Up to ZAR 2 000 (Two thousand Rand)	Petty cash with no competitive bids or price quotations
ZAR 2 000 to ZAR 1 000 000 Above R 2 000 (Two thousand Rand) but not exceeding ZAR 1 000 000 (One million Rand)	Written price quotations: At least three (3) verbal or written quotations from prospective suppliers registered on the Central Supplier Database (*see below).
Above ZAR 1 000 000 (One million Rand)	Open Competitive Bids advertised in at least the Government Tender Bulletin and eTender Publication. Prospective suppliers must register on the Central Supplier Database (CSD) prior to submitting bids (open tenders). Open competitive bidding can be single or multi-stage according to the complexity of the project.

*Central Supplier Database: SCM Instruction No.4A of 2016/17 mandates the use of the Central Supplier Database (CSD) established by the National Treasury

Appointment of Consultants TR 16A6.3 (g) requires AO/AA to ensure that instructions issued by the National Treasury in respect of appointment of consultants are complied with. PN SCM Instruction No.3 of 2003³⁴ requires that consultants be appointed by means of competitive bidding processes whenever possible and, in general, the procedures described for acquisition of goods and services apply subject to provisions in this Instruction. This includes reference to use of both Quality and Cost-Based Selection and Quality Based Selection. This Instruction was amended, following findings in court cases concerning application of preferential procurement regime, by NT Instruction NO NUMBER of 2010/11 (issued September 2010) in respect of guidelines on bids that include "functionality" as a criterion for evaluation. SCM Guide³⁵ Chapter 5 Appointment of Consultants sets out in detail recommended practices in relation to the appointment of consultants.

³⁴ Amended by NT Instruction dated 3 September 2010 (not numbered).

³⁵ Supply Chain Management. A Guide for Accounting Officers/Authorities, National Treasury, February 2004
http://ocpo.treasury.gov.za/Resource_Centre/Legislation/SCM%20Jan900-Guidelines.pdf

Pillar I. Legal, Regulatory, and Policy Framework

CIDB

The CIDB Standard for Uniformity (SFU)³⁶ lists standard procurement procedures and describes those procedures (see table below)

Table 1: Standard Procurement Procedures and Tender Evaluation Methods

Procedure		Description	
PP1	Negotiation procedure	A tender offer is solicited from a single tenderer.	
PP2	Competitive selection procedure	Any procurement procedure in which the contract is normally awarded to the contractor who submits the lowest financial offer or obtains the highest number of tender evaluation points.	
	PP2A	Nominated procedure	Tenderers that satisfy prescribed criteria are accepted to an electronic data base. Tenderers are invited to submit tender offers based on search criteria and their position on the data base. Tenderers are repositioned on the data base upon appointment or upon the submission of a tender offer.
	PP2B	Open procedure	Tenderers must submit tender offers in response to an advertisement by the employer to do so.
	PP2C	Qualified procedure	A call for expressions of interest is advertised and thereafter only those tenderers who have expressed interest, satisfy objective criteria and who are selected to submit tender offers, are invited to do so.
	PP2D	Quotation procedure	Tender offers are solicited from not less than three tenderers in any manner the employer chooses, subject to the procedures being fair, equitable, transparent, competitive and cost-effective.
	PP2E	Proposal procedure using the two-envelope system	Tenderers submit technical and financial proposals in two envelopes. The financial proposal is only opened should the technical proposal be found to be acceptable.
	PP2F	Proposal procedure using the two-stage system	Non-financial proposal are called for. Tender offers are then invited from those tenderers that submit acceptable proposals based on revised procurement documents. Alternatively, a contract is negotiated with the tenderer scoring the highest number of evaluation points.
	PP2G	Shopping procedure	Written or verbal offers are solicited in respect of readily available goods obtained from three sources. The goods are purchased from the source providing the lowest price once it is confirmed in writing.
PP3	Competitive negotiation procedure	A procurement procedure which reduces the number of tenderers competing for the contract through a series of negotiations until the remaining tenderers are invited to submit final offers.	
	PP3A	Restricted competitive negotiations	A call for expressions of interest is advertised and thereafter only those tenderers who have expressed interest, satisfy objective criteria and who are selected to submit tender offers, are invited to do so. The employer evaluates the offers and determines who may enter into competitive negotiations.
	PP3B	Open competitive negotiations	Tenderers must submit tender offers in response to an advertisement by the employer to do so. The employer evaluates the offers and determines who may enter into competitive negotiations.

The SFU also lists the standard methods for procuring different categories of engineering and construction works contracts, by reference to the above list in Table 1. SFU does not set out conditions for use of each of the standard procurement procedures.

Construction related professional services: The CIDB SFU requires that construction related professional services be solicited using a standard method in accordance with Table 1 above. The SFU also lists the standard methods for procuring different types of professional services, by reference to Table 1.

The equivalence between the standard methods for procuring professional services in CIDB's SFU and those provided in PN SCM Instruction No.3 of 2003 is outlined in Annexure 1 to the CIDB Best Practice Guide A7 Procurement of Professional Services.

Gap analysis

Open Competitive Bidding is the required default method for procurement above the threshold of ZAR 1 000 000 (One million Rand) for procuring entities to whom TR 16 SCM applies. The legal framework does not establish a sufficiently single clear and unambiguous list or definitions of available procurement methods, with associated conditions for use in every case, and applying to the procurement of goods, services, consulting services and construction related procurement (works and works related).

Recommendations

Combined recommendations for 1(b)(a) and 1(b)(d)

To improve clarity, coherence and certainty, introduce legislative provisions listing in a clear and unambiguous manner all available procurement methods to include competitive and less competitive procurement procedures.

³⁶ CIDB Standard for Uniformity in Engineering and Construction Works Contracts, August 2019.

Pillar I. Legal, Regulatory, and Policy Framework

Each of the available methods should be clearly defined, with associated conditions for use. The procurement methods listed should apply, as relevant, to the procurement of goods, services, consulting services and construction related procurement.

The list of available procurement methods and associated conditions for use should ideally be placed in a higher-level legal instrument of universal application. This provides both stability and consistency. Lower-level instruments can be used to regulate methods and conditions at a more detailed level, including to accommodate particular sectoral requirements.

Assessment criterion 1(b)(b):

The procurement methods prescribed include competitive and less competitive procurement procedures and provide an appropriate range of options that ensure value for money, fairness, transparency, proportionality and integrity.

Conclusion: No gap

Red flag: No

Qualitative analysis

Procurement methods are not all prescribed or not prescribed in detail in the PFMA regime (see analysis at 1(b)(a)). The designated threshold levels for procurement in SCM Instruction No.2 of 2021/22 provide for simpler approaches to be adopted for lower value procurements (petty cash and price quotations) and requires competitive bidding for higher value procurements. The Supply Chain Management Guide for Accounting Officers/Authorities (SCM Guide) which is an advisory document does, however, provide guidance on a range of SCM issues including on pre-qualification and two stage bidding. SCM Guide s.4.9 Inviting bids, includes advice on use of pre-qualification, based entirely upon the capability and resources of prospective bidders to perform the particular contract, for large or complex works or other circumstances where the high costs of preparing detailed bid documents could discourage competition. SCM Guide s.4.9 Two-stage bidding, proposes and explains a two-stage bidding process (first stage is for unpriced initial technical proposals) for turnkey contracts, contracts for large or complex plants or works of a special nature and procurement of equipment subject to rapid technological advances such as major computer and communications systems. Conditions for use of a two-stage bidding process are listed.

CIDB

The CIDB Standard for Uniformity allows for a range of procedures including procedures using two envelopes, two stages and competitive negotiations, to reflect the complexity of the relevant procurement (see list of procedures in analysis at 1(b)(a)). Use of procedures for more complex procurements is supported by guidelines on contracting strategies.

Gap analysis

Recommendations

Assessment criterion 1(b)(c):

Fractioning of contracts to limit competition is prohibited.

Conclusion: No gap

Red flag: No

Qualitative analysis

There are relevant provisions in PN SCM Instruction No.2 of 2021/2022 which are of mandatory application to procuring entities falling within the scope of TR 16A SCM.

Pillar I. Legal, Regulatory, and Policy Framework

PN SCM Instruction No.2 of 2021/2022 Threshold Values for the procurement of Goods and Services by means of Petty Cash, Verbal/Written Price Quotations and Competitive Bids, provides at s.4.1 that “Procurement of goods and services may not deliberately be split into parts or items of lesser value in order to circumvent the prescribed procurement process. When determining transaction values, where required goods and services consist of different parts or items, said parts or items must as far as possible be treated and dealt with as a single transaction for the purposes of determining which procurement process to follow.”

Provisions on prohibition of fractioning of contracts to limit competition are not set out in the PFMA or TR. Ideally, they should be placed in high level procurement legislation of universal application.

CIDB

Above referenced provisions apply to construction related procurement.

CIDB SFU provides at s.4.5.8 that employers [procuring entities] “promote the participation and development of registered contractors by means of.....a) unbundling projects into smaller contracts.” There is further guidance on unbundling contracts included CIDB Best Practice Guide A8 Procurement Measures to Develop Registered Contractors s.6.2 which includes presentation of strengths and weaknesses of this approach.

This is a legitimate use of creation of smaller contract opportunities, to broaden participation particularly for SMEs, provided it is not done with the intention of limiting competition

Gap analysis

Recommendations

Assessment criterion 1(b)(d):

Appropriate standards for competitive procedures are specified.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The PFMA regime provides some safeguards against use of “other means” of procurement by, for example, defining “emergency situation” and “urgent case” and requiring use of all “other means” to be recorded and approved by AO/AA, with report on deviation sent to relevant Treasury and AGSA (within 14 days after finalization of the procurement) and recorded in the annual report of the institution (see analysis at 1(b)(a)). However, the approval is internal, the reporting requirements are after the fact and there is discretion at institutional level to define additional “other means” for procurement. These factors open up the possibility of inappropriate use of less or non-competitive procedures.

CIDB

As noted at 1(b)(a), the CIDB Standard for Uniformity (SFU) does not set out conditions for use of each of the standard procurement procedures and this includes PP1 Negotiation procedure (single source). The terminology used in PFMA regime and CIDB regime to describe procurement methods is not well aligned.

Gap analysis

Permitted use of “other means”, which are not exhaustively defined, affords wide discretion at a procuring entity level reducing the clarity and coherence of the system and opens up the possibility of inappropriate use of less or non-competitive procedures.

Recommendations

See combined recommendations at 1(b)(a).

Sub-indicator 1(c)

Advertising rules and time limits

The legal framework meets the following conditions:

Pillar I. Legal, Regulatory, and Policy Framework

Assessment criterion 1(c)(a):

The legal framework requires that procurement opportunities are publicly advertised, unless the restriction of procurement opportunities is explicitly justified (refer to indicator 1(b)).

Conclusion: No gap

Red flag: No

Qualitative analysis

The legal framework requires procurement opportunities for competitive tenders to be publicly advertised on the e-Tender portal. Opportunities for construction related procurement must also be advertised on the CIDB website. There is no automatic link between the e-Tender portal and the CIDB website.

TR s.16A6.3 (c) requires the AO/AA to ensure that bids are “advertised in at least the *Government Tender Bulletin* for a minimum period of 21 days before closure [....]”

SCM Instruction No.9 of 2022/23 Mandatory use of e-Tender Portal, which took effect from 01 November 2022, requires open competitive bids (including the complete set of bid documents) to be published on the e-Tender Portal, for at least 21 days, save in exceptional cases. Accounting officers may advertise bids on other media, including the *Government Tender Bulletin*, “should they deem it necessary”. In practice, the *Government Tender Bulletin* is no longer available and procuring entities are required to use the e-Tender Portal.³⁷ Publication is not compulsory in the case of procurement through price quotations or other means. Procuring entities may, at their own discretion, utilize the e-Tender Portal.

CIDB

CIDB Regulations R.24 requires publication of invitations to express interest or soliciting competitive tenders (i.e. advertisements) to be published on the CIDB website. Invitations/solicitations must be in accordance with TR 16A SCM and the CIDB’s standard for uniformity. The CIDB has published a “Standard Tender Notice and Invitation to Tender.” Publication on the CIDB website is in addition to publication on the e-Tender Portal.

Gap analysis

Recommendations

Assessment criterion 1(c)(b):

Publication of opportunities provides sufficient time, consistent with the method, nature and complexity of procurement, for potential bidders to obtain documents and respond to the advertisement. The minimum time frames for submission of bids/proposals are defined for each procurement method, and these time frames are extended when international competition is solicited.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

A minimum time frame of 21 days is specified for open competitive bidding. No minimum time frames are specified for other procurement methods. There is no provision specifically requiring the 21-day period to be extended when international competition is solicited.

TR 16A6.3 (c) requires the AO/AA to ensure that [open competitive] bids are “advertised in at least the *Government Tender Bulletin* for a minimum period of 21 days before closure [....]”. In urgent cases, bids may be advertised for a shorter period “as the AO/AA may determine.” No minimum time frames are designated for procurement methods other than open competitive bidding.

³⁷ Information provided by NT/OCPO, December 2023.

Pillar I. Legal, Regulatory, and Policy Framework

SCM Instruction No.2 of 2022/23, which took effect from 01 November 2022, reflects the provisions in TR 16A6.3 and requires open competitive bids (including the complete set of bid documents) to be published on the e-Tender Portal, for at least 21 days.

No minimum time frames are designated for procurement methods other than open competitive bidding.

There is no provision specifically requiring the 21-day period to be extended when international competition is solicited.

SCM Instruction No.2 of 2021/22 requires AOs/AAs to prescribe in their SCM policies the minimum number of days for price quotations, balancing the need to ensure that prospective suppliers have enough time to submit quotations with the need for the organ of state to delivery services. SCM Guide s.4.8 Preparation time, provides that the time allowed for preparation and submission of bids should be determined with due consideration to the particular circumstances of the project and the magnitude and complexity of the contract. In general, a period of not less than 30 days is advised with a longer period of not less than 12 weeks where large works or complex equipment are involved.

CIDB

Above referenced provisions apply to construction related procurement.

Gap analysis

No minimum time frames are specified for procurement methods other than open competitive bidding. There is no provision specifically requiring the 21-day period for open competitive bidding to be extended when international competition is solicited.

Recommendations

To enhance consistency, introduce legislative provisions specifying minimum time frames for less competitive procurement methods and establish criteria for setting the minimum time, including factors such as the complexity of the procurement and the level of expected competition and location of bidders.

Ideally, these provisions should be placed in a higher-level legal instrument of universal application, with lower-level instrument/s used to regulate at a more detailed level, including to accommodate particular sectoral requirements.

As noted at 1(c)(a), opportunities for construction related procurement must be advertised both on the e-Tender portal and on the CIDB website. There is no automatic link between the e-Tender portal and the CIDB website. To further improve consistency as well as to reduce administration and eliminate duplication, consider putting into place measures to enable procuring entities to place a single advertisement which is then published at both locations and/or implement a single system and location for all advertisements.

Assessment criterion 1(c)(c):

Publication of open tenders is mandated in at least a newspaper of wide national circulation or on a unique Internet official site where all public procurement opportunities are posted. This should be easily accessible at no cost and should not involve other barriers (e.g. technological barriers).

Conclusion: No gap

Red flag: No

Qualitative analysis

Open tenders must be published on the e-Tender Portal, which is easily accessible on-line. In addition, tenders for construction related opportunities must be published on the CIDB website.

SCM Instruction No.2 of 2022/23, which took effect from 01 November 2022, requires open competitive bids (including the complete set of bid documents) to be published on the e-Tender Portal, for at least 21 days. In addition, accounting officers may advertise bids on other media, including the Government Tender Bulletin, "should they deem it necessary". The e-Tender Portal is easily accessible on-line.

Pillar I. Legal, Regulatory, and Policy Framework

CIDB CIDB Regulations R.24 requires publication of invitations to express interest or soliciting competitive tenders (i.e. advertisements) to be published on the CIDB website.
Gap analysis
Recommendations
Assessment criterion 1(c)(d): The content published includes enough information to allow potential bidders to determine whether they are able to submit a bid and are interested in submitting one.
Conclusion: No gap
Red flag: No
Qualitative analysis The content published on both the e-Tender Portal and the CIDB website is sufficient for bidders to determine whether they are able and interested in submitting a bid. The advertisements published on the e-Tender Portal are in standard format and include the following summary information: purchaser (organ of state), tender type, province, publication and closing date, contact for enquiries and details of a briefing session (if to be held). All advertised tenders must include the tender documents which can be reviewed online. The information provided is sufficient for bidders to determine whether they are able and interested in submitting a bid. SCM Instruction No.2 of 2022/23, which took effect from 01 November 2022, requires open competitive bids (including the complete set of bid documents) to be published on the e-Tender Portal, for at least 21 days. In addition, accounting officers may advertise bids on other media, including the Government Tender Bulletin, “should they deem it necessary”
CIDB The CIDB specifies the minimum content for advertisements published on the CIDB website which must include: the name of the employer (purchaser); contract title; description of supplies, services and construction works require; closing time and date for submission, date and time for clarification meeting (if any); contact for enquiries, eligibility criteria, preferences offered. All advertised tenders must include the tender documents which can be reviewed online. The information provided is sufficient for bidders to determine whether they are able and interested in submitting a bid.
Gap analysis
Recommendations
Sub-indicator 1(d) Rules on participation The legal framework meets the following conditions:
Assessment criterion 1(d)(a): It establishes that participation of interested parties is fair and based on qualification and in accordance with rules on eligibility and exclusions

Pillar I. Legal, Regulatory, and Policy Framework

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

Underlying principles in the Constitution for procurement require the system, and thus the process for qualification, to be “fair, equitable, transparent, competitive and cost effective”. TR s.16A9 Avoiding abuse of supply chain management system, contains a number of provisions relating to checks on eligibility and exclusion to be made by the AO/AA, and additional discretionary grounds for exclusion. In practice, registration on the Central Supplier Database establishes baseline eligibility requirements. For construction related procurement, CIDB registration is a requirement. The overall picture is fragmented and there is no clear, consolidated list of rules on eligibility and exclusion to be applied to determine qualification of interested parties.

The underlying principles of the conduct of procurement, as set out in the Constitution, require organs of state to have supply chain management system that are “fair, equitable, transparent, competitive and cost effective”. TR s.16A9 Avoiding abuse of supply chain management system, contains a number of provisions relating to checks on eligibility and exclusion to be made by the AO/AA, and additional discretionary grounds for exclusion. TR 16A9.1, in summary, requires the AO/AA to: take all reasonable steps to prevent abuse of the SCM system; investigate allegations of corruption, improper conduct or failure to comply with the SCM system and take necessary steps when justified; check the NT’s database prior to contract award to ensure that no recommended bidder or its directors are listed as prohibited from doing business with the public sector; reject any bid from a supplier who fails to provide written proof from SARS that there are no outstanding tax obligations or arrangements to meet outstanding tax obligations; reject a proposal for award of a contract if the recommended bidder has committed a corrupt or fraudulent act in competing for a contract, and; cancel a contract if the supplier or “any official or other role player” committed any corrupt or fraudulent act during the bidding process or execution of the contract. TR 16A9.2 provides that the AO/AA may disregard a bid if the bidder or any of its directors (i) have abused the institution’s supply chain management system, (ii) committed fraud or any other improper conduct in relation to such a system, (iii) failed to perform on any previous contract (see analysis at 1(d)(c)). In practice, registration on the Central Supplier Database establishes baseline eligibility requirements. Suppliers on the Restricted Supplier List or List of Tender Defaulters must be excluded from participation. (see analysis at 1(d)(c)).

CIDB

Above referenced provisions apply to construction related procurement.

According to CIDB Act s.18 “A contractor may not undertake, carry out or complete any construction works or portion thereof for public sector contracts, awarded in terms of competitive tender or quotation, unless he or she is registered with the Board and holds a valid registration certificate issued by the Board”.

CIDB Best Practice Guidance A3 Evaluating tenders, offers included general guidance on eligibility and grounds for rejection and disqualification. CIDB grading will be incorporated within eligibility criteria.

Gap analysis

The overall picture is fragmented and there is no clear, consolidated list of rules on eligibility and exclusion to be applied to determine qualification of interested parties.

Recommendations

To enhance clarity, include in the legal framework a clear, consolidated list of rules on (1) exclusion; and (2) eligibility, in each case with grounds and conditions clearly prescribed and supported by practical guidance. Ideally, these provisions should be placed in a higher-level legal instrument of universal application, with lower-level instrument/s used to regulate at a more detailed level, including to accommodate particular sectoral requirements.

Pillar I. Legal, Regulatory, and Policy Framework

Assessment criterion 1(d)(b):

It ensures that there are no barriers to participation in the public procurement market.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

Charging fees for procurement documents: Charging fees for procurement documents is permitted and is at the discretion of the AO/AA. SCM Guide for AA/AO 2004 provides that AA/AO “may decide to charge a refundable or non-refundable fee for bidding documents if and when necessary” subject to provisos to ensure that the fee is reasonable and reflects only the cost of printing and delivery, that it is not so high as to discourage prospective bidders and requiring the monies received to be paid into designated funds. In practice, there is a mixed picture in terms of whether or not fees are charged, the basis and sum charged. In direct engagement with stakeholders, the MAPS Assessment team received negative comments on the impact of fees for bidding documents.

CIDB: Registration for eligibility to participate in construction works procurement: CIDB Registration is required as a condition for eligibility to participate in construction procurement tenders for works above specified threshold. CIDB Act s.18 prohibits a contractor from undertaking, carrying out or completing any construction works unless registered with CIDB and holding a valid registration certificate. CIDB Comprehensive Guide to Contractor Registration V.6 (page 2) states that “All contractors seeking to participate in public sector infrastructure delivery must be registered on the cidb Register of Contractors”.

CID Regulations CID Regulations Part IV, R.25(1) requires the procuring entity to stipulate in a tender offer or expression of interest for a construction works contract “that only submissions of tender offers or expressions of interest by contractors who are registered in the category of registration required...may be evaluated in relation to that contract.” The following provision, R25(1A) provides some flexibility allowing for “a tender offer or expression of interest of a contractor who is not registered.....but who is capable of being so registered prior to tender evaluation of those submissions may be evaluated, but in the case of expressions of interest, the contractor concerned must be capable of being so registered within 21 working days after closing date for those submissions.” This links the requirement for registration to eligibility for evaluation and wording for tender document is set out in the CIDB Standard for Uniformity (2019) section 4.5.

CIDB Registration of external contractors – requirement for office in South Africa: According to CIDB Comprehensive Guide to Contractor Registration v.6 (page 8), “All external companies [on the CIDB Register] must maintain an office in South Africa and must have a registered physical address in South Africa and must be registered with the Companies and Intellectual Property Commission (CIPC).”

See also Qualitative analysis, Gap analysis and supporting recommendation at 3(a) to undertake a critical review of the effectiveness of current measures for empowerment and economic & industrial growth (including local preference) through public procurement, including whether they may create barriers to entry for domestic or foreign suppliers.

Gap analysis

Charges for bidding documents, CIDB Registration as a condition for eligibility and CIDB requirements for external companies registered with the CIDB to maintain an office and have a registered physical address in South Africa and be CIPC registered, are potential barriers to entry.

Recommendations

Undertake a critical review of the impact on all potential suppliers, including MSMES and foreign suppliers, and market competition of charges for bidding documents, CIDB Registration as a condition for eligibility and CIDB

Pillar I. Legal, Regulatory, and Policy Framework

requirements for external companies registered with the CIDB to maintain an office and have a registered physical address in South Africa and be CIPC registered company. Where a negative impact is identified the review should identify measures to remove or reduce the impact and to stimulate market participation.

See also Qualitative analysis, Gap analysis and supporting recommendation at 3(a).

Assessment criterion 1(d)(c):

It details the eligibility requirements and provides for exclusions for criminal or corrupt activities, and for administrative debarment under the law, subject to due process or prohibition of commercial relations.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

There are provisions in the legal and regulatory framework detailing eligibility requirements and providing for exclusion for criminal or corrupt activities. Debarment on conviction for corruption-related offences is subject to due process of the courts which make an order to endorse and offender's particulars on the Register of Tender Defaulters. The CIDB operates as well-defined system to investigate complaints which may result in a sanction being applied to a registered contractor of restriction or prohibition from participating in public sector construction works procurement for a period of up to 10 years.

Suppliers may also be debarred from doing business with government by inclusion in the Restricted Supplier List following a process set out in SCM Instruction No.3 of 2021/22. However, the high level of discretion available to the individual AO/AA raises risks of inconsistency and/or bias in the application of grounds for restrictions on participation. In addition, TR 16A9.2 provides that the AO/AA may disregard a bid if the bidder or any of its directors (i) have abused the institution's supply chain management system, (ii) committed fraud or any other improper conduct in relation to such a system, (iii) failed to perform on any previous contract. The wording of these grounds is vague, not well aligned with the anti-corruption regime and, again, raises concerns as to the efficacy of the process where significant discretion is exercised at a local level. There is no list of grounds for exclusion specifically covering terrorist related offences, money laundering or terrorist financing, child labour, human trafficking.

Eligibility & exclusion requirements in Treasury Regulations: According to TR s.16A9, the AO/AA must: check the National Treasury's database prior to contract award to ensure that no recommended bidder or its directors are listed as prohibited from doing business with the public sector; reject a proposal for award of a contract if the recommended bidder has committed a corrupt or fraudulent act in competing for a contract.

Registration on the Central Supplier Database: All suppliers with whom procuring entities wish to contract must be registered on the Central Supplier Database. AO/AAs must not award any bid for price quotations to a bidder who is not registered on the CSD. (SCM Instruction 4A of 2016/1). Thus the requirements which suppliers must satisfy in order to obtain and retain CSD registration can be classified for the purposes of this MAPS Assessment as baseline eligibility requirements. These relate, essentially, to requirements for business registration, tax compliance, B-BBEE status level and whether the supplier is prohibited from participation due to listing on the Restricted Supplier List or Register of Tender Defaulters. CSD registration should satisfy the requirements for checks to be undertaken by the AO/AA pursuant to TR 16A9.1(c)(d) & (e).

Other grounds for rejection of a bid (exclusion): TR 16A9.2 provides that the AO/AA may disregard a bid if the bidder or any of its directors (i) have abused the institution's supply chain management system, (ii) committed fraud or any other improper conduct in relation to such a system, (iii) failed to perform on any previous contract. The wording of these grounds leaves significant levels of discretion to the AO/AA to decide on grounds for rejection of a bid on a case-by-case basis. There is no comprehensive guidance issued by NT/OCPO to AO/AAs on exercise of this discretion.

Terrorism, money laundering, child labour and trafficking offences: There is no list of grounds for exclusion covering terrorist related offences, money laundering or terrorist financing, child labour, human trafficking.

Pillar I. Legal, Regulatory, and Policy Framework

Debarment – Restricted Supplier List: There is a system of debarment, with a process to be followed prior to listing of a supplier on the Restricted Supplier List. SCM Instruction No.3 of 2021/22 sets out the process leading to debarment of suppliers from doing business with government by inclusion in the restricted supplier list which is published by National Treasury. The process is led by the AO/AA of an institution who is required to notify in writing the relevant supplier of (a) the intention to restrict, (b) grounds for restriction, (c) intended period of restriction, not exceeding 10 years, (d) right of supplier to make representations within 14 days as to why should not be restricted. The AO/AA is required to: consider any representations made; consult National Treasury and consider any views provided by the National Treasury prior to making a final decision. If the AO/AA makes a decision to restrict a supplier, they must inform National Treasury which adds the supplier to the published list and the AO/AA must inform the restricted supplier as soon as the restriction is recorded. The level of discretion available to the AO/AA is high and this raises risks of inconsistency of application of grounds for restrictions on participation, unless robust control and review measures are in place.

Debarment – Register of Tenderer Defaulters where convicted of corruption related offences (PRECCA): The Register of Tender Defaulters is a list of suppliers who have been convicted of corruption offences relating to contracts and tenders under PRECCA and the Court has made an order to endorse their particulars on the Register. Convicted suppliers must be prohibited from participation in procurement by the “National Treasury, purchasing authority or any Government Department” for a period of 5 to 10 years and existing contracts may be terminated, in addition to other actions for damages. (see analysis at Indicator 14 (c)(c) for further detail)

The Restricted Supplier List and Tender Defaulter report is available (in a consolidated document) from the NT/OCPO website.³⁸

CIDB

CIDB sanctions regime: CIDB Regulations, Part V provides for a process for investigation of a complaint or suspicion of an act or omission in respect of the CIDB Code of Conduct. If the complaint or suspicion implicates a person employed by an organ of state the CIDB must refer it to the relevant AO/AA for investigation, or Audit Committee in the case of the CIDB. If the complaint or suspicion concerns a registered contractor the matter is investigated according to a due process, including a formal inquiry with a right for the contractor to attend and be represented, which is set out in detail in the CIDB Regulations. Sanction can include “restricting or prohibiting the respondent from participating in public sector construction works procurement for a period of time, which period may not exceed 10 years.” Decisions are published in the Gazette and on the CIDB’s register of contractors. They do not appear to be included in the Restricted Supplier List and Tender Defaulter report published on the NT/OCPO website. There is a right of appeal for judicial review of a finding or sanctions.

Gap analysis

This analysis identifies four distinct gaps, as follows:

- (1) There is no list of grounds for exclusion covering terrorist related offences, money laundering or terrorist financing, child labour, human trafficking as prescribed by the MAPS Methodology.
- (2) There is a high level of discretion afforded to AO/AA in deciding upon debarment of a supplier from doing business with government, by inclusion in the Restricted Supplier List. This raises risks of inconsistency and/or bias in the application of grounds for restrictions on participation.
- (3) The wording of grounds upon an AO/AA may disregard a bid in TR16A9.2, is vague and not well aligned with the anti-corruption regime. This raises concerns as to the efficacy of the process where significant discretion is exercised at a local level.
- (4) The list of CIDB restricted/prohibited suppliers and the Restricted Supplier List and Tender Defaulter Report published by NT/OCPO are not linked, creating complexity and reducing clarity.

³⁸ <http://ocpo.treasury.gov.za/RestrictedSupplier/RestrictedSuppliersReport.pdf>

Pillar I. Legal, Regulatory, and Policy Framework

Recommendations

(1) Include in the legal framework specific provisions listing grounds for ineligibility due to conviction by final judgment for specified organised crime, terrorist and trafficking offences (participation in a criminal organization; terrorist offences or offences linked to terrorist activities or inciting or aiding or abetting or attempting to commit such an offence; money laundering or terrorist financing; child labour; and all forms of trafficking in human beings.)

(2) Review operation of the processes and outcomes of the system for adding suppliers to the Restricted Supplier List, in particular to establish the detailed grounds upon which a decision is made, the consistency of the decisions and the resulting periods of debarment. If inconsistencies, bias or other issues are flagged, identify measures to remedy these issues, to ensure that the system is fit for purpose.

(3) Review and amend, redraft or remove (as necessary) the grounds upon which bids may be disregarded, to ensure that they are aligned with anti-corruption legislation and well defined, thus limiting room for misapplication. It is advisable to provide additional Instructions or guidance, including practical examples, to inform and support officers in decision making on this issue. (See also analysis, gaps and recommendations on anti-corruption framework at 14(a)).

(4) To simplify checks on suppliers who are restricted or prohibited from participation, consider linking list of CIDB restricted/prohibited suppliers and Restricted Supplier List and Tender Defaulter report published by NT/OCPO to provide a single source of reference.

Assessment criterion 1(d)(d):

It establishes rules for the participation of state-owned enterprises that promote fair competition.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The PFMA regime does not establish rules for participation of state-owned enterprises³⁹ as bidders in public procurement processes.

16A6.6 The accounting officer or accounting authority may, on behalf the department, constitutional institution or public entity, participate in any contract arranged by means of a competitive bidding process by any other organ of state, subject to the written approval of such organ of state and the relevant contractors.

Gap analysis

The PFMA regime does not establish rules for participation of state-owned enterprises⁴⁰ as bidders in public procurement processes. This may jeopardise fair competition as state-owned enterprises may have an unfair advantage over other bidders because, for example, they benefit from subsidies, tax exemptions or other forms of preferential treatment.

Recommendations

Include in the legal framework specific rules applying to participation of state-owned enterprises⁴¹ as bidders in public procurement processes, aimed at promoting fair competition.

Assessment criterion 1(d)(e):

It details the procedures that can be used to determine a bidder's eligibility and ability to perform a specific contract.

Conclusion: No gap

³⁹ For the purposes of the MAPS Assessment the term "state-owned enterprises" is used to refer collectively to Major Public Entities (Sched 2) and Public Entities (3A&C), as defined by the PFMA.

⁴⁰ For the purposes of the MAPS Assessment the term "state-owned enterprises" is used to refer collectively to Major Public Entities (Sched 2) and Public Entities (3A&C), as defined by the PFMA.

⁴¹ For the purposes of the MAPS Assessment the term "state-owned enterprises" is used to refer collectively to Major Public Entities (Sched 2) and Public Entities (3A&C), as defined by the PFMA.

Pillar I. Legal, Regulatory, and Policy Framework

Red flag: No

Qualitative analysis.

Eligibility: Baseline eligibility is established through conducting checks for supplier registration on the Central Supplier Database and there is a clear process to be followed. There are additional discretionary grounds for disregarding a bid/bidder. TR s.16A9 provides that the AO/AA may disregard a bid if the bidder or any of its directors (i) have abused the institution's supply chain management system, (ii) committed fraud or any other improper conduct in relation to such a system, (iii) failed to perform on any previous contract. (see analysis at 1(d)((c)). SCM Instruction No.3 of 2021/22 requires institutions to include in their bid documents a Bidder Disclosure form for bidders to complete and sign. Institutions may either use the standard OCPO form (SBD4) or use the same content in their own bid documents. SBD4 includes: a statement that bidders will be excluded if they are on the Restricted Supplier List or the Register of Tender Defaulters, a declaration of interest and independent bid determination by the bidder as well as acknowledgement that matters may be referred under the Competition Act or PRECCA where relevant. This SBD4 replaces previous SBDs 4, 8 and 9. The AO/AA must evaluate information provided in SBD4 and may reject the bid and restrict the bidder from participation if a relevant transgression is identified. See also analysis at 1(d)(a).

CIDB

CIDB Best Practice Guidance A3 Evaluating tenders offers included general guidance on process for determining eligibility and grounds for rejection and disqualification.

CIDB Registration is a condition for eligibility for evaluation of works construction contract tenders (see analysis at 1(d)(b).

Gap analysis

Recommendations

Sub-indicator 1(e)

Procurement documentation and specifications

The legal framework meets the following conditions:

Assessment criterion 1(e)(a):

It establishes the minimum content of the procurement documents and requires that content is relevant and sufficient for suppliers to respond to the requirement.

Conclusion: No gap

Red flag: No

Qualitative analysis

There are limited provisions in Treasury Instructions relating to the content of procurement documents. Minimum content of procurement documents is prescribed by reference to the Standard Bidding Documents issued by OCPO which must be used by procuring entities, with minimal changes when customizing them for local use. In the case of construction related procurement CIDB standard procurement documents must be used. In practice, procurement opportunities advertised on the e-Tender Portal and CIDB website must include copies of the full tender documents. The content of the standard bidding/procurement documents available to suppliers is relevant and sufficient for suppliers to respond to the requirements.

TR 16A6.3(a) requires the AO/AA to ensure that bid documentation and general conditions of contract are in accordance with instructions of National Treasury, or prescripts of the CIDB in the case of a bid relating to the construction industry.

Pillar I. Legal, Regulatory, and Policy Framework

TR 16A6. (b) requires bid documentation to “include evaluation and adjudication criteria, including the criteria prescribed in terms of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000) and the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003)”

Goods and Services: PN SCM Instruction No.1 of 2003 General Conditions of Contract (GCC) and Standardized Bidding Documents (SBDs), provides that all accounting officers/accounting authorities “should customize and utilize standard bidding documents (SBDs) issued by the National Treasury. These SBDs should be used with minimum changes that are necessary to address contract and project specific issues.”

SBDs were attached to PN SCM Instruction No.1 of 2003 but have been updated on several occasions, most recently in March 2023. See analysis at 2(b)(a) for list of current SBDs issued by NT/OCPO.

SCM Guide 1.6.2.2. List of minimum content of bid documents: Bid documents will comprise at the least the following: General Conditions of Contract: specifications, data sheets/drawings; and a specific contract agreement stipulating delivery standards and requirements. 1.6.2.4. “It is imperative that accounting officers/authorities take due care that standardized bid documents are used for all standard procurement of goods, works and services. It is the responsibility of the SCM Office in the National Treasury to issue pro forma standardized bid documentation.”

CIDB

TR 16A6.3(a) requires the AO/AA to ensure that bid documentation and general conditions of contract are in accordance with instructions of National Treasury, or prescripts of the CIDB in the case of a bid relating to the construction industry. The content of the standard bidding documents issued by CIDB is relevant and sufficient for suppliers to respond to the requirements.

Gap analysis

Recommendations

Assessment criterion 1(e)(b):

It requires the use of neutral specifications, citing international norms when possible, and provides for the use of functional specifications where appropriate.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The general principles requiring organs of state to have supply chain management system that are “fair, equitable, transparent, competitive and cost effective” is generally understood to require the use of neutral specifications with the fairness principle of particular relevance. Treasury Regulations do not, however, contain specific provisions requiring use of neutral specification nor does it specify use of international norms where possible or provide for use of functional (i.e. output-based) specifications where appropriate. These requirements are included in the SCM Guide which is advisory in nature. The CIDB Standard for Uniformity (SFU) has specific provisions requiring use neutral specifications which, where possible, should be functional/output based and specify national or international standards.

SCM Guide (advisory only): para.3.4.1: standards and technical specifications should promote the broadest possible competition. Recommended that as far as possible should specify accepted standards such as those issued by Standards South Africa, the ISO or an authority recognized by the South African National Accreditation System (SANAS). Para 3.4.2 requires that specifications should be based on relevant characteristics and/or performance requirements. References to brand names or catalogue number should be avoided. If it is necessary to quote a

Pillar I. Legal, Regulatory, and Policy Framework

brand name or catalogue number ..the words “or equivalent” should be added after such reference. The specification should permit acceptance of goods with similar characteristics and equivalent performance.

CIDB

CIDB SFU s.4.4.6.1 requires that the scope of work shall, wherever possible, be described in terms of performance rather than the design or descriptive characteristics (i.e. a functional or output-based approach) and be based on national or international standards, where such exist.

CIDB SFU s.4.4.6.2 provides as follows: “Requirements in the form of specifications, plans, drawings, designs, testing and test methods, packaging, marking or labelling or conformity certification shall not create trade barriers. Reference to any particular trademark, name, patent, design, type, specific origin or producer shall not be made unless there is no other sufficiently precise or intelligible way of describing the characteristics of the work. Such reference shall be accompanied by the words “or equivalent”

Gap analysis

Treasury Regulations do not contain specific provisions requiring use of neutral specification nor do they specify use of international norms where possible or provide for use of output based (“functional” in MAPS terminology) specifications to promote innovation, where appropriate.

Recommendations

Combined recommendation for 1(e)(b) and 1(e)(c)

Introduce legislative provisions to specifically refer to use of international or other recognized equivalent norms and to the principle of equivalence for procurement of goods, services including consulting services and construction related procurement. Also consider including provisions requiring use of output-based specifications in the case of all procurements, where appropriate, to promote innovation.

Assessment criterion 1(e)(c):

It requires recognition of standards that are equivalent, when neutral specifications are not available.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

TR do not contain specific provisions to address this issue, but the principle of equivalence is contained in the SCM Guide. The CIDB Standard for Uniformity (SFU) has a specific provision requiring use of the words “or equivalent” where neutral specifications are not available.

SCM Guide: Para 3.4.2 requires that specifications should be based on relevant characteristics and/or performance requirements. References to brand names or catalogue number should be avoided. If it is necessary to quote a brand name or catalogue number ..the words “or equivalent” should be added after such reference. The specification should permit acceptance of goods with similar characteristics and equivalent performance.

CIDB

CIDB SFU s.4.4.6.2: “Requirements in the form of specifications, plans, drawings, designs, testing and test methods, packaging, marking or labelling or conformity certification shall not create trade barriers. Reference to any particular trademark, name, patent, design, type, specific origin or producer shall not be made unless there is no other sufficiently precise or intelligible way of describing the characteristics of the work. Such reference shall be accompanied by the words “or equivalent”.

Gap analysis

Although guidance makes it clear that procuring entities should include the words “or equivalent” where neutral specifications are not available, Treasury Regulations do not contain specific provisions making this a requirement.

Recommendations

See combined recommendation at 1(e)(b)

Pillar I. Legal, Regulatory, and Policy Framework

Assessment criterion 1(e)(d):

Potential bidders are allowed to request a clarification of the procurement document, and the procuring entity is required to respond in a timely fashion and communicate the clarification to all potential bidders (in writing).

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

TR do not contain specific provisions to address this issue.

The e-Tender Portal has a clarification function. SCM Instruction No.09 of 2022/23 provides at s.3.4 that institutions may upload any clarification requests that have been received and the responses provided on the e-Tender portal as a measure to ensure transparency in the bid process, but this is not mandatory.

SCM Guide s.4.8 Bid Content: “Each prospective bidder should be provided with the same information and should be assured of an equal opportunity to obtain additional information on a timely basis.” It also provides for possibility of pre-bid meetings to seek clarification. This provision goes on to confirm that “Any additional information, clarification, correction of errors or modifications of bidding documents should be sent to each recipient of the original bidding documents in sufficient time before the deadline for receipt of bids to enable bidders to take appropriate actions. If necessary, the deadline should be extended.”

CIDB

CIDB SFU Annex C Standard Conditions of Tender includes provisions for a tender to request clarification of tender documents at least 5 working days before tender closing time and for a response to be provided and to notify all tenderers who collected tender documents, although no timescale for response is specified. There are also provisions on clarification meetings.

Gap analysis

Although SCM Instruction provides for uploading of clarification requests and responses and guidance makes it clear that procuring entities should provide for a process for clarification of procurement documents, Treasury Regulations do not contain specific provisions making this a requirement.

Recommendations

To enable equal treatment of suppliers help them to understand clearly what is requested of them and how the procurement process is to be carried out, introduce legislative provisions to clearly provide a right for potential bidder to request clarification of a procurement document, with specified timelines for responses and a requirement for written communication of clarifications to all potential bidders.

Sub-indicator 1(f)

Evaluation and award criteria

The legal framework mandates that:

Assessment criterion 1(f)(a):

The legal framework mandates that the evaluation criteria are objective, relevant to the subject matter of the contract, and precisely specified in advance in the procurement documents, so that the award decision is made solely on the basis of the criteria stipulated in the documents.

Conclusion: No gap

Red flag: No

Qualitative analysis

Evaluation criteria are required to be specified in advance in the procurement documents so that the award decision is made on the basis of prescribed criteria, this includes both functionality evaluation criteria and application of preference points system for identified goals.

Pillar I. Legal, Regulatory, and Policy Framework

TR s.16A3.2 requires that, in accordance with underlying principles derived from the Constitution, a supply chain management system is “fair, equitable, transparent and cost effective” and that bid documentation must include the evaluation criteria. TR do not contain specific provisions using terminology mandating evaluation criteria to be objective and relevant.

The TR provide that bid documentation must include “evaluation and adjudication criteria” including those prescribed under the PPPFA and B-BBEEA. The Standard Bidding Documents published by OCPO include a Preference Points Claim form (SBD 6.1). The regulations supporting implementation of the PPPFA are the Preferential Procurement Regulations 2022 (2022 PPPFA Regulations) which took effect from 16 January 2023.⁴² 2022 PPPFA Regulations require all organs of state to stipulate in the tender documents the applicable preference point system and the specific goal in the invitation to submit the tender for which a point may be awarded, and the number of points awarded for each goal. There are also requirements concerning identification of the relevant preference point system (80/20 or 90/10), and formulae to be applied to calculate preference points. (see analysis at 1(a)(a) for more information on the PPPFA and preference points system.

SCM Guide (advisory) provides requires that institutions should “Make available the broad criteria intended for the evaluation of bids, to evaluate bids objectively and notify the outcome promptly.” (s.2.5.3); the bidding documents should specify any factors which will be taken into account in evaluating bids and how such factors would be quantified or otherwise evaluated.” (s.4.8), and; that Bids should only be evaluated in terms of the criteria stipulated in the bidding documents (s.4.11).

CIDB

The PFMA regime provisions apply. The CIDB SFU requires procurement documents to “set out, in a clear and unambiguous manner, the criteria by which tenders are to be evaluated.” (s.4.2.2.1). s.4.3 provides that “Generally, tender submissions are evaluated in terms of “Financial offer and preference”. It also requires use of a Standard Tender Evaluation Method as described in the SFU. In the event of “functionality” being introduced as part of the evaluation criteria, such a requirement must be stated in the tender documents.” S.4.3.1 goes on to provide that evaluation criteria for measuring functionality must be objective and tender documents must specify the evaluation criteria for measuring functionality, points for each criteria/sub-criteria and minimum qualifying score. The minimum qualifying score must be determined separately for each tender and may not be so low that it may jeopardize quality or so high as to be unreasonably restrictive. Standard procurement documents reflect these provisions.

Gap analysis

Recommendations

Assessment criterion 1(f)(b):

The legal framework allows the use of price and non-price attributes and/or the consideration of life cycle cost as appropriate to ensure objective and value-for-money decisions.

Conclusion: Substantive gap

Red flag: No

⁴² The 2022 PPPFA Regulations repealed the Preferential Procurement Regulations 2017 (2017 PPPFA Regulations) following a judgment of the Constitutional Court on 16 February 2022. Minister of Finance v Afribusines NPC 2022(4) SA 362 (majority judgment) & see also National Treasury Media Statement on 2022 PPPFA Regulations. https://www.treasury.gov.za/comm_media/press/2022/2022110801%20Media%20Statement%20-%20PPP%20Regulations%202022.pdf

Pillar I. Legal, Regulatory, and Policy Framework

Qualitative analysis

The PFMA regime does not clearly provide for the use of price and non-price attributes and/or consideration of life cycle cost, or total cost of ownership. The PPPFA preference point system mandates use of non-price attributes related to the PPPFA framework through application of the preference points system at the final stage of evaluation of tenders.

The legal framework allows the use of “functionality” evaluation criteria to be applied in the tender evaluation process before evaluation of preference and price. In a standard tender evaluation process for single stage procurement using functionality criteria the process can be summarized as follows:

Tenders are first checked to determine completeness and then for responsiveness, to confirm compliance with requirements of the procurement documents and eligibility criteria. Tenders which are complete and compliant are then evaluated in two stages: Stage 1 evaluation of “functionality” criteria, using a pass/fail score and applying weightings and methodology set out by the procuring entity in the tender documents. Tenders which fail the functionality evaluation are rejected. Tenders which pass the functionality evaluation move to Stage 2. The functionality score is not carried through to Stage 2. Stage 2: evaluation applies the PPPFA preference scheme and Price.

Functionality criteria are bid specific. According to NT, “functionality evaluation criteria test bidders’ ability to provide what is to be bought. Whether or not a bid should be invited on the basis of the functionality criteria depends on the nature of the required commodity or service, taking into account quality, reliability, viability and durability and the bidder’s technical ability to carry out the contract”.⁴³ Although not clearly expressed as such, it appears that “functionality” criteria can be used in more than one way. For example, they may be used as an extension of the assessment of the ability/suitability of a tenderer to look at issues such as relevant experience. Functionality criteria could, potentially, go further and include evaluation of other non-price attributes such as environmental impact of a product’s life cycle but this positive impact will be limited by the way in which the overall value for money assessment is conducted. The value for money assessment comprises evaluation of functionality, preference and price. The functionality element is, however, a pass/fail score, which means that the final outcome will not reflect the qualitative benefits of offers exceeding the pass/fail mark. (see also analysis at 9(b)).

CIDB

The PFMA regime provisions apply. The CIDB SFU requires procurement documents to “set out, in a clear and unambiguous manner, the criteria by which tenders are to be evaluated.” (s.4.2.2.1). s.4.3 provides that “Generally, tender submissions are evaluated in terms of “Financial offer and preference”. In the event of “functionality” being introduced as part of the evaluation criteria, such a requirement must be stated in the tender documents.” S.4.3.1 goes on to provide that evaluation criteria for measuring functionality must be objective and tender documents must specify the evaluation criteria for measuring functionality, points for each criteria/sub-criteria and minimum qualifying score. The minimum qualifying score must be determined separately for each tender and may not be so low that it may jeopardize quality or so high as to be unreasonably restrictive. Standard procurement documents reflect these provisions.

Gap analysis

The PFMA regime does not clearly provide for the use of price and non-price attributes and/or consideration of life cycle cost, or total cost of ownership. Where functionality criteria are used, the prescribed methodology means that the value for money assessment will not always fully reflect the full value of qualitative aspects of tenders.

Recommendations

Include provisions in the legal framework to clearly provide for the use of methods such as life cycle costing or total cost of ownership together with clear requirements on the data bidders should provide in their tenders to

⁴³ SCM Review Report 2015, National Treasury

Pillar I. Legal, Regulatory, and Policy Framework

make the determination. Consider the ways in which non-price functionality criteria can be best assessed to ensure that the qualitative benefits can be differentiated and, potentially, higher marks awarded for offers which exceed baseline requirements.

Assessment criterion 1(f)(c):

The legal framework mandates that quality is a major consideration in evaluating proposals for consulting services, and clear procedures and methodologies for assessment of technical capacity are defined.

Conclusion: No gap

Red flag: No

Qualitative analysis

The legal framework requires quality to be a major consideration in evaluating proposals for consulting service and there are clear procedures and methodologies for doing so.

TR SCM 16A6(g) states that the AO/AA must ensure that instructions issued by NT in respect of consultants are complied with. PN SCM Instruction No.3 of 2003 requires that consultants be appointed by means of competitive bidding processes whenever possible and, in general, the procedures described for acquisition of goods and services apply subject to provisions in the Instruction which includes reference to use of both Quality and Cost-Based Selection and Quality Based Selection. SCM Guide Chapter 5 contains detailed provisions on appointment of consultants including evaluation of bid/proposals allowing for quality as a major consideration.

CIDB

In addition to TR SCM provisions referred to above, CIDB Best Practice Guide A7 The Procurement of Professional Services, provides detailed guidance on appointment of consultants for the provision of professional services, with strong emphasis on qualitative assessment.

Gap analysis

Recommendations

Assessment criterion 1(f)(d):

The legal framework mandates that the way evaluation criteria are combined and their relative weight determined should be clearly defined in the procurement documents.

Conclusion: No gap

Red flag: No

Qualitative analysis

The PFMA regime and CIDB regime set out requirements on the processes to be applied including requirements for publication in the procurement documents of scoring, weightings and methodology for the evaluation of “functionality” evaluation criteria (see analysis at 1(f)(b)). The PPPFA framework requires that the preference points system to be applied is clearly defined in the procurement documents and the PFMA framework and standard documents reflect this.

SCM Guide: s.4.11 Evaluation, requires that on evaluation points scored for price must be added to points scored for goals and the contract is usually awarded to the bidder who scores the highest points.

CIDB

The CIDB SFU requires procurement documents to “set out, in a clear and unambiguous manner, the criteria by which tenders are to be evaluated.” (s.4.2.2.1). S.4.3.1 provides that evaluation criteria for measuring functionality

Pillar I. Legal, Regulatory, and Policy Framework

must be objective and tender documents must specify the evaluation criteria for measuring functionality, points for each criteria/sub-criteria and minimum qualifying score.

Gap analysis

Recommendations

Assessment criterion 1(f)(e):

The legal framework mandates that during the period of the evaluation, information on the examination, clarification and evaluation of bids/proposals is not disclosed to participants or to others not officially involved in the evaluation process.

Conclusion: No gap

Red flag: Choose an item.

Qualitative analysis

PN SCM Instruction No.4 of 2003, The Code of Conduct for Supply Chain Management Practitioners (SCM Code of Conduct), s.5 Confidentiality, requires that “No information regarding any bid/contract/bidder/contractor may be revealed if such actions will infringe on the relevant bidder’s/Contractor’s personal rights ” and requires that “Matters of confidential nature in the possession of supply chain practitioners should be kept confidential unless legislation, the performance of duty or the provisions of law requires otherwise. [...]”

SCM Guide s.4.10 Receiving responses – Confidentiality requires that after bid opening, information relating to the examination, clarification and evaluation of bids and recommendations concerning awards should not be disclosed to bidders or other persons not officially concerned with the process, until the successful bidder is notified of the award.

NT SCM Circular, 3 March 2006, The Code of Conduct for Bid Adjudication Committees, emphasises the importance of confidentiality and non-disclosure and requires members of the Committee and officials rendering administrative support to sign a Declaration of Confidentiality and Impartiality.

CIDB

CIDB Code of Conduct requires that the employer, his employees or agent (in the case of procuring entities this will include those involved in the evaluation process) shall “Not breach the confidentiality of information, particularly intellectual property, provided by tenderers in support of their tender submissions.”

CIDB SFU also refers to keeping confidential proposed solutions and associated information in the context of competitive negotiation procedures.

Gap analysis

Recommendations

Sub-indicator 1(g)

Submission, receipt, and opening of tenders

The legal framework provides for the following provisions:

Assessment criterion 1(g)(a):

Opening of tenders in a defined and regulated proceeding, immediately following the closing date for bid submission.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

Pillar I. Legal, Regulatory, and Policy Framework

There is no procedure prescribed for opening of tenders in Treasury Regulations or Instructions, although there is more detail in the SCM Guide. The SBD Invitation to Bid and Bidding terms SBD ITB 1 refers to the closing date and time for submission of bids and address for deposit of bid documents but contains no further information on bid submission.

SCM Guide (advisory): s.4.8 Bid submission: Bidders should be permitted to submit bids by mail or by hand. The deadline and place of receipt of bids should be specified in the invitation to bid. S.4.10 provides that bids received after the time stipulates should not be accepted. s.4.10 Receiving responses - Opening of Bids requires the time for the bid opening to be the same as the deadline for receipt of bids or promptly thereafter, as set out in the invitation to bid. The institution should open all bids at the stipulated time and place. Bids should be opened in public with bidders or their representative allowed to be present with name of bidder and total amount of being read out, if requested. The names of the bidders and their individual total prices should be recorded when bids are open. s.4.11 Evaluating responses includes guidance on rejection of bids, including late submission of bids.

CIDB

CIDB SFU CIDB SFU Annex C Standard Conditions of Tender contains provisions at C.3.4 on Opening of Tender Submissions requires opening at the time and place stated in the tender data.

Gap analysis

Although it is generally understood that bid opening is to be conducted in public, there is no procedure prescribed for public opening of tenders in Treasury Regulations or Instructions and the right of bidders or their representatives and other with legitimate interest in outcomes, such as representatives of civil society organized is not referenced in the PFMA regime.

Recommendations

To enhance transparency and accountability, introduce legislative provisions applying to procurement of goods, services, consulting services and construction related, to clearly set out the process for bid opening and specify who is permitted to attend public opening of tenders. Legislative provisions on bid opening should also require that, save in specified cases, bids are opened immediately after the deadline for submission of tenders, to reduce the possibility of loss of alteration of proposals and submissions.

Assessment criterion 1(g)(b):

Records of proceedings for bid openings are retained and available for review.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

TR do not contain specific provisions to address this issue. SCM Guide (advisory) requires the names of bidders and their total prices to be recorded when bids are opened. CIDB regime provides that the bid opening record is made available to all interested persons on request.

CIDB

CIDB SFU CIDB SFU Annex C Standard Conditions of Tender contains provisions at C.3.4 on Opening of Tender Submissions requires procuring entities to make available the bid opening record to all interested persons on request (4.10)

Gap analysis

The provisions on records of bid proceedings in the current legal framework are limited and should be enhanced, to ensure standard practices and enhance transparency and accountability.

Recommendations

Introduce legislative provisions applying to procurement of goods, services, consulting services and construction related, clearly setting out the information that should be recorded, which, for open tendering should include: name

Pillar I. Legal, Regulatory, and Policy Framework

& address of bidders, date and condition the tender was received (for compliance), tender prices, any withdrawals or modifications to tenders duly submitted and any alternative offers requested or permitted (where relevant and permissible). Legislative provisions should also require that records of bid opening are maintained and shared with the bidders and are available for review and audit purposes.

Assessment criterion 1(g)(c):

Security and confidentiality of bids is maintained prior to bid opening and until after the award of contracts.

Conclusion: No gap

Red flag: Choose an item.

Qualitative analysis

The Code of Conduct for Supply Chain Management Practitioners (SCM Code of Conduct), issued in PN SCM Instruction No.4 of 2003, s.5 Confidentiality, requires that “No information regarding any bid/contract/bidder/contractor may be revealed if such actions will infringe on the relevant bidder’s/Contractor’s personal rights ” and requires that “Matters of confidential nature in the possession of supply chain practitioners should be kept confidential unless legislation, the performance of duty or the provisions of law requires otherwise. [...]”

SCM Guide (4.10) requires that after public opening of bids, information relating to the examination, clarification and evaluation of bids and recommendations concerning bid award shall not be disclosed to those not officially involved in the process until after the successful bidder is notified of the award.

CIDB

CIDB Code of Conduct requires that the employer, his employees or agent (in the case of procuring entities this will include those involved in the evaluation process) shall “Not breach the confidentiality of information, particularly intellectual property, provided by tenderers in support of their tender submissions.”

CIDB SFU also refers to keeping confidential proposed solutions and associated information in the context of competitive negotiation procedures.

Gap analysis

Recommendations

Assessment criterion 1(g)(d):

The disclosure of specific sensitive information is prohibited, as regulated in the legal framework.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

Provisions on disclosure of specific sensitive information in the PFMA regime are limited. There is specific reference to protection of intellectual property rights in the CIDB regime.

The Code of Conduct for Supply Chain Management Practitioners (SCM Code of Conduct), issued in PN SCM Instruction No.4 of 2003, s.5 Confidentiality, requires that “Matters of confidential nature in the possession of supply chain practitioners should be kept confidential unless legislation, the performance of duty or the provisions of law requires otherwise. [...]” SCM Guide (4.10) requires that after public opening of bids, information relating to the examination, clarification and evaluation of bids and recommendations concerning bid award shall not be disclosed to those not officially involved in the process until after the successful bidder is notified of the award.

Pillar I. Legal, Regulatory, and Policy Framework

CIDB

CIDB Code of Conduct requires that the employer, his employees or agent (in the case of procuring entities this will include those involved in the evaluation process) shall “Not breach the confidentiality of information, particularly intellectual property, provided by tenderers in support of their tender submissions.”

CIDB SFU also refers to keeping confidential proposed solutions and associated information in the context of competitive negotiation procedures.

Gap analysis

Provisions on disclosure of specific sensitive information are limited and should be enhanced to take into account the legitimate needs of bidders to protect trade secrets and other proprietary information, in particular.

Recommendations

Introduce legislative provisions applying consistently to procurement of all types - goods, services, consulting services and construction related- to ensure measures which take into account the legitimate needs of bidders to protect trade secrets and other proprietary information as well as the need to avoid disclosing information that can be used to distort competition. It can be difficult balancing act to ensure appropriate levels of transparency whilst protecting legitimate interests and so it is advisable to support such provisions with practical guidelines to facilitate decision making on a case-by-case basis.

Assessment criterion 1(g)(e):

The modality of submitting tenders and receipt by the government is well defined, to avoid unnecessary rejection of tenders.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The CIDB regime sets out detailed requirements on submission of tenders. SCM Guide (advisory): s.4.8 Bid submission: Bidders should be permitted to submit bids by mail or by hand. The deadline and place of receipt of bids should be specified in the invitation to bid. S.4.10 provides that bids received after the time stipulates should not be accepted.

Notification of award: Instruction No.2 of 2022/23 requires notifications of open competitive bid awards to be published on the e-Tender Portal within 10 working days of the successful bidder accepting the bid award.

CIDB

CIDB SFU Annex C Standard Conditions of Tender contains provisions at C.2.13 on submitting a tender offer which clearly sets out in detail the requirements for submission of tenders.

Notification of award: CIDB Regulations require publication of contract award on the CIDB website.

Gap analysis

The modality of submitting tenders and receipt by government is not well defined in the legislative framework, thus raising the risk of rejection of otherwise compliant proposals.

Recommendations

Introduce provisions applying to procurement of goods, services, consulting services and construction related, clearly setting out how bids are to be submitted, including number of copies, sealing and marking of envelopes and addressing security and confidentiality requirements, with necessary flexibilities to allow for e-GP electronic submission and receipt.

Pillar I. Legal, Regulatory, and Policy Framework

<p style="text-align: center;">Sub-indicator 1(h) Right to challenge and appeal The legal framework provides for the following:</p>
<p>Assessment criterion 1(h)(a): Participants in procurement proceedings have the right to challenge decisions or actions taken by the procuring entity.</p>
<p>Conclusion: No gap</p>
<p>Red flag: No</p>
<p>Qualitative analysis Rights to challenge procurement proceedings for procurement of goods (supplies), services and construction (works) related procurement are based on administrative and common law rights and principles using judicial review through the courts. The PFMA regime does not set out an express right for participants to challenge decisions or actions taken by the procuring entity or designate a route for challenge.</p> <p>There is some provision for a complaints mechanism at procuring entity level relating to operation of SCM system, with detail left to be described at local level. Checks of institutions' websites by MAPS Assessment team demonstrated a mixed picture in terms of information on available of an SCM complaints system.</p> <p>TR s.16A9.3 requires the National Treasury and each provincial treasury to establish and mechanism "(a) to receive complaints regarding alleged non-compliance with the prescribed minimum norms and standards; and (b) to make recommendations for remedial actions to be taken if non-compliance of any norms and standards is established, including any recommendations of criminal steps to be taken in case of corruption, fraud or other criminal offences." Treasury SCM Regulation 16A9.1 requires AO/AA to investigate any allegations.... of corruption, improper conduct or "failure to comply with the supply chain management system..." SCM Instruction No.3 of 2021/22 details measures for preventing and combating abuse in the SCM system.</p>
<p>Gap analysis</p>
<p>Recommendations</p>
<p>Assessment criterion 1(h)(b): Provisions make it possible to respond to a challenge with administrative review by another body, independent of the procuring entity that has the authority to suspend the award decision and grant remedies, and also establish the right for judicial review.</p>
<p>Conclusion: No gap</p>
<p>Red flag: No</p>
<p>Qualitative analysis As noted at 1(h)(a), the PFMA does not set out an express right for participants to challenge decisions or actions taken by the procuring entity or designate a route for challenge. Independent review of decisions of procuring entities in relation to public procurement is through the court system, with applications for judicial review being made to the relevant High Court (there are 14 Provincial Division of the High Court). Applications for interim relief (including for suspension of an award decision) can be made and grant of applications is at the discretion of the Court. Courts have a range of remedies available.</p> <p>There are two main avenue for judicial review, the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and the constitutional principle of legality applying common law.</p>

Pillar I. Legal, Regulatory, and Policy Framework

Remedies in proceedings for judicial review (listed in PAJA s.8) include directing the administrator to give reasons or act in a manner that the court requires; prohibit the administrator from acting in a particular manner; setting aside the administrative action and remitting the matter for reconsideration by the administrator or in exceptional cases substituting or varying the administrative action or correcting the defect or payment of compensation. Orders made by the court may include directing the taking of a decision, declaring the rights of the parties in relation to the taking of the decision; directing any of the parties to do, or refrain from doing any action or thing which the court considers necessary.

The Court's discretion to "grant any order that is just and equitable" means that contract award decisions may be set aside and concluded contracts declared void and there is case law on these issues.

Interim relief: PAJA s.8(1) specifically provides for interim relief pending judicial review applications, with general requirements for interim relief applying in public procurement cases. Interim relief is a discretionary remedy with the court weighing the interests of the respective parties in granting or withholding relief.

For applications under PAJA, internal remedies must, as a general rule, be exhausted before court proceedings are commenced.

Gap analysis

Recommendations

Assessment criterion 1(h)(c):

Rules establish the matters that are subject to review.

Conclusion: No gap

Red flag: No

Qualitative analysis

As noted at 1(h)(a), the PFMA regime does not set out an express right for participants to challenge decisions or actions taken by the procuring entity or designate a route for challenge. The PFMA regime does not establish the matter that are subject to review. Judicial review applications can be made on widely defined grounds applying to decisions by procuring entities in the context of public procurement.

In practice, in most cases, decisions made during a procurement process become public at the end of the process when the contract award decision is made and thus challenges arise at that point, or afterwards. It is possible to challenge earlier decisions, if known, such as a decision not to go out to procurement. It is common for parties to seek to resolve concerns through less formal means.⁴⁴

PAJA s.6 lists administrative actions which are subject to review and include the following, of particular relevance to public procurement decisions (in summary): non-compliance with a mandatory or material procedure or condition prescribed by an empowering provision; procedural unfairness; error of law; actions taken for unauthorised reasons, ulterior purposes for motives, with irrelevant considerations, bad faith, arbitrarily or capriciously; contravention of a law; failure to take a decision or unreasonable delay in doing so; unreasonable exercise of power

An application for judicial review under the principle of legality, which continues to be developed by the Courts, encompasses several grounds for review including lawfulness, rationality, undue delay and vagueness.

Gap analysis

Recommendations

Assessment criterion 1(h)(d):

⁴⁴ Information provided by NT/OCPO in discussions with MAPS Assessment Team, January/February 2024.

Pillar I. Legal, Regulatory, and Policy Framework

Rules establish time frames for the submission of challenges and appeals and for issuance of decisions by the institution in charge of the review and the independent appeals body.

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

Applications for judicial review under PAJA must be made PAJA s.7(1) “without reasonable delay and not later than 180 days after the date [...] on which proceedings instituted in terms of internal remedies [...] have been concluded.” (PAJA s.7(1)) This time frame can be extended. Applications for judicial review under the principle of legality are not subject to the time constraints of PAJA applications. The courts in South Africa have “long held that reviews must, as a general rule, be instituted without undue delay”⁴⁵ and courts have power to refuse a review application in the case of unreasonable delay. Time frames for court decisions and publication of judgments, where relevant, are subject to the Uniform Rules of Court. Applicants can make requests relating to timelines as part of the court case management process. Courts may reserve judgment which can mean delays in issuing of judgments.

According to World Bank data (2017) the [average] time taken by the first-tier review body (Court) to render a decision is 228 days from filing of a complaint.⁴⁶

Supplier confidence in the system is limited. In response to the MAPS private sector survey, 58% of respondents said that the system for challenge of public procurement decisions and appeals to the court are not trustworthy and 56% were of the view that court judgments are not consistent.

Gap analysis

Time frames for issuing decisions on appeal are not specified in the public procurement legal framework. The rules applying to time frames for application for judicial review and covering the process for issuance of decisions are contained in statute and Rules which are of general application to judicial review cases heard by the High Court. The available procedures and time taken for court proceedings and decisions do not, in practice, guarantee an effective and efficient process meeting the practical and commercial imperatives of procurement related complaints. In addition, necessary reforms require a national mandate and actions going beyond those lying solely with in the procurement sphere.

The Gap is assigned a red flag because lack of an efficient review system can severely impede the objectives sought through public procurement by reducing confidence in the system which can have a negative impact on competition. In addition, necessary reforms require a national mandate and actions going beyond those lying solely with in the procurement sphere.

Recommendations

Consider undertaking a critical study of the data and information available and stakeholders views on the operation of the system of judicial review to assess the fitness of purpose and efficiency of the current system for procurement complaints using the route of judicial review and to gauge confidence in and effectiveness of the operation of the system in practice. This should be undertaken with the aim of identifying whether the existing route may be adapted to meet the MAPS methodology requirements for an efficient review system or whether a new approach is required, such as the establishment of a specialist independent procurement review body.

Assessment criterion 1(h)(e):

Applications for appeal and decisions are published in easily accessible places and within specified time frames, in line with legislation protecting sensitive information.

⁴⁵ Minister of International Relations and Co-operation and Others v Simeka Group (Pty) Ltd and Others (610/2021) [2023] ZASCA 98 (14 June 2023), paragraph [65].

⁴⁶ <https://pubdocs.worldbank.org/en/996201520270732530/South-Africa.xlsx>

Pillar I. Legal, Regulatory, and Policy Framework

Conclusion: Substantive gap
Red flag: Yes
Qualitative analysis There is no central source of all public procurement related decisions by the High Court/s. Individual judges may decide to publish a judgment if it is in the public interest to do so or if it concerns an important point of law. As a general rule, all hearings are in public and any judgment or order of the court is a public document.
Gap analysis Publication of decisions in procurement cases allows interested parties to be better informed as to the consistency and fairness of the process. Court judgments are, as a general rule, public documents but High Court judgments are not published as a matter of course and there is no official central government source of all public procurement related decisions made by the High Court. The Gap is assigned a red flag because lack of comprehensive and reliable information on review can severely impede the objectives sought through public procurement by reducing confidence in the system.
Recommendations Pending review and decision on the fitness for purpose of the current system and proposals for improvement or changes, consider ways to gather more information on High Court judgments in procurement matters to start to collate relevant information. One possibility may be to require organs of state to report to NT when an application for judicial review is issued in the High Court and to notify NT of the outcome, with relevant case references.
Assessment criterion 1(h)(f): Decisions by the independent appeals body can be subject to higher-level review (judicial review).
Conclusion: No gap
Red flag: No
Qualitative analysis Decisions of the High Court can be appealed to a superior court. Superior Courts Act No.10 of 2013 confirms the right of appeal to a superior court against a decision of a lower court. This covers a decision by Division of the High Court which may be appealed to the Supreme Court of Appeal, also possibly Constitutional Court. In practice, procurement cases are regularly considered by the Supreme Court of Appeal.
Gap analysis
Recommendations
Sub-indicator 1(i) Contract management The legal framework provides for the following:
Assessment criterion 1(i)(a): Functions for undertaking contract management are defined and responsibilities are clearly assigned.
Conclusion: No gap
Red flag: No

Pillar I. Legal, Regulatory, and Policy Framework

Qualitative analysis

Treasury Regulations set out a number of provisions of general application relating to contract management issues, placing the lead responsibility on the AO/AA, including: R 8.1 to put measures in place for payment approval and processing; TR 10 implement Asset management – control systems and processes; TR SCM 16A9 develop and implement an effective and efficient supply chain management system to provide for management of demand, acquisition, logistics, disposal, risk and regular assessment of supply chain performance. TR SCM 16A4 requires the AO/AA to establish a separate supply chain management unit to implement the institution’s SCM system.

SCM Guide (advisory) s.4.12 Contract administration confirms that contract administration is the responsibility of the AO/AA. Chapter 6 Logistics Management focuses on goods and includes requirements relating to stock/warehouse management, order processing, monitoring vendor performance and accounts payable. Chapter 9 Supply Chain Performance sets out some basic issues to be review in monitoring and analysis, to determine whether the proper process is being followed and whether desired objectives are achieved.

The Contract Management Framework, issued by National Treasury (August 2010)⁴⁷ is a high-level document that sets out requirements for government institutions pertaining to the management of, and accounting for, contract agreements, including allocation of responsibilities. Practical guidance on the operation of the Contract Management Framework is contained in separate and detailed Contract Management Guide (2010).⁴⁸

CIDB

In addition to TR/SCM provisions, here are CIDB Best Practice Guides which support aspects of pro-active contract management, including: A1 the Procurement Cycle, A6 Management of Construction Risks and C2 Choosing an Appropriate Form of Contract.

Gap analysis

Recommendations

Assessment criterion 1(i)(b):

Conditions for contract amendments are defined, ensure economy and do not arbitrarily limit competition.

Conclusion: No gap

Red flag: No

Qualitative analysis

SCM Instruction No.3 of 2021/22 on Enhancing Compliance Transparency and Accountability in SCM, section 5 Expansions and variation of contracts permits the AO/AA to expand a contract by increasing the scope of work or vary a contract by changing the scope of work. If an expansion or variation requires extension in the period of the contract, the justification given (“motivation”) must distinguish between change in scope and change in the period of contract extension. The AO/AA is required to submit a monthly report to the relevant treasury and the AGSA where the original contract is expanded or varied as follows:

- by more than 20% or R 20 million (whichever is the lesser amount), including all applicable taxes, for construction related goods and/or services;
- by more than 15% or R 15 million (whichever is the lesser amount), including all applicable taxes, for all other goods and/or services.

⁴⁷ <https://ag.treasury.gov.za/org/tss/Shared%20Documents/Contract%20Management/Contract%20Management%20Framework%20-%20Ver%201.pdf>

⁴⁸ <https://oag.treasury.gov.za/Publications/Forms/AllItems.aspx?RootFolder=%2FPublications%2F16%2E%20Contract%20Management%2FGuideline&FolderCTID=0x0120007EBBC03F454D95408FB944B7B07F6166&View={EA6E6B15-593D-4839-A804-A91A49CB20A0}>

Pillar I. Legal, Regulatory, and Policy Framework

The relevant treasury and AGSA may request additional information. These expansions or variations must also be reported to National Treasury in an annual report.

SCM Guide s.4.8 Price adjustments due to escalation sets out a recommended contractual price adjustment formula and guidance on price adjustments due to rate of exchange (ROE).

NT Instruction No.3 of 2019/20 Framework for Infrastructure Delivery and procurement Management, sets out at a high level, principles and measures to be applied for management, review and improvement.

CIDB

Standard Conditions of Contract issued/supported by CIDB include relevant contract variation provisions.

Gap analysis

Recommendations

Assessment criterion 1(i)(c):

There are efficient and fair processes to resolve disputes promptly during the performance of the contract.

Conclusion: No gap

Red flag: No

Qualitative analysis

The PFMA regime does not include provisions on dispute resolution. Dispute resolution is addressed in contract terms. Government Procurement General Conditions of Contract (Revised February 2008) s.27 Settlement of Disputes requires, in summary: (1) Initial attempt to resolve dispute or difference amicably by mutual consultation. (2) If after 30 days the attempt to resolve the dispute is not successful, with party may give notice of intention to commence with mediation in accordance with rules of procedure specified in Special Conditions of Contract. If mediation is unsuccessful: (3) matter may be settled in South African court of law.

CIDB

CIDB standard form contracts make provision for resolution of disputes by adjudication. There is a CIDB Adjudication procedure, based on the Institute of Civil Engineers Adjudication procedure, 1997 which can be used in any form of contract including suppliers, professional services, joint venture and subcontracts. According to CIDB, the GCC for construction works adopts the CIDB procedure. CIDB has issued Best Practice Guidance C3 Adjudication, sets out information on incorporation of relevant adjudication provisions in JBCC, FIDIC and NEC contracts, which include dispute resolution and arbitration provisions.

Gap analysis

Recommendations

Assessment criterion 1(i)(d):

The final outcome of a dispute resolution process is enforceable.

Conclusion: No gap

Red flag: No

Qualitative analysis

The final outcomes of dispute resolution processes are enforceable.

Pillar I. Legal, Regulatory, and Policy Framework

Mediation: Where mediation is conducted in accordance with Mediation Rules of the Association of Arbitrators (Southern Africa), the Settlement Agreement shall be finance and binding.

Adjudication decisions must be enforceable as a matter of contractual obligation between parties as this is not an arbitral award.

Arbitration: South Africa has an Arbitration Act No.42 of 1965 which provides for binding effect of arbitration agreements and powers of the court in relation to arbitration agreements including award by order of the court. South Africa acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 3 May 1976.⁴⁹

Court decisions: Decisions of South African courts of law are enforceable.

Gap analysis

Recommendations

Sub-indicator 1(j)

Electronic Procurement (e-Procurement)

The legal framework provides for the following:

Assessment criterion 1(j)(a):

The legal framework allows or mandates e-Procurement solutions covering the public procurement cycle, whether entirely or partially.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The legal framework deals with use of e-procurement in a piecemeal manner and allows or mandates e-Procurement solutions for certain aspects of the procurement cycle where open competitive bidding is used.

There is no single, comprehensive end-to-end e-GP system. Local use of e-procurement and e-GP systems is envisaged. See, for example, SCM Guide s.14.2 which refers to the requirement on AO/AA to obtain permission from the relevant treasury before introduction of an e-procurement system as prerequisite to ensure compatibility across government.

SCM Instruction notes address e-Procurement solutions as follows:

Use of the on-line e-Tender Portal is mandated for advertising of open competitive bids, to include the publication of complete set of bid documents (SCM Instruction No.9 of 2022/23).

Amendment to advertised bids, cancellation of bids and notification of final award of bids must also be published on the e-Tender Portal.

The Central Supplier Database (CSD) to check for supplier eligibility (see analysis at 1(d)9e).

The e-Tender Portal includes a clarification function, use of which is not mandatory.

CIDB

Use of the on-line CIDB website is required for advertisement of construction related procurement opportunities.

Gap analysis

The current legal framework requires updating to fully align with current use of e-procurement and allow for future developments in use of e-procurement solutions.

⁴⁹ <https://www.newyorkconvention.org/countries>

Pillar I. Legal, Regulatory, and Policy Framework

Recommendations

The legal framework will need to be reviewed to permit and facilitate the introduction and implementation of the upgraded or new e-GP systems. This will require consideration of changes having an impact on the whole procurement cycle, from procurement planning through to contract and performance management, delivery and payment. If substantially upgraded or new e-GP systems are foreseen, it is likely that functionalities will be progressively rolled out. Provisions in the legal framework will need to allow sufficient flexibility to take account of staged roll-out, including stages when end-to-end procurement is conducted partly using e-GP system and partly paper-based.

See 1(j)(a) and 1(j)(b) below for specific Gaps and related Recommendations, to include provisions in the revised legal framework that (1) ensure the use of appropriate tools and standards that provide unrestricted and full access to the system (2) require interested parties to be informed which parts of the processes will be managed electronically. See also analysis and recommendations at Indicator 7.

Assessment criterion 1(j)(b):

The legal framework ensures the use of tools and standards that provide unrestricted and full access to the system, taking into consideration privacy, security of data and authentication.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

There are no provisions in the current legal framework that ensure the use of tools and standards that provide unrestricted and full access to the system, taking into consideration privacy, security of data and authentication.

Gap analysis

The legal framework does not include necessary provisions to facilitate effective use of e-procurement systems by ensuring that the use of tools and standards that provide unrestricted and full access to the system, taking into consideration privacy, security of data and authentication.

Recommendations

Introduce provisions into legal framework to ensure the consistent application of electronic technologies and require standardized formats, technical equipment and connection arrangements and procedures to grant unrestricted and full access to e-procurement. These provisions will need to be comprehensive and tailored to reflect the particularities of the e-GP system/s in South Africa.

Assessment criterion 1(j)(c):

The legal framework requires that interested parties be informed which parts of the processes will be managed electronically.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

TR do not contain specific provisions to address this issue. There are no provisions in the current legal framework that require interested parties to be informed which part of the process will be managed electronically.

Gap analysis

There are no provisions in the current legal framework that require interested parties to be informed which part of the process will be managed electronically. Bidders need to know in advance which parts of the process will be managed electronically, so they have a clear understanding of the processes to be followed.

Pillar I. Legal, Regulatory, and Policy Framework

Recommendations

Introduce provisions into legal framework to make it mandatory to inform potential bidders which parts of the processes will be managed electronically (e.g. availability of procurement documents, communication, bid submission, contract awards, billing and payments etc.). Provisions in the legal framework will need to allow sufficient flexibility to take account of staged roll-out in the event of upgraded or new end-to-end e-GP systems and will need to clarify whether conventional paper-based procurement is still allowed and at what phases of the procurement process.

Sub-indicator 1(k)

Norms for safekeeping of records, documents and electronic data

The legal framework provides for the following:

Assessment criterion 1(k)(a):

A comprehensive list is established of the procurement records and documents related to transactions including contract management. This should be kept at the operational level. It should outline what is available for public inspection including conditions for access.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

NT/OCPO has not issued a comprehensive list for use by procuring entities at operational level, of procurement records and documents to be retained related to procurement transactions, including contract management. Rights of access for public inspection are covered by the Promotion of Access to Information Act (PAIA) and PAIA Manuals issued by public bodies in accordance with statutory obligations. See analysis at 1(k)(b) on document retention obligations.

Under the Promotion of Access to Information Act No.2 of 2000, s.14, public bodies are required to compile a manual as a guide for requesters which describes the procedure to be followed when requesting records. Each public body has its own PAIA manual which should list available information. By way of example, the Ministry of Finance PAIA Manual⁵⁰ lists categories of records automatically available on request. The list includes operational Tender information, as follows: Tender Adverts, Designated Sectors Information and Documents, Transversal Tenders / Contracts/ Requests for Proposals/ Requests for Information/ Expression of Interest, Publication of Bidders, Finalised Contract, Information on Tenders Awarded, Supplier Database Registration. The PAIA Manual also lists categories or records not automatically available and thus subject to a full data access request.

CIDB

Gap analysis

There is no comprehensive list for use by procuring entities at operational level, of procurement records and documents to be retained related to procurement transactions, including contract management. This potentially affects the ability to look at implementation performance which is important information for the functioning of both internal and external control systems.

Recommendations

Consider publishing a check list for use by procuring entities at an operational level which sets out which procurement documents are to be retained, to ensure complete procurement records. This should refer to and align with rights of public access to information under the Promotion of Access to Information Act.

⁵⁰ <https://www.treasury.gov.za/PAIA/PAIA%20Manual%20-%20National%20Treasury.pdf>

Pillar I. Legal, Regulatory, and Policy Framework

Assessment criterion 1(k)(b):

There is a document retention policy that is both compatible with the statute of limitations in the country for investigating and prosecuting cases of fraud and corruption and compatible with the audit cycles.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

There is no procurement specific document retention policy. There is national legislation on archiving and document retention, the National Archives and Record Service Act, 1996.⁵¹ The National Archives Records Management Policy Manual lists different retention/disposal periods for documents. The retention periods are compatible with standard audit cycles. The MAPS Assessment team was unable to establish conclusively whether the document retention periods for procurement documents is sufficiently well aligned with the limitation period for corruption related prosecutions to prevent loss of relevant documents prior to expiry of the limitation period.

Document retention: National Archives and Record Service Act No.43 of 1996: National Archives Records Management Policy Manual lists different retention/disposal periods for documents including: A20 20 years and transfer to archives repository, D7 destroy 7 years after closure, DAU destroy immediately after audit, DAU3 destroy 3 years after auditing is completed, DAU7 destroy 3 years after auditing is completed.

Public access to information: Constitution s.32(1) – right of access to any information held by the state, Constitution s 217(1) procurement – transparency obligations, Promotion of Access to Information Act No.2 of 2000 (right to access and grounds for refusal), Promotion of Administrative Justice Act (right to reasons) - procurement has been recognized by courts as an administrative action.

Statute of Limitations: Under the Criminal Procedure Act No.51 of 1977, s.18 the right to institute criminal proceedings for corruption lapses after a period of 20 years from the time the offence was committed. It is possible for an accused to be charged outside the 20-year period where a prima facie case it made out on paper and a warrant of arrest has been issued within the 20-year period. The reviewing experts conducting the Country Review on implementation of chapter and chapter IV of United Nations Convention Against Corruption observed that the limitation period is in compliance with UNCAC Article 30 Statute of Limitations.⁵²

Gap analysis

There is no procurement specific document retention policy.

Recommendations

To assist those responsible for managing procurement records to be clear about the document retention and destruction rules applying to procurement related documents, prepare and issue a procurement specific document retention policy, note or guidance (as appropriate) on document retention and destruction in the particular context of procurement. This must be aligned with national archiving requirements and the limitation period for corruption related prosecutions.

Assessment criterion 1(k)(c):

There are established security protocols to protect records (physical and/or electronic).

Conclusion: Substantive gap

Red flag: No

⁵¹ National Archives and Record Service of South Africa Act No.43 of 1996 (as amended).

⁵²

https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2013_05_09_South_Africa_Final_Country_Review_Report.pdf

Pillar I. Legal, Regulatory, and Policy Framework

Qualitative analysis

TR do not contain specific provisions to address this issue. The MAPS Assessment team was unable to find procurement specific security protocols to protect records.

CIDB

The MAPS Assessment team was unable to find procurement specific security protocols to protect records.

Gap

There are no established security protocols to protect public procurement records (physical and/or electronic) thus jeopardizing the ability to check implementation performance due to lack of availability of relevant records.

Recommendations

Establish security protocols to protect records of public procurement, both physical and electronic and consider measures, including enforcement, to ensure compliance in a consistent manner by all procuring entities. This will need to be closely aligned with new provisions to be introduced to ensure appropriate alignment with operation of the e-GP system.

Sub-indicator 1(I)

Public procurement principles in specialized legislation

The legal and regulatory body of norms complies with the following conditions :

Assessment criterion 1(I)(a):

Public procurement principles and/or the legal framework apply in any specialised legislation that governs procurement by entities operating in specific sectors, as appropriate.

Conclusion: No gap

Red flag: No

Qualitative analysis

PFMA regime applies to procurement activities conducted by the State Information Technology Agency (SITA) for procurement of information technology systems and services on behalf of, departments and organs of state and when acting as agent of the SA Government. SITA is bound by the guiding principles in section 217(5) of the Constitution and repeated in PFMA requiring procurement to be “in accordance with a system that is fair, equitable, transparent, competitive and cost effective”.

Procurement of Information Technology by SITA

The State Information Technology Agency Act, 1998 (SITA Act)⁵³ establishes the State Information Technology Agency as a wholly state-owned company, to provide information technology related systems and services to, or on behalf of, departments and organs of state and act as agent of the SA Government. In some cases, SITA is mandated to provide systems and services to departments and organs of state, in other cases provision by SITA is optional. SITA is listed as a Public Entity in PFMA Schedule 3, Part A and thus is subject to the PFMA regime, including TR 16A SCM, when conducting procurement. Where SITA acts as procurement agent on behalf of an institution, SITA must facilitate the procurement strictly in terms of the prescribed legislation.

PN NT Instruction No.5 of 2009/10 Procurement through the State Information Technology Agency (SITA) and Accountability of Accounting Officers/Authorities, summarises prescribed procedures for procurement of ICT related goods and/or services through SITA which are referred to as “summaries of the prescribed legislation and Treasury Regulations”. Use of transversal term contracts is also permitted.

⁵³ State Information Technology Agency Act, 1998 (Act No.88 of 1998) as amended.

Pillar I. Legal, Regulatory, and Policy Framework

Gap analysis
Recommendations
Assessment criterion 1(l)(b): Public procurement principles and/or laws apply to the selection and contracting of public private partnerships (PPP), including concessions as appropriate.
Conclusion: No gap
Red flag: No
Qualitative analysis TR s.16 Public Private Partnerships (PPP) contains provisions covering the process for feasibility study, procurement and award of a PPP agreement. TR s.16.5.3 requires that the procurement procedure “must be in accordance with a system that is fair, equitable, transparent, competitive and cost effective. These are the guiding principles set out in section 217(5) of the Constitution and repeated in PFMA.
Gap analysis
Recommendations
Assessment criterion 1(l)(c): Responsibilities for developing policies and supporting the implementation of PPPs, including concessions, are clearly assigned.
Conclusion: No gap
Red flag: No
Qualitative analysis National Treasury is responsible for developing policies and supporting implementation of PPPs. According to the National Treasury’s 2023 Budget Review, Annexure D, Public-Sector Infrastructure and Public-Private Partnerships Update, ⁵⁴ in 2022, National Treasury started the process of implementing the resulting recommendations, applicable to the three spheres of government. The implementation plan identifies workstreams covering each reform area, addressing: Policy framework, PPP legal and regulatory framework (tied in with the Public Procurement Bill), strengthening of institutional arrangements to create a centre of excellence and also a dedicated regulatory unit within NT, improving the quantification of fiscal risks and contingent liabilities, and financial support mechanisms. In February 2023, National Treasury published draft amendments to TR 16 which are subject to a public consultation process. ⁵⁵
Gap analysis
Recommendations

⁵⁴ <https://www.treasury.gov.za/documents/national%20budget/2023/review/Annexure%20D.pdf>

⁵⁵ Press Release, National Treasury, 23 February 2024 & Gazette, 19 February 2024.
<https://www.treasury.gov.za/public%20comments/MPPP%20Regulations/PFMA%20treasury%20Regulations.pdf>

Pillar I. Legal, Regulatory, and Policy Framework

Indicator 2. Implementing regulations and tools support the legal framework

Note: The Preliminary Explanatory Note for Pillar I describes the legal framework analysed under Pillar I, Indicator 1. It explains the limited nature of provisions in PFMA and Treasury Regulations concerning procurement and thus the decision to include analysis of both Treasury Regulations and legally binding NT Instructions and SCM Instructions, in order to provide meaningful findings. As there is currently no single procurement law, the analysis in 2(a) presents overall findings in relation to the following legal framework documents (as appropriate) which have also been analysed to address specific criteria under Pillar I, Indicator 1: Treasury Regulations and legally binding NT Instructions and SCM Instructions and CIDB Code of Conduct and Standard for Uniformity (legally binding precepts).

Sub-indicator 2(a) Implementing regulations to define processes and procedures
Assessment criterion 2(a)(a): There are regulations that supplement and detail the provisions of the procurement law, and do not contradict the law.
Conclusion: No gap
Red flag: No
Qualitative analysis Legally binding NT Instructions and SCM Instructions supplement the limited provisions on procurement in the Constitution, PFMA and Treasury Regulations. CIDB Code of Conduct and Standard for Uniformity provide additional, more detailed provisions for construction related procurement.
Gap analysis
Recommendations
Assessment criterion 2(a)(b): The regulations are clear, comprehensive and consolidated as a set of regulations readily available in a single accessible place.
Conclusion: Substantive gap
Red flag: Yes
Qualitative analysis There is no clear, comprehensive and consolidated set of regulations and documents available in a single accessible place. The package of NT Instructions and SCM Instructions are not consolidated or comprehensive and in some cases, lack clarity. There is a Dashboard of NT Instructions and SCM instructions available from the OCPO website but the content is not fully up to date ⁵⁶ and it is not in a particularly user friendly format, essentially functioning as a list of instructions currently in force. The CIDB Code of Conduct, Standard for Uniformity are internally consistent. NT/OCPO work together to ensure that documents are not contradictory. Documents issued by NT/OCPO and CIDB use different terminology on key issues – for example, to refer to procurement methods. Whilst technically aligned, they do not present a coherent set of documents. Documents published by NT/OCPO are published and available to download from the OCPO website. Documents published by CIDB are published and available to download from the CIDB website.

⁵⁶ OCPO Dashboard (October 2022, accessed and downloaded 15 September 2023.)

Pillar I. Legal, Regulatory, and Policy Framework

Gap analysis

There is no clear, comprehensive and consolidated set of regulations and documents issued by NT/OCPO and CIDB are not available in a single accessible place. This is likely to hinder stakeholders' understanding of the system and the application of the legal framework in practice.

This Gap is assigned a Red Flag because it obstructs clear understanding of the procurement system and thus is likely to impact on multiple aspects of the operation of the system in practice.

Recommendations

Consider practical measures to (1) ensure that there is a single point of access to a comprehensive and consolidated set of regulations and documents issued by NT/OCPO and CIDB; and (2) better present the current documents, for example by use of an interactive user manual linking explanations of procurement activities to the relevant instructions.

In the meantime implement measures to ensure that content of information available through OCPO Dashboard is fully up to date.

Assessment criterion 2(a)(c):

Responsibility for maintenance of the regulations is clearly established, and the regulations are updated regularly

Conclusion: No gap

Red flag: No

Qualitative analysis

Responsibility for issuing and maintaining Treasury Regulations, NT Instructions and SCM Instructions is clearly assigned to National Treasury under the PFMA. NT instructions and SCM Instructions are regularly updated and a dashboard listing Instructions in force and history of amendments is published and available to download from the NT/OCPO website.

Responsibility for issuing and maintaining CIDB Regulations and legally binding precepts is clearly assigned to the CIDB under the CIDB Act/Regulations. The CIDB Regulations have been reviewed and updated. The Standard for Uniformity was reviewed several times in the period from its first publication in 2004 to 2019. In CIDB is in the process of reviewing the Standard for Uniformity with the aim to conclude that review before the end of the financial year. Some of the Best Practice Guidelines may benefit from further review and updating.

Gap analysis

Recommendations

Sub-indicator 2(b)

Model procurement documents for goods, works and services

Assessment criterion 2(b)(a):

There are model procurement documents provided for use for a wide range of goods, works and services, including consulting services procured by public entities.

Conclusion: No gap

Red flag: No

Qualitative analysis

TR 16A6.3 SCM requires AO/AA to ensure that bid documentation is in accordance with the instructions of National Treasury or the prescripts of the CIDB, in the case of a bid relating to the construction industry.

PN SCM Instruction No.1 of 2003 General Conditions of Contract (GCC) and Standardized Bidding Documents (SBDs), provides that all accounting officers/accounting authorities "should customize and utilize standard bidding

Pillar I. Legal, Regulatory, and Policy Framework

documents (SBDs) issued by the National Treasury. These SBDs should be used with minimum changes that are necessary to address contract and project specific issues.”

SBDs were attached to PN SCM Instruction No.1 of 2003 but have been updated.

The current SBDs issued by OCPO are listed below

No.	Content	Published Date
SBD 1	Part A Invitation to Bid	24 March 2023 [Revised]
	Part B Terms and Conditions for Bidding	
SBD 2	No SBD 2	-
SBD 3.1	Pricing Schedule – Firm Prices	22 September 2015
SBD 3.2	Pricing Schedule – Non-Firm Prices	22 September 2015
SBD 3.3	Pricing Schedule – Professional Services	22 September 2015
SBD 4	Bidder’s Disclosure Form 2022 version replaces earlier SDB 4, SBD 8 & SDB 9	SCM Instruction No.3 of 2021/2022 March 2022
SBD 5	Declaration NIP Obligation Agreement	22 September 2015
SBD 6.1	Preference Points Claim Form in terms of Preferential Procurement Regulations 2022	19 December 2022
SBD 6.2	Declaration Certificate for Local Production and Content for Designated Sectors	17 July 2017
SBD 7.1	Contract Form – Purchase of Goods/Works	24 March 2023 [Revised]
SBD 7.2	Contract Form – Rendering of Services	24 March 2023 [Revised]
SBD 7.3	Contract Form – Tender for “Income-Generating Contracts” (as defined in Preferential Procurement Regulations 2022)	24 March 2023 [Revised]

CIDB

The CIDB SFU Includes standard bid documents in annexes, as follows: Annex A- Standard Tender notice and Invitation to Tender; Annex B- form of Offer and Acceptance; Annex C – Standard Conditions of Tender; Annex D – Standard Conditions for calling for Expression of Interest; Annex E – Standard Notice and Invitation to submit an Expression of Interest; Annex F – Record of Addenda to Tender Document; Annex G – Compulsory Enterprise questionnaire.

Gap analysis

Recommendations

Assessment criterion 2(b)(b):

At a minimum, there is a standard and mandatory set of clauses or templates that reflect the legal framework. These clauses can be used in documents prepared for competitive tendering/bidding.

Conclusion: No gap

Red flag: No

Qualitative analysis

Standard Bidding Documents are issued by NT/OCPO and by CIDB for use by procuring entities (see analysis at 2(b)(a))

Gap analysis

Recommendations

Pillar I. Legal, Regulatory, and Policy Framework

<p>Assessment criterion 2(b)(c): The documents are kept up to date, with responsibility for preparation and updating clearly assigned.</p>
<p>Conclusion: No gap</p>
<p>Red flag: No</p>
<p>Qualitative analysis NT/OCPO is responsible for and regularly updates the SBDs, as can be seen from the revised versions available from NT/OCPO website and SCM Instructions (see analysis at 2(b)(a)). CIDB is responsible for preparing and updating CIDB standard bidding documents. These are included as annexes to the SFU, which has been regularly updated.</p>
<p>Gap analysis</p>
<p>Recommendations</p>
<p style="text-align: center;">Sub-indicator 2(c) Standard contract conditions used</p>
<p>Assessment criterion 2(c)(a): There are standard contract conditions for the most common types of contracts, and their use is mandatory.</p>
<p>Conclusion: Substantive gap</p>
<p>Red flag: No</p>
<p>Qualitative analysis</p> <p>Goods and Services: There is a single set of General Conditions of Contract intended to apply to procurement of all goods and services. The General Conditions of Contract are drafted to apply to purchase of goods and ancillary services. They are not well suited for purchase of stand-alone services or consultancy services.</p> <p>TR 16A6.3 SCM requires AO/AA to ensure that general conditions of contract are in accordance with the instructions of National Treasury or the prescripts of the CIDB in the case of a bid relating to the construction industry. PN SCM Instruction No.1 of 2003 General Conditions of Contract (GCC) and Standardised Bidding Documents (SBDs) requires all accounting officers/accounting authorities to base their bid invitations on the GCC issued by National Treasury, with GCC attached at Annexure A and provides that GCC standard wording should not be amended. Where any aspect is not covered by the GCC, Special Conditions of Contract (SCC) relevant to a specific bid invitation may be compiled separately. In the event of conflict between GCC and SCC, GCC shall prevail. The General Conditions of Contract can be downloaded from NT/OCPO Resources library.</p> <p>CIDB. PN SCM Instruction No.1 of 2003 provides that for bids related to building, engineering and construction works, the General Conditions of Contract and Standard Bidding Documents for Construction Projects issued by the CIDB apply. The Standard for Uniformity in Construction Procurement issued by CIDB establishes minimum requirements for uniformity in construction procurement covering procurement documentation including contract terms, procedures and practices. The CIDB SFU s.2 references standard form conditions of contract for use in construction related procurement. The CIDB provides guidance on which form of contract is most appropriate for given situations. The conditions of contract from external sources listed by CIDB are: GCC for Construction Works (South African Institution of Civil Engineering) and various conditions of contract issued by FIDIC, JBCC and NEC.</p>

Pillar I. Legal, Regulatory, and Policy Framework

The CIDB also publishes its own contract documents which can be downloaded free of charge from the CIDB website.^{57 58} These are as follows:

Contract Documents – from CIDB website resources page
General Conditions of Purchase, CIDB 1018 – 3 rd edition, January 2009
General Conditions of Service, CIDB – 1 st edition, January 2009
Standard Professional Services contract, CIDB 1015 - 3 rd edition, July 2009
Contract for Supply and Delivery of Goods , CIDB 1019 - 3 rd edition, August 2008
Supply of Goods (Short form) , CIDB 1020 - 2 nd edition, September 2005
The Supply Contract, CIDB 1021 – 2 nd editions, September 2005
Joint Venture Agreement, CIDB 1017 – 1 st edition, March 2004

Gap analysis

The General Conditions of Contract (GCC) for goods and services published by NT/OCPO are not well suited for purchase of stand-alone services or consultancy services. GCC have not been updated for some years. CIDB contracts do not appear to have been updated for some years.

Recommendations

Review the General Conditions of Contract (GCC) published by NT/OCPO and revise or update as necessary to ensure that they are fit for purpose. Prepare additional standard contract conditions, as a minimum there should be standard contract conditions tailored for purchase of stand-alone services and for consultancy services. Review standard contracts published by CIDB and revise or update as necessary to ensure that they are fit for purpose.

Assessment criterion 2(c)(b):

The content of the standard contract conditions is generally consistent with internationally accepted practice.

Conclusion: No gap

Red flag: No

Qualitative analysis

The content of standard conditions is generally consistent with internationally accepted practice. For construction related contracts, contract conditions from external national and international sources – SAICE, JBCC, FIDIC and NEC - are recommended for use in specified cases .

Gap analysis

Recommendations

Assessment criterion 2(c)(c):

Standard contract conditions are an integral part of the procurement documents and made available to participants in procurement proceedings.

Conclusion: No gap

Red flag: No

⁵⁷ Useful Documents for Construction Tenders: SCM documents, accessed 16 October 2023

<https://www.cidb.org.za/cidb-tenders/useful-documents/>

⁵⁸ Procurement Documents templates, accessed 16 October 2023

<https://www.cidb.org.za/resource-centre/downloads-2/#47-100-wpfd-procurement-documents-templates-and-guidelines>

Pillar I. Legal, Regulatory, and Policy Framework

Qualitative analysis

SBD 7.1, 7.2 and 7.3 are standard Contract Forms for Purchase of Goods/Works (7.1), Rendering of Services (7.2) and “Income-Generating Contracts” (7.3). In each case, the standard contract forms incorporate the General Conditions of Contract and any Special Conditions of Contract by reference. Samples of Bidding documents uploaded to the e-Tender Portal generally included the GCC either as a copy or by providing a link.

CIDB

Contract conditions are an integral part of the procurement documents for construction related procurement, made available to participants through the e-Tender Portal and CIDB website.

Gap analysis

Recommendations

Sub-indicator 2(d)

User’s guide or manual for procuring entities

Assessment criterion 2(d)(a):

There is (a) comprehensive procurement manual(s) detailing all procedures for the correct implementation of procurement regulations and laws.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

There is no comprehensive, up to date procurement manual detailing all procedures for the correct implementation of procurement regulations and law.

The Guide for Accounting Officers/Authorities on Supply Chain Management⁵⁹ (SCM Guide) goes some way to satisfying this requirement but it is not comprehensive and it has not been updated since it was published in 2004. The Contract Management Framework, issued by National Treasury (August 2010)⁶⁰ is a high level document that sets out requirements for government institutions pertaining to the management of, and accounting for, contract agreements, including allocation of responsibilities. Practical guidance on the operation of the Contract Management Framework is contained in separate and detailed Contract Management Guide (2010).⁶¹ These documents have not been updated.

There is also separate guidance on implementation of B-BBEEA and PPPFA frameworks.

CIDB

The CIDB has published useful a range of useful Best Practice Guides to support correct implementation of relevant procurement regulations and law. This includes Best Practice Guide A2 Applying the procurement prescripts of the CIDB in the Public Sector (December 2007 Ed.5) , which provides commentary on how the PFMA regime and CIDB mesh together to ensure correct implementation, but it has not been updated recently.

Gap analysis

There is no comprehensive, up to date procurement manual detailing all procedures for the correct implementation of procurement regulations and law. Lack of a comprehensive user manual is likely to reduce consistency of application within the procurement system.

⁵⁹ Supply Chain Management. A Guide for Accounting Officers/Authorities, National Treasury, February 2004
http://ocpo.treasury.gov.za/Resource_Centre/Legislation/SCM%20Jan900-Guidelines.pdf

⁶⁰ <https://ag.treasury.gov.za/org/tss/Shared%20Documents/Contract%20Management/Contract%20Management%20Framework%20-%20Ver%201.pdf>

⁶¹ <https://oag.treasury.gov.za/Publications/Forms/AllItems.aspx?RootFolder=%2FPublications%2F16%2E%20Contract%20Management%2FGuideline&FolderCTID=0x0120007EBBC03F454D95408FB944B7B07F6166&View={EA6E6B15-593D-4839-A804-A91A49CB20A0}>

Pillar I. Legal, Regulatory, and Policy Framework

<p>Recommendations Prepare a comprehensive manual for use by procurement staff that incorporates law, policy and procedures and helps turn policy into practice and enhance consistency within the procurement system. This should both explain, in easily understandable way, the legal and regulatory requirements together with information on how these requirements are implemented in practice, including reference to relevant standard documents and templates.</p>
<p>Assessment criterion 2(d)(b): Responsibility for maintenance of the manual is clearly established, and the manual is updated regularly.</p>
<p>Conclusion: Minor gap</p>
<p>Red flag: No</p>
<p>Qualitative analysis PFMA s.76(4) provides for National Treasury to make regulations or issues instructions “concerning the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective” but it does not expressly reference preparation and maintenance of manuals.</p>
<p>CIDB CIDB Act s.5 requires the CIDB to promote best practice including through provision of information to stakeholders on best practice, industry performance and improvement. The CIDB must publish best practice standards and guidelines as well as promote standardization of the procurement process.</p>
<p>Gap analysis Responsibility for preparation and maintenance of a PFMA regime manual is not specifically referenced.</p>
<p>Recommendations To improve clarity, include specific reference in the legal framework to where responsibility lies for maintenance and updating the user’s guide or manual.</p>

Indicator 3. The legal and policy frameworks support the sustainable development of the country and the implementation of international obligations

<p style="text-align: center;">Sub-indicator 3(a) Sustainable Public Procurement (SPP)</p>
<p>Assessment criterion 3(a)(a): The country has a policy/strategy in place to implement SPP in support of broader national policy objectives</p>
<p>Conclusion: Substantive gap</p>
<p>Red flag: Yes</p>
<p>Qualitative analysis There is significant emphasis in South Africa on the use of procurement to promote economic and social benefits, improvements and growth, in particular through the B-BBEEA and PPPFA frameworks, and industrial growth & development and related policies. There is, however, no single policy or strategy and related implementation plan in place to draw together and address all aspects of sustainable public procurement - economic, social and environmental - as a coherent whole. There is a notable lack of provisions allowing for environmental factors to be incorporated at all stages of the procurement cycle. The National Development Plan 2030⁶² was published in 2012. References to procurement, in the context of sustainability places greater emphasis on social and economic issues rather than environmental impact. For</p>

⁶² <https://www.gov.za/issues/national-development-plan-2030>

Pillar I. Legal, Regulatory, and Policy Framework

example, it refers to a “commitment to public and private procurement approaches that stimulate domestic industry” (p.40), and to procurement regulations as policy instruments to change ownership patterns (p.42). The understandable focus on social and economic issues is reflected in the B-BBEEA and PPPFA frameworks applying to procurement, local preference (local production and local content),⁶³ as well as in national industrial development programmes and policies.

South Africa’s targets for Sustainable Development, Goal 12 Responsible Consumption and Production include, at 12.7 to “Promote public procurement practices that are sustainable, in accordance with national policies and priorities.”⁶⁴ There are, however, not clearly defined environmental objectives for procurement and green procurement is not currently embedded in the procurement system.

Gap analysis

There is no single policy or strategy and related implementation plan in place to draw together and address all aspects of sustainable public procurement - economic, social and environmental - as a coherent whole. There is a notable lack of provisions allowing for environmental factors to be incorporated at all stages of the procurement cycle.

This Gap is assigned a Red flag because preparation and agreement on an SPP policy/strategy and implementation plan applying to all procuring entities and aligning with broader national policy objectives will require input from a number of institutions.

Recommendations

Combined recommendations for 3(a)

Develop a single, consolidated, sustainable public procurement policy/strategy to draw together and implement all elements of SPP - economic, environmental (including climate considerations) and social (including gender equality) and aligned with the B-BBEEA and PPPFA frameworks). The SPP should support broader national policy objectives and reflect national priorities.

It is recommended that a critical review of the effectiveness of current measures for empowerment and economic & industrial growth through public procurement is included as part of the SPP strategy development process. This should include assessment of whether the range of current measures, including local preference (local production and local content), enhance or hinder domestic and international competition, achieve stated aims and contribute effectively to Sustainable Development Goals.

The SPP Strategy should be supported by a clear implementation plan/road map to cover introduction of systems and tools to operationalize, facilitate and monitor the application of SPP in priority areas in particular. It should also identify and provide for any amendments necessary to the legal/regulatory framework to allow for sustainability considerations to be fully incorporated at all stages of the procurement cycle, ensuring well-balance application of sustainability criteria from planning through to contract delivery and monitoring. SPP requirements embedded in the legal and regulatory framework should be reflected in model procurement documents, contract conditions and in supporting practical guidelines for implementation and related training.

Assessment criterion 3(a)(b):

The SPP implementation plan is based on an in-depth assessment; systems and tools are in place to operationalise, facilitate and monitor the application of SPP.

Conclusion: Substantive gap

⁶³ See analysis at 1(a)(a).

⁶⁴ <https://southafrica.un.org/en/sdgs>

Pillar I. Legal, Regulatory, and Policy Framework

Red flag: Yes

Qualitative analysis

There is currently no sustainable public procurement policy/strategy in place to implement SPP in support of broader national policy objectives and thus no implementation plan to assess.

Gap analysis

There is currently no sustainable public procurement policy/strategy in place to implement SPP in support of broader national policy objectives and thus no implementation plan to assess.

This Gap is assigned a Red flag because preparation and agreement on an SPP policy/strategy and implementation plan applying to all procuring entities and aligning with broader national policy objectives will require input from a number of institutions

Recommendations

Assessment criterion 3(a)(c):

The legal and regulatory frameworks allow for sustainability (i.e. economic, environmental and social criteria) to be incorporated at all stages of the procurement cycle.

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

Incorporation of certain social and economic criteria into the procurement process occurs through the application of the B-BBEEA and PPPFA frameworks as well as national industrial development and growth programmes and policies. These frameworks have an impact on the whole procurement cycle, from planning through to delivery. As noted in 3(a)(b) environmental (green) issues are not currently embedded in the procurement system and, for example, there is no guidance on how use of life-cycle costing or how to incorporate environmental objectives into the procurement cycle .

Gap analysis

Provisions in the public procurement legal and regulatory framework allowing for sustainability to be incorporated in to all stages of the procurement cycle are limited and the main focus is on social and economic issues. There is the possibility to use “functionality” evaluation criteria which may include criteria relating to SPP, but the way in which functional criteria are currently assessed is unlikely to deliver significant benefits from an SPP perspective (see analysis at 1(f)(b)). There is no detailed guidance on when and how to incorporate sustainability at all stages of the procurement cycle.

This Gap is assigned a Red flag because of the system wide impact of the lack of sustainability provisions which will hinder achievement of broader sustainability objectives and necessity for inter-institutional cooperation to review, identify and implement required measures in a consistent manner for all procurement and in line with proposed SPP strategy and implementation plan.

Recommendations

See combined recommendations at 3(a)(a).

Assessment criterion 3(a)(d):

The legal provisions require a well-balanced application of sustainability criteria to ensure value for money.

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

Pillar I. Legal, Regulatory, and Policy Framework

The MAPS Assessment team was unable to find legal provisions in the PFMA regime which specifically set out requirements for well-balanced application of sustainability criteria (economic, social and environmental) for the express purpose of ensuring value for money.

Gap analysis

Provisions for well-balanced application of all types of sustainability criteria (economic, social and environmental) throughout the procurement cycle are not evident. There is no comprehensive supporting guidance on how to apply sustainability criteria (economic, social and environmental) to ensure value for money.

This Gap is assigned a Red flag because of the system wide impact of the lack of provisions which will hinder broader sustainability objectives and necessity for inter-institutional cooperation to review, identify and implement required measures in a consistent manner for all procurement and in line with proposed SPP strategy and implementation plan.

Recommendations

See combined recommendations at 3(a)(a).

Sub-indicator 3(b)

Obligations deriving from international agreements

Public procurement-related obligations deriving from binding international agreements are:

Assessment criterion 3(b)(a):

Clearly established

Conclusion: Choose an item.

Red flag: Choose an item.

Qualitative analysis

Not applicable.

South Africa is a WTO member but not a signatory to the GPA. It has concluded a number of Free Trade Agreements but they do not include detailed public procurement specific chapters or annexes to be analysed for the purpose of this assessment criterion.

WTO: South Africa has been a WTO member since 1 January 1995.⁶⁵ South Africa is not a party to the WTO GPA (Agreement on Government Procurement) and it does not have observer status.⁶⁶

Regional Trade Agreements: South Africa is a member of the Southern African Customs Union (SACU). It has concluded the following free trade agreements, either bilaterally or as member of SACU: Southern Africa Development Community (SADC) Protocols on Trade in Goods and in Services, Trade Development and Cooperation Agreement with the European Union, EFTA-SACU FTA, SADC EPA States – EU Economic Partnership Agreement.⁶⁷ The SADC-EI EPA confirms the parties' commitment to transparent and predictable public procurement systems in accordance with national laws and recognition of the importance of making public procurement law, regulations and rulings publicly available as well as confirming the possibility of future negotiations on public procurement. These free trade agreements do not, however, include detailed public procurement specific chapters or annexes.

International Treaties: South Africa is a party to all 9 Core Human Rights Conventions⁶⁸ as well as other conventions including UNCAC.

Gap analysis

⁶⁵ https://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm

⁶⁶ https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm

⁶⁷ Department of Trade, Industry and Competition - Trade Agreements page

<http://www.thedtic.gov.za/sectors-and-services-2/1-4-2-trade-and-export/market-access/trade-agreements/>

⁶⁸ https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=EN

Pillar I. Legal, Regulatory, and Policy Framework

Recommendations
Assessment criterion 3(b)(b): Consistently adopted in laws and regulations and reflected in procurement policies.
Conclusion: Choose an item.
Red flag: Choose an item.
Qualitative analysis Not applicable.
Gap analysis
Recommendations

Pillar II. Institutional Framework and Management Capacity

Indicator 4. The public procurement system is mainstreamed and well integrated into the public financial management system

Sub-indicator 4(a)

Procurement planning and the budget cycle

The legal and regulatory framework, financial procedures and systems provide for the following:

Assessment criterion 4(a)(a):

Annual or multi-annual procurement plans are prepared, to facilitate the budget planning and formulation process and to contribute to multi-year planning.

Conclusion: Minor gap

Red flag: No

Qualitative analysis

The Medium-Term Strategic Framework (MTEF) is the budgetary framework used to identify the government's strategic priorities and to allocate resources accordingly. It does not identify planned procurement expenditures specifically. The Public Finance Management Act (PFMA), which provides the legal framework for procurement in the public sector, does not explicitly refer to the obligation to devise an annual or multi-annual procurement plan which would be aligned with budget planning and formulation. However, art 52 (b) of the PFMA mentions that the accounting authority for a public entity listed in Schedule 2 or a government business enterprise listed in Schedule 3 must submit to the accounting officer a corporate plan in the prescribed format covering the affairs of that public entity or business enterprise for the following three financial years. For example, Eskom's corporate plan FY24-FY28 identifies procurement as being essential to implement the company's budget priorities.

Only the SCM Instruction 2 OF 2016/2017 mandates public entities listed in Schedule 2 to prepare, update and report on annual procurement plans. These procurement plans shall be submitted to NT by 31 March every year and include purchases of over 500,000 ZAR. Article 3.1.2 of the SCM Instruction 2 OF 2016/2017 mentions that public entities must align the procurement plan with the institution's budget and annual performance plan for a specific financial year. Procurement opportunities can be retrieved in PDF format from NT's website and can be extracted in excel from the eTenders portal.

For large infrastructure projects (in excess of R1 billion for projects and R3 billion for programmes), dedicated budget preparation guidelines have been developed. The latest *Guidelines for the Preparation of Budget Submissions for Large Strategic Infrastructure Projects*⁶⁹ were published on 26 May 2023 and explicitly mention that submissions shall include a procurement and implementation plan.

Gap analysis

While general provisions exist to require organs of state to devise corporate plans, including procurement expenditures, which align with the Medium-Term Expenditure Framework, such plans do not provide detailed information about future procurement expenditures. Specific provisions linking procurement plans to budget planning and appropriation only exist for major capital projects.

While procurement opportunities can be retrieved in excel from the eTenders portal, information included remains limited and unclear. For example, a significant number of past advertisements are included in the document and there is no clear indication as to why those items are included in the list. Further, there is no indication of the procurement method envisaged, the budget, nor the anticipated duration of the contracts.

Recommendations

Procurement plans are disaggregated by quarters and current quarter's opportunities are published on NT's website. The eTenders portal also provides information on procurement plans, however from information

⁶⁹ [Microsoft Word - 2023 LargeInfraBudgetGuideline - NTDS \(003\) \(treasury.gov.za\)](#)

Pillar II. Institutional Framework and Management Capacity

available online, the timescale of published information remains unclear (many past advertisements and future not exceeding the current quarter). National Treasury could revisit the way information about procurement plans is structured to provide better visibility on future procurement opportunities.

Assessment criterion 4(a)(b):

Budget funds are committed or appropriated in a timely manner and cover the full amount of the contract (or at least the amount necessary to cover the portion of the contract performed within the budget period).

Conclusion: Minor gap

Red flag: No

Qualitative analysis

The Framework for Supply Chain Management (2003) adopted by the National Treasury stipulates that accounting officer or accounting authority of an institution to which these regulations apply must develop and implement in that institution an effective and efficient supply chain management system. Such supply chain management system shall provide at least for a policy covering demand management (art. 3.2(c)). Details on the commitment or appropriation of funds and the coverage of procurement expenditure seem therefore to be left to the discretion of each institution. However, NT Instruction 3 2021/2022 now details that accounting officers “must ensure that cash flow is sufficient to meet contractual obligations”.

Gap analysis

Supply chain management policies of each institution to which this Framework applies need to cover the demand management phase of the procurement cycle, which includes considerations about budget availability. The only formal obligation to ensure timely commitment of funds resides in the wording of NT Instruction 3 2021/2022 where accounting officers must ensure sufficient cash flow to meet contractual obligations.

Recommendations

National Treasury could consider revising its Framework for Supply Chain Management (2003) to clearly spell out that individual SCM policies of organs of state should mandate that budget funds need to be committed or appropriated in a timely manner and cover the amount of the contract performed within the budget period.

Assessment criterion 4(a)(c):

A feedback mechanism reporting on budget execution is in place, in particular regarding the completion of major contracts.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

Section 16A.11 of the PFMA indicates that the accounting officer or the accounting authority must submit to the relevant treasury supply chain management information as such treasury may require. Apart from this section, the PFMA is silent on reporting procurement information as part of the budget execution. Instruction 2 OF 2016/2017 stipulates in its article 4 that the accounting officer/authority of public entities must report quarterly on procurement plans. This includes reporting on the actual acquisition concluded over the quarter (article 4.1.2.1). The Standing Committee on Public Accounts provides an opportunity to discuss overall procurement expenditures of the organs of State.

For major capital projects, the online platform Vulekamali, a joint initiative of the National Treasury and the Civil Society Coalition for Open Budgets, provides detailed information on infrastructure projects across the country. The National Treasury developed a circular to implement a standardized reporting approach to provincial infrastructure projects. The National Treasury extended the scope of the infrastructure reporting model from April

Pillar II. Institutional Framework and Management Capacity

2021 to include national government. The model aims to enhance transparency and uniformity on infrastructure budget analysis and spending reviews across the spheres of government. To improve consolidation of reporting on project details for national government, infrastructure data is being collated. The National Treasury will start in-depth monitoring and analysis of capital expenditure for national government from 1 April 2023.

Gap analysis

While accounting officers must report quarterly on procurement plans (article 4.1.2.1), discussions with stakeholders highlighted that the National Treasury is not systematically kept abreast of the implementation of procurement plans and this notably arise when organs of state are using deviations from the standard open competitive bidding procedure.

Recommendations

Currently, accounting authorities from public entities are required to prepare and report quarterly on the implementation of their procurement plans. However, this reporting excludes information about procurement expenditure committed through “other means” (i.e. other than open competitive bidding). Therefore, strengthening reporting on budget execution, including on procurement expenditures beyond infrastructure projects and including procurement through other means, could reinforce transparency and accountability of organs of state.

Sub-indicator 4(b)

Financial procedures and the procurement cycle

The legal and regulatory framework, financial procedures and systems should ensure that:

Assessment criterion 4(b)(a):

No solicitation of tenders/proposals takes place without certification of the availability of funds.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

Relationships between budget availability and issuance of procurement processes seem to have been exposed to recent tensions. Indeed, NT SCM Instruction Note 3 2016/2017⁷⁰ mentioned in its article 11 that “an Accounting Officer / Accounting Authority must not advertise a bid for which no provision has been made in the budget”. However, NT Instruction Note 3 2021/2022⁷¹ repealed the previous instruction and now details that accounting officers “may not invite price quotation or bids if no or insufficient provision is made in the budget of the institution”. The only specific indications to ensure budget availability before issuing a tender have been found in chapter 16 of the PFMA for PPPs.

Gap analysis

While NT Instruction 3 2021/2022 expanded the scope of procurement procedures subject to considerations on budget availability to include price quotation and the notion of budget availability to include insufficient budget provision, it now only suggests accounting authorities/officers to consider this provision. Ultimately, the decision to comply with such provision is now left to individual procuring agencies and their individual supply chain management framework.

⁷⁰

<https://www.ectreasury.gov.za/modules/content/files/Documents/Treasury%20Circulars/2016/National%20Treasury%20SCM%20Instruction%20No%203%20of%202016-2017-%20Prevention%20and%20combating%20abuse%20in%20SCM.pdf>

⁷¹

https://static.pmg.org.za/PFMA_SCM_Instruction_No_03_Of_2021_22_Enhancing_Compliance_Transparency_and_Accountability_In_SCM.pdf

Pillar II. Institutional Framework and Management Capacity

Indeed, the Framework for Supply Chain Management (2003) adopted by the National Treasury stipulates that the accounting officer or accounting authority of an institution to which these regulations apply must develop and implement in that institution an effective and efficient supply chain management system. Such supply chain management system shall provide at least for a policy covering demand management (art. 3.2(c)). Therefore, supply chain management policies of each institution to which this Framework applies need to cover this phase of the procurement cycle. However, the Framework for Supply Chain Management is silent on the minimum elements which should be integrated, including ensuring budget availability before issuing a competitive bidding process.

This could severely impact the attractiveness of competitive tenders in South Africa since it deprives potential bidders from budget certainty. In addition, it could also potentially represent a waste of time and resources both on the public sector and on the private market, should tenders be cancelled due to the lack of availability of funds.

In infrastructure projects, requirements to ensure budget availability before commencing a procurement process are more clearly spelled out. Indeed, paragraph 16.4.2 of the PFMA which deals with the establishment of PPPs specifies that an institution may not proceed with the procurement phase of a PPP without the prior written approval of the relevant treasury for the feasibility study.

Recommendations

The National Treasury could consider reintroducing a formal obligation to ensure sufficient budget availability before issuing tenders or price quotation.

Assessment criterion 4(b)(b):

The national regulations/procedures for processing of invoices and authorisation of payments are followed, publicly available and clear to potential bidders.*

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

The PFMA in its section 38(1)(f)] imposes to accounting officers to settle all contractual obligations and to pay all money owing, including intergovernmental claims, within the prescribed period. Treasury Regulation 8.2. 3 provides that unless determined otherwise in a contract or other agreement, all payments due to creditors must be settled within 30 days from receipt of an invoice and the National Treasury has been providing reports to relevant stakeholders on the status of noncompliance with this Regulation. The same is true at provincial level, where public entities are required to report to provincial treasuries on non-compliance with Treasury Regulation 8.2.3.

The Annual Report on Non-Compliance with Payments of Supplier's Invoices within 30 days for the fiscal year 2021/2022⁷² shows that invoices not paid within the prescribed timeframe in Rand value amount to ZAR 39.8 billion. This corresponds to 469.653 invoices. However, the share these invoices represent compared to the total number and amount of invoices remains unknown. Provincial departments account for almost 90% of invoices not paid within 30 days in Rand value and for 70% of the number of invoices.

The National Treasury has been providing reports to relevant stakeholders on the status of noncompliance with Treasury Regulation 8.2.3 and continues to monitor the level of compliance with the requirement to pay supplier's invoices within the prescribed period in terms of the Public Finance Management Act (PFMA), 1999. In monitoring progress on payment of suppliers within the prescribed period the National Treasury issued a Treasury Instruction Note Number 34⁷³ which requires departments to submit 30 days exception reports to the relevant treasuries by

⁷² [ANNUAL REPORT ON NON-COMPLIANCE WITH PAYMENTS OF SUPPLIER'S INVOICES WITHIN 30 DAYS – FY2021/22 \(treasury.gov.za\)](https://treasury.gov.za)

⁷³ [https://oag.treasury.gov.za/Publications/10.%20Instruction%20Notes/For%20fin%20year%202011-12/20111130%20Instruction%20Note%2034%20-%20Effecting%20payments%20within%2030%20days%20from%20receipt%20of%20an%20invoice%20\(TR8.3.2\).pdf](https://oag.treasury.gov.za/Publications/10.%20Instruction%20Notes/For%20fin%20year%202011-12/20111130%20Instruction%20Note%2034%20-%20Effecting%20payments%20within%2030%20days%20from%20receipt%20of%20an%20invoice%20(TR8.3.2).pdf)

Pillar II. Institutional Framework and Management Capacity

the 7th day of each month with information in respect of the preceding month, with details of the following information:

- (a) the number and value of invoices paid after 30 days after the date of receiving invoices.
- (b) the number and value of invoices that are older than 30 days, which remained unpaid; and
- (c) the reasons for the late and/or non-payment of the invoices referred to above.

Furthermore, Provincial treasuries are also required to collate information from their respective provincial departments and to submit exception reports to the National Treasury by the 15th day of each month with information from the preceding month. The Treasury Instruction Note Number 34 also requires departments to implement manual or electronic systems and processes that will enable departments to track invoices from the time they are received at the relevant cost centers to the time that a payment is made. In terms of this Instruction Note, a Management Committee resolution constituted by the Forum of South African Directors-General (FOSAD), the National Treasury must provide the Forum with statistics each month on the exception reports, broken down per national and provincial department. The information required in terms of this Instruction Note will therefore be provided to FOSAD on a monthly basis. A copy of this Instruction Note will be forwarded to the Office of the Auditor-General to ensure that its contents are included in their audit scope.

[https://oag.treasury.gov.za/Publications/10.%20Instruction%20Notes/For%20fin%20year%202011-12/20111130%20Instruction%20Note%2034%20-%20Effecting%20payments%20within%2030%20days%20from%20receipt%20of%20an%20invoice%20\(TR8.3.2\).pdf](https://oag.treasury.gov.za/Publications/10.%20Instruction%20Notes/For%20fin%20year%202011-12/20111130%20Instruction%20Note%2034%20-%20Effecting%20payments%20within%2030%20days%20from%20receipt%20of%20an%20invoice%20(TR8.3.2).pdf)

Quantitative analysis

*// Minimum indicator // * Quantitative indicator to substantiate assessment of sub-indicator 4(b) Assessment criterion (b):*

- invoices for procurement of goods, works and services paid on time (in % of total number of invoices).

Source: PFM systems.

The minimum quantitative indicator (*invoices for procurement of goods, works and services paid on time in % of total number of invoices*) provided for in the MAPS methodology cannot be assessed since the total number of invoices remain unknown.

Gap analysis

While national and provincial departments are required to report to provincial treasuries and the National Treasury on the number and amount of invoices which are not paid within the prescribed timeframe, the share it represents compared to the total number and amount of invoices remains unknown. Indeed, the National Treasury has no means to record the total number and amount of invoices processed by organs of state in a fiscal year.

In addition, at the time of the assessment, reporting requirements only extended to national and provincial departments. These requirements do not apply to Constitutional Institutions and Public Entities, the latter representing a significant share of public procurement expenditure in the country. If extrapolated from the the latest estimated breakdown by type of Organs of State included in the 2018 report on national and provincial procurement spend, one could estimate that national and provincial institutions currently subject to reporting requirements typically represent around 23.5% total procurement expenditure (i.e. ZAR 220 billion in FY16/17 out of a total of ZAR 938 billion). Using the estimated total procurement expenditure provided for in the Concept note, the estimated total procurement expenditure for these institutions for FY 21/22 should be around ZAR 218 billion (i.e. 23.5% of ZAR 931.5 billion in FY 21/22). Taking into account that for the same year the total amount of invoices paid after 30 days was ZAR 39.8 billion, around 18.5% of invoices in rand value are not paid within the prescribed timeframe.

Pillar II. Institutional Framework and Management Capacity

Further, the average payment timeframe for those invoices which are not paid within 30 days is not disclosed, preventing to understand how serious the problem on late payment to suppliers is. In addition, delayed payments incur interest rates which put an additional strain on limited public budgets. The 2021-2022 report of the Auditor General of South Africa⁷⁴ notes that: “It is common for government to have to pay interest incurred due to late payments, such as when auditees do not pay their creditors within 30 days... Interest and penalties were the reasons for R0,59 billion of the fruitless and wasteful expenditure of high impact auditees”.

These gaps raise a red flag considering estimates around the number of invoices not paid within the prescribed timeframe and their financial impact on limited public finances. This situation defeats the overarching principle of fairness of the South African public procurement system.

Recommendations

National Treasury should further reinforce its oversight around timely payments within the prescribed timelines by collecting information on the total number and amount of invoices processed by Organs of State and by expanding reporting requirements to large procuring entities such as Public Entities. Doing so would first help understanding how systemic are challenges around late payments and would allow to quantitatively define how much they impact public finances.

Indicator 5. The country has an institution in charge of the normative/regulatory function

Sub-indicator 5(a)

Status and legal basis of the normative/regulatory institution function

The legal and regulatory framework, financial procedures and systems provide for the following:

Assessment criterion 5(a)(a):

The legal and regulatory framework specifies the normative/regulatory function and assigns appropriate authorities formal powers to enable the institution to function effectively, or the normative/regulatory functions are clearly assigned to various units within the government.

Conclusion: Minor gap

Red flag: No

Qualitative analysis

Article 217 of the South African 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 by following a system which is fair, equitable, transparent, competitive and cost-effective.” Expanding on this general statement, the PFMA further details in its Article 76 (4) (c) that: “The National Treasury may make regulations or issue instructions applicable to all institutions to which this Act applies concerning... the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective”.

Section 38(1)(a) (for departments and constitutional institutions) and section 51(1)(a) (for public entities listed in schedules 2 and 3) of the PFMA state that an accounting officer / authority must ensure that they have and maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

Created in 2013, the Office of the Chief Procurement Officer (OCPO) within the National Treasury is responsible for the public procurement regulatory framework and policies in South Africa. It reports directly to the Director General of the National Treasury. The OCPO, working with all government institutions, was established to modernise and

⁷⁴ <https://pfma-2021-2022.agsareports.co.za/wp-content/uploads/2022/12/22253B-2021-22-PFMA-General-Report-interactive-V3.pdf>

Pillar II. Institutional Framework and Management Capacity

oversee the South African public sector Supply Chain Management (SCM) system to ensure that the procurement of goods, services and construction works are fair, equitable, transparent, competitive and cost effective in line with the Constitution and all relevant legislation.

However, beyond the National Treasury and the OCPO, a number of other institutions develop policies and regulations that apply to procurement. The Broad-Based Black Economic Empowerment Act of 2003 (BBBEE Act), developed and managed by the Department of Trade, Industry and Commerce (DTIC), decides on qualification criteria to be used by all public entities in preferential procurement. Further, the Preferential Procurement Regulations stipulate that the DTIC is able to designate specific industries of critical and/or strategic importance, for tenders in which it is indicated that only locally manufactured products with a prescribed minimum threshold for local content will be considered.

The Construction Industry Development Board, within the Department of Public Works and Infrastructure (DPWI), is responsible for designing standards for uniformity in construction procurement through prescripts. SITA also develops Minimum Inter-Operability Standards applicable to ICT procurement.

Gap analysis

Having placed responsibilities for devising the normative framework on various institutions considering the type of procurement carried out is not uncommon but poses additional challenges on organs of state to ensure they apply the correct normative framework.

It further increases complexity for responsible institutions to ensure the various, yet interconnected, regulatory provisions are aligned and do not contradict each other. A clear illustration of this challenge could be found in construction procurement. For this type of procurement, overall responsibilities are assigned both to National Treasury as the overall custodian of the supply chain management system and to the CIDB eliciting rules and prescripts for the construction industry.

Recommendations

NT/OCPO could further develop practical tools, such as guides, to explain the various procurement model policies, the different procurement methods, in which instances they shall be used and list relevant standards and bidding documents. Doing so would provide additional clarity to organs of state and would help them navigating the public procurement framework.

Sub-indicator 5(b)

Responsibilities of the normative/regulatory function

The following functions are clearly assigned to one or several agencies without creating gaps or overlaps in responsibility:

Assessment criterion 5(b)(a):

providing advice to procuring entities

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The National Treasury and OCPO developed several guidelines to support procuring institutions, mostly setting up supply chain management policies. The General Procurement Guidelines⁷⁵, the 2004 Supply chain management: A guide for accounting officers/authorities⁷⁶ or more recently the Implementation guide on Preferential

⁷⁵

http://ocpo.treasury.gov.za/Resource_Centre/Legislation/GENERAL%20PROCUREMENT%20GUIDELINES%20-%20202.pdf

⁷⁶ http://ocpo.treasury.gov.za/Resource_Centre/Legislation/SCM%20Jan900-Guidelines.pdf

Pillar II. Institutional Framework and Management Capacity

Procurement Regulations, 2022⁷⁷ are all documents which further detail how accounting officers/authorities are supposed to design their supply chain management policies.

The DTIC provides guidance to ensure provisions of the BBBEE Act are respected and fully implemented.

For public works, the Construction Industry Development Board (CIDB) developed construction standards which can be used by procuring institutions when outsourcing construction services. Implementing agents such as the South African Development Bank or the Department for Public Works and Infrastructure can support procuring institutions which are outsourcing infrastructure projects. They could either procure on behalf of these institutions or provide ad-hoc support.

SITA also provides end-to-end procurement services for ICT to public agencies to ensure cost effective procurement of ICT products and services in a manner that is consistent with government procurement prescripts (including the State Information Technology Agency Act 1998: Regulations), and promote the South African ICT industry, particularly in the context of the Broad Base Black Economic Empowerment policy.

More broadly, the Government Technical Advisory Centre, established in terms of the Public Service Act (1994) as a government component, assists organs of state to build their capacity for efficient, effective and transparent financial management, including specialised procurement support for high-impact government initiatives.

Gap analysis

The complexity and fragmentation of the normative framework is reflected in the various advisory functions existing depending on the type of goods, services or public works procured. The legal and regulatory body of norms applying to public procurement is extensive, complex and fragmented and so is the advisory role given to multiple stakeholders. The multitude of legislative provisions impacting on planning, conduct and delivery of procurement outcomes presents significant challenges in identifying and understanding the procurement system as a coherent whole, reinforcing the need for integrated guidance. This fragmentation results in overlaps in terms of responsibility for providing advice, especially in the case of construction works and related services.

Recommendations

South Africa should completely overhaul this complexity. National Treasury and other stakeholders should consider developing practical tools, such as guides, to explain the various procurement model policies, the different procurement methods, in which instances they shall be used and list relevant standards and bidding documents. Doing so would provide additional clarity to organs of state and would help them navigating the public procurement framework.

Assessment criterion 5(b)(b):

drafting procurement policies

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

National Treasury through OCPO is responsible for drafting Instructions, Circulars and guidelines to support the implementation of Section 217 of the Constitution, the PFMA and the PPPFA.

There is a unit dealing with all the SCM Policy and Legal matters in the public procurement space. This unit ensures that the development and implementation of acceptable SCM norms and standards for National, Provincial and Local government are maintained. The unit is headed by a Senior Manager and it continuously (1) reviews all legislation affecting SCM, (2) proposes recommendations on how the broader objectives of government can be achieved through a non-fragmented legislative environment and (3) coordinates inputs for specific reviews on procurement law in South Africa.

⁷⁷ [IMPLEMENTATION GUIDE PPR 2022 - MARCH 2023 VERSION 1.pdf \(treasury.gov.za\)](#)

Pillar II. Institutional Framework and Management Capacity

The DTIC is responsible for drafting policies relating to the implementation of the BBBEE Act.
The CIDB is responsible for drafting policies and guidelines relating to construction procurement.

Gap analysis

Because of the dual normative framework where NT/OCPO regulate the entire procurement system while CIDB has a policy making mandate in construction procurement, overlaps and conflicting provisions exist de facto. An illustration could be found in the repeal of Treasury Instruction No.4 of 2015/2016.

Treasury Instruction No.4 of 2015/16 Standard for Infrastructure Procurement and Delivery (SIPD) had been developed to regulate infrastructure procurement. CIDB, being also responsible for developing construction procurement standards, developed its own regulations such as the 2019 Standard for Uniformity. The 2015/2016 Treasury Instruction was repealed and replaced by NT SCM Instruction No.3 of 2019/2020 Framework for Infrastructure Delivery and Procurement Management (FIDPM).

Based on discussions with stakeholders it seems that one of the reasons for the repeal of the SIPD and replacement with FIDPM was that the former contradicted the CIDB's Standard for Uniformity. The new FIDPM is now eventually fully aligned with the CIDB SFU.

Recommendations

Until the legislative framework is unified, National Treasury and the CIDB should ensure that all new norms or standards related to construction procurement are jointly developed and take due account of existing provisions.

Assessment criterion 5(b)(c):

proposing changes/drafting amendments to the legal and regulatory framework

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

National Treasury through **OCPO** is responsible for proposing changes and drafting amendments to the legal and regulatory procurement framework.

The **DTIC** is responsible for proposing changes and drafting amendments relating to the BBBEE Act.

The **CIDB** is responsible for proposing changes and drafting amendments to the Construction Act.

SITA is responsible for proposing changes and drafting amendments to the SITA Act.

Gap analysis

While responsibilities for drafting amendments to the public procurement normative framework are clearly assigned, the multiplicity of policy owners increases the risk of conflicting provisions. Construction procurement is certainly an area which is exposed to such risks of conflicts.

Recommendations

Reinforce coordination between different policy owners so that risks of developing contradicting normative frameworks are reduced.

Assessment criterion 5(b)(d):

monitoring public procurement

Pillar II. Institutional Framework and Management Capacity

Conclusion: No gap

Red flag: No

Qualitative analysis

OCPO's unit "SCM Governance, Monitoring and Compliance" manages the SCM governance framework including its design, development and implementation, monitoring and evaluation of compliance thereto, and management of non-compliance in all three spheres of Government.

However, significant responsibility is left to the accounting officer/authority in each organ of State to monitor public procurement practices.

- The **CIDB** monitors compliance with its prescripts and can fine public entities in case of breach.
- The **DTIC** monitors compliance with the BBEE Act. The B-BBEE Act places a responsibility on the custodian of the Act (the DTIC) to monitor compliance with the Act. The role is played by the B-BBEE Commission which is an institution established in terms of Section 13 (B) of the B-BBEE Act. Annually the B-BBEE Commission issues a compliance report that highlights progress made in implementing B-BBEE both in the public as well as the private sector.

The overall monitoring of the public procurement system is formally assigned to National Treasury and several Instructions make clear reference to reporting obligations.

Gap analysis

Recommendations

Assessment criterion 5(b)(e):

providing procurement information

Conclusion: Minor gap

Red flag: No

Qualitative analysis

Providing procurement information could encompass two main dimensions: providing access to general knowledge about the South African public procurement system and providing information which would be used in public procurement processes.

OCPO through its website, the eTenders platform and the Central Supplier Database provide general procurement information. The **CIDB** manages the Register of Contractors for construction procurement beyond providing on its website information on construction procurement and related prescripts. CIDB issues gradings for construction industry suppliers. There is an integration between CIDB grading system and the CSD. CIDB pulls CSD information and returns supplier CIDB grading to CSD.

Gap analysis

The allocation of responsibilities on the provision of procurement information follows the same structure as for policy ownership (i.e. NT/OCPO being the custodian of the whole public procurement system while CIDB, DTIC and SITA have sectoral responsibilities). This layered structure does not provide organs of state with a one-stop-shop where they could find all relevant procurement information.

Recommendations

Pillar II. Institutional Framework and Management Capacity

NT/OCPO could consider aggregating all procurement information in one place so as to facilitate access to procurement information.

Assessment criterion 5(b)(f):
managing statistical databases

Conclusion: Minor gap

Red flag: No

Qualitative analysis

OCPO, through its SCM-ICT unit, manages statistical information on procurement and publishes available data on data.etenders.gov.za. The CIDB holds the Register of Contractors and the Register of Projects for construction procurement which provides statistical information about companies participating in related public tenders.

Gap analysis

While OPCO hosts most of statistical information about competitive bidding in South Africa, the Register of Contractors and the Register of Projects provide useful additional statistics on companies participating in construction procurement.

Recommendations

The OCPO could ensure that statistical information held by the CIDB is also reflected in the e-Tender portal.

Assessment criterion 5(b)(g):
preparing reports on procurement to other parts of government

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

National Treasury produces reports on procurement by national and provincial government. The National Treasury published a document called "State of procurement spent in National and Provincial Departments", where the document provided an analysis of the government's spend on suppliers who are providing goods, services and works specifically to national and provincial government. In addition, a procurement spent analysis enhances the insights by identifying spent patterns cognisant of the size, nature and focus of the spent in national and provincial departments. The Employees of State doing business with Government report is one of the reports that provides a view on the current status of Government employees doing business with the State and explores several initiatives implemented across the Government by several role players to strengthen controls to prevent, detect, report and take action in instances where Government employees are doing business with the State.

NT and OCPO also prepare reports related to procurement to the Standing Committee on Public Accounts and the Standing Committee on Appropriations.

Gap analysis

National Treasury produces reports on procurement by national and provincial government. However, the last report is 5 years old, and it does not seem that reports have a set frequency (i.e. monthly, annual). Beyond NT's role, each organ of state is required to produce an annual activity report, but procurement information is kept to a minimum.

Recommendations

NT should resume its practice of analysing public procurement spend.

Pillar II. Institutional Framework and Management Capacity

Assessment criterion 5(b)(h):

developing and supporting the implementation of initiatives for improvements of the public procurement system

Conclusion: Minor gap

Red flag: No

Qualitative analysis

The PFMA in its Article 76 (4) (c) stipulates that: “The National Treasury may make regulations or issue instructions applicable to all institutions to which this Act applies concerning... the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective”. To support the implementation of this mandate, the OCPO is the custodian of public procurement modernization and oversees this role for the South African government. The CIDB is responsible for designing and implementing improvements to the construction procurement framework. The DITC is responsible for the implementation of improvements/changes to the BBBEE Act.

Gap analysis

While responsibilities for designing and implementing improvements to the public procurement normative framework are clearly assigned, the multiplicity of policy owners increases the risk of conflicting provisions. Construction procurement is certainly an area which is exposed to such risks of conflicts.

Recommendations

Reinforce coordination between different policy owners so that risks of developing contradicting normative frameworks are reduced.

Assessment criterion 5(b)(i):

providing tools and documents, including integrity training programmes, to support training and capacity development of the staff responsible for implementing procurement

-

Conclusion: No gap

Red flag: No

Qualitative analysis

The Capacity Building unit within the Office of the Accountant General (OAG) in the National Treasury provides training solutions and support to requesting departments. The Capacity Building unit developed has a strategy for public financial management⁷⁸ which covers elements of supply chain management. The Annual Report for National Treasury, reflects that the Office of the Accountant General has embarked on key support training and capacity development on SCM-related initiatives with SCM/CFO forums.

Further, through bilateral engagements with individual clients, the CIDB provides support, including training and capacitation. The training program is segmented according to the following learning outcomes:

- Legislative requirements
- SCM powers and functions
- Procurement documents for construction and engineering projects
- Solicitation of tender offers
- Evaluation of tender offers
- Implementation and management of infrastructure projects

⁷⁸ <https://oag.treasury.gov.za/Capacity%20Building%20Directorates1/Capacity%20Development%20Strategy.pdf>

Pillar II. Institutional Framework and Management Capacity

Gap analysis
Recommendations
Assessment criterion 5(b)(j): supporting the professionalisation of the procurement function (e.g. development of role descriptions, competency profiles and accreditation and certification schemes for the profession)
Conclusion: Substantive gap
Red flag: No
Qualitative analysis <p>There is no formal procurement association where each SCM practitioner belongs to, no mandatory training requirements for the practitioners and there is no system for accrediting or certifying procurement professionals including mechanisms for continuous professional development for procurement professionals. However the <u>Office of the Accountant General</u> has a capacity development <u>strategy for public financial management</u>. The OAG developed a technical competency dictionary on supply chain management⁷⁹, as part of the broader competency framework for financial management, which outlines various proficiency levels in procurement competencies and maps them against typical roles in the supply chain management function.</p> <p>On the other hand, the OCPO has an established Interim SCM Council with the purpose of professionalizing the SCM discipline in South Africa. The Interim SCM Council has laid a foundation for the professionalisation of the SCM as a discipline within the South African educational system. Its establishment was part of a project financed by GIZ. There will be defined national set of SCM norms and standards once the Council is fully functional. The Council is also planning to develop a framework for career pathing that allows for progression, articulation, portability, transferability and recognition; and develop a framework for ethical professional conduct. Additionally, the Capacity Building unit has identified SCM Learnership Programmes that were targeting SCM practitioners.</p>
Gap analysis It remains unclear whether the OAG or the Interim SCM Council has the institutional leadership in supporting the professionalisation of the procurement function (e.g. development of role descriptions, competency profiles and accreditation and certification schemes for the profession). Further, the Interim SCM Council at the time of the assessment doesn't seem to be fully functional.
Recommendations Clarify roles and responsibilities of the different institutions to support the professionalisation of the procurement function and reactivate the Interim SCM Council.
Assessment criterion 5(b)(k): designing and managing centralised online platforms and other e-Procurement systems, as appropriate
Conclusion: Minor gap

79

<https://oag.treasury.gov.za/Publications/18.%20Competency%20Framework%20for%20Public%20Financial%20Management/%28New%29%20Implementation%20of%20the%20Revised%20SCM%20Technical%20Competency%20Dictionary%20and%20the%20Expl%20Note/Annexure%20B%20-%20SCM%20Explanatory%20Note.pdf>

Pillar II. Institutional Framework and Management Capacity

Red flag: No

Qualitative analysis

The OCPO (through its ICT unit) is designing and managing the Central Supplier Database (CSD) and the eTenders portal. These centralised online platforms cover supplier registration to participate in public tenders and announcements of tenders as well as exchange of information between procuring entities and interested bidders. The rest of the procurement cycle (demand management and contract execution) is dealt with by internal systems in procuring entities.

The OCPO is also responsible for the design and the management of the section in the eTenders portal (data.etenders.gov.za) which provides procurement information in an open data format.

The CIDB is responsible for the design and management of the Register of Contractors where suppliers have also to be registered to participate in construction procurement.

Gap analysis

While the OCPO has been granted a clear mandate in terms of the design and management of online platforms and other e-Procurement systems, the fact that the CIDB manages another register for construction procurement implies that companies have to register in two different platforms.

Recommendations

The OCPO and the CIDB should assess the technical feasibility of interconnecting the Central Supplier Database and the Register of Contractors to avoid duplicating information.

Sub-indicator 5(c)

Organisation, funding, staffing, and level of independence and authority

Assessment criterion 5(c)(a):

The normative/regulatory function (or the institutions entrusted with responsibilities for the regulatory function if there is not a single institution) and the head of the institution have a high-level and authoritative standing in government.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

National Treasury, under the leadership of the Ministry of Finance, retains the overall responsibility to “make regulations or issue instructions applicable to all institutions to which this Act applies concerning... the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective” according to Article 76 (4) (c) of the PFMA.

However, the operational harm of the Treasury is the OCPO which should ensure that the system for procuring goods, services and construction works is conducted in a fair, equitable, transparent, competitive and cost-effective manner in line with the Constitution and all relevant legislations. The OCPO is placed in the National Treasury directly under the Director General. The Chief Procurement Officer is appointed by the Minister of Finance upon Cabinet concurrence. Nevertheless, the Chief Procurement Officer can be revoked by the Director General of National Treasury..

The DTIC, responsible for Preferential Procurement Regulations, is a stand-alone department headed by a Minister and the CIDB is under the DPWI which is also a stand-alone department headed by a Minister. The CIDB prescripts apply to departments at all levels of government, SOEs and state agencies that procure construction-related works, goods or services.

Pillar II. Institutional Framework and Management Capacity

Gap analysis

The OCPO has no statutory role granted by a legislative provision. It is only in terms of the PFMA and the MFMA that the office plays an authoritative regulatory function. However, such basis does not cover all instances of procurement and the relationship between the PFMA and other regulatory instruments (e.g. SITA Act, the CIDB Act, etc...) is not clear in all instances, resulting in regulatory gaps where the OCPO cannot fulfil an authoritative standard-setting function. In addition, the fact that the Chief Procurement Officer is under the authority of the DG creates a barrier to ensuring the functional independence of the Office.

Besides issues around the structure and human resources of the OCPO, stewardship in the South African public procurement system is also exposed to deviations from rules and standards. Indeed, the recommendations made by the OPCO and NT to organs of State are non-binding. Under the previous SCM Instruction Note of 2016/2017 where the authorisation from National Treasury was mandatory, several hearings before the Standing Committee on Public Accounts (SCOPA) underlined the tendency of decisions taken by National Treasury regarding deviations or expansions not being followed by Accounting Officers in organs of State.

With the new SCM Instruction Note of 2021/2022 which only obliges Accounting Officers of Organs of State to report on deviations or expansions to National Treasury, this problem now manifests in the questionable low number of deviations and expansions reported. Indeed, when comparing deviations in the fourth quarter of 2021/2022 (under the regime of Instruction Note of 2016/2017) to deviations in the first quarter of 2022/2023 (under the regime of Instruction Note 2021/2022), reported deviations amounted to less than 10% of those in the previous quarter (2,979,071,208 ZAR vs. 228,319,236 ZAR)⁸⁰.

Recommendations

While it retains ultimate responsibility over the public procurement system in South Africa, the National Treasury should consider available means to reinforce the authoritative standing of the OCPO, and its Head, considering its role in steering the regulatory landscape.

Public Procurement Bill:

The creation of the PPO would be a welcomed step towards greater authoritative standing of the regulatory function in the South African public procurement system. With the power to issue binding instructions to all organs of state, the PPO could drastically shape an effective use of public procurement by ensuring an harmonised application of the regulatory framework. In its section 5.2 (d), the Public Procurement Bill version B18-2023 stated that the Public Procurement Office “if of the view that the procurement policy applied by a procuring institution does not comply with a provision of this Act”... could “review such policy and advise the institution on amendments”. This section granted significant normative role to the PPO, especially on individual SCM policy of organs of State. Yet, the revised version of the Bill B18B-2023 does not include such a provision which could severely undermine efforts to grant the PPO with a greater authoritative standing.

However, this role cannot be effectively fulfilled if the office is not granted the necessary human resources, both in numbers and skills, and if it is not enjoying effective independence. Since most of the implementation details are not dealt with directly in the Public Procurement Bill but rather left to subsequent regulations, NT could seize this opportunity to craft regulations which would ensure adequate staffing and effective independence of the PPO so that it could exercise its mandate efficiently.

Assessment criterion 5(c)(b):

Financing is secured by the legal/regulatory framework, to ensure the function’s independence and proper staffing.

⁸⁰ [Chief Procurement Officer on Requests for contract deviations and expansions in Quarter 1 2022/23 | PMG](#)

Pillar II. Institutional Framework and Management Capacity

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

The OCPO is financed by the national budget. In 2022/2023, its annual budget was 182,796,000 ZAR (approximately 9.7 MEUR) with 35% (63,454,000 ZAR) allocated to compensation of employees. The table below details the breakdown of OCPO's annual budget in 2022/2023 (the headings refer to specific units within the OCPO).

Economic Classification 2022/2023	R'000								
	CPO	CD:TC	CD:SCM ICT	CD:PL	CD:GMC	CD:SCS	CD:SP	TOTAL	
Compensation of Employees	3 888	13 415	9 742	8 879	18 317	3 789	5 424	63 454	35%
Goods & Services	110 162	1 214	2 233	582	1 644	644	860	117 339	64%
Payment for Capital Assets	70	701	750	126	174	82	100	2 003	1%
TOTAL	114 120	15 330	12 725	9 587	20 135	4 515	6 384	182 796	100%

The CIDB is also financed by the national budget. In 2023/2024, its total annual budget was 222,743,000 ZAR (approximately 11.3 MEUR), with 17,222,000 ZAR allocated to its programme on procurement⁸¹.

Gap analysis

As a division of NT, the financing of OCPO is secured from the national budget. However, out of 140 approved positions, 36 remain unfunded (25%) which signals a relatively strong discrepancy between human resources needs assessment and available funds. A number of weaknesses observed in this assessment such as technical issues affecting the intended functioning of eTenders might well be explained by the absence of necessary budgets to equip the institution with adequate of human resources.

Severe shortages of human resources due to the unavailability of corresponding budgets have also been experienced by CIDB⁸².

This gap is assigned a red flag considering the systemic nature of the issue and that inadequate staffing cannot support the achievement of the objectives of the South African public procurement system.

Recommendations

The OCPO, together with NT, should consider available means to finance all positions to allow the institution to carry out its mandate effectively.

The CIDB, together with DPWI, should consider available means to finance all positions to allow the institution to carry out its mandate effectively.

This gap is assigned a red flag considering that this gap cannot be addressed within the procurement system and would warrant a broader reallocation of public finances.

Assessment criterion 5(c)(c):

The institution's internal organisation, authority and staffing are sufficient and consistent with its responsibilities.

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

⁸¹ [Construction Industry Development Board, Annual performance plan 2021/2022](#)

⁸² [Construction Industry Development Board, Annual performance plan 2021/2022](#)

Pillar II. Institutional Framework and Management Capacity

Formally located in National Treasury's Programme 5, the Office of Chief Procurement Officer had, as of 31 March 2023, 140 positions available, of which 104 were funded and 36 positions unfunded. Of the 140 approved positions, only 80 positions are filled (60 positions vacant), showing a vacancy rate of 43%⁸³.

For the CIDB, the annual performance plan also highlights shortages in terms of human resources⁸⁴.

Gap analysis

The mandate of the OCPO is relatively broad since the Office is responsible for policy formulation, management of e-Procurement central databases and systems, monitoring of the performance of the public procurement system and the implementation of transversal terms contracts for general commodities. The number of unfunded positions highlight the difference between the assessment of needs in terms of human resources (i.e. the number of approved positions) and the resources actually at hand (i.e. the number of funded positions).

Further, high turnover rates in the Office have been a systemic challenge and this rate was around 43% in 2022-2023. When compared to the average vacancy rate within NT which is about 15%, this rate is almost threefold in OCPO. The starkest illustration of this issue could be found in OCPO leadership. Indeed, the Chief Procurement Officer position has been vacant for almost 5 years with the current Chief taking office in August 2022.

Similar issues have been highlighted for the CIDB responsible for construction-related policy formulation, management of databases and monitoring of the compliance with CIDB prescripts.

Recommendations

The role undertaken by the OCPO cannot be effectively fulfilled if the office is not granted the necessary human resources, both in numbers and skills. National Treasury needs to address the severe issue of vacancy rates in the OCPO to provide the institution with the human capacity necessary to carry out its mandate.

The CIDB needs to ensure that its programme overseeing public procurement is provided with adequate human resources.

Sub-indicator 5(d) Avoiding conflict of interest

Assessment criterion 5(d)(a):

The normative/regulatory institution has a system in place to avoid conflicts of interest.*

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

The system in place within NT/OCPO draws on the general provisions relating to conflicts of interest.

The National Treasury issued a practice note that provides for guidance to accounting officers on how to regulate the environment within which bids should be considered when they are submitted by persons employed by the state or by persons connected with or related to persons employed by the state.

Treasury Regulation 16A8.4 indicates that if a supply chain management official or other role player, or any close family member, partner or associate of such official or other role player, has any private or business interest in any contract to be awarded, that official or other role player must –

- (a) disclose that interest; and
- (b) withdraw from participating in any manner whatsoever in the process relating to that contract.

The Department of Public Service and Administration (DPSA) issued a Directive to public service employees to disclose their financial interests and another Directive specifically for Senior Managers and Head of Departments (HODs) to disclose their financial interests. The disclosure is done electronically (eDisclosure).

⁸³ [National Treasury Annual Report 2022-23.pdf](#)

⁸⁴ [Construction Industry Development Board, Annual performance plan 2021/2022](#)

Pillar II. Institutional Framework and Management Capacity

Quantitative analysis

* *Recommended quantitative indicator to substantiate assessment of sub-indicator 5(d) Assessment criterion (a):*
- *Perception that the normative/regulatory institution is free from conflicts of interest (in % of responses).*
Source: Survey.

Out of the 366 respondents to the survey, about 44% felt there are conflict of interest related to public procurement in NT/OCPO.

Gap analysis

The functions and roles of NT/OCPO in the South African public procurement system are extremely varied (from policy making to the management of electronic systems and an overall oversight function). This variety of roles would warrant specific provisions to deal with conflict of interests going beyond general requirements applicable to the entire public administration.

This gap is assigned a red flag because it cannot be addressed only within the procurement system and would require the active contribution of the DPSA.

Recommendations

Considering the role of NT and OCPO in the public procurement system (including the implementation and award of transversal terms contracts), general provisions on the management of conflict of interest would need to be reinforced. For example, several dimensions could be strengthened such as post-public employment for public procurement officials or expanding the prohibition to do business with the State beyond directors of companies.

Indicator 6. Procuring entities and their mandates are clearly defined

Sub-indicator 6(a)

Definition, responsibilities and formal powers of procuring entities

The legal framework provides for the following:

Assessment criterion 6(a)(a):

Procuring entities are clearly defined.

Conclusion: No gap

Red flag: No

Qualitative analysis

Section 217 in the Constitution of South Africa states that “When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, procures goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective”.

The definitions classify “organ of state” as (a) any department of state or administration in the national, provincial, or local sphere of government; or (b) any other functionary or institution exercising a power or performing a function in terms of the Constitution. The Schedules of the PFMA lists all the public entities. Schedule 1 lists constitutional institutions, Schedule 2 details major public entities, while Schedule 3 lists all other public entities (national public entities, state-owned companies, national government business enterprises, provincial public entities, and provincial government business enterprises).

Gap analysis

Pillar II. Institutional Framework and Management Capacity

Recommendations
Assessment criterion 6(a)(b): Responsibilities and competencies of procuring entities are clearly defined.
Conclusion: No gap
Red flag: No
Qualitative analysis <p>Within each organ of state, the accounting officer or the accounting authority plays a central role. Indeed, in the PFMA, Section 38 (for departments and constitutional institutions) and Section 51 (for public entities) mention that each organ of State must have an accounting officer/authority who is responsible and should be held accountable for any expenditures relating to supply chain management within their line of responsibility. Any expenditure incurred should be subject to appropriate regulation and accounting officers'/authorities' directives and procedures.</p> <p>In support to the PFMA, NT Regulation on the Framework for Supply Chain Management (2003) stipulates in its Section 4. (1) that the "accounting officer or accounting authority of an institution to which these regulations apply must establish a separate supply chain management unit within the office of that institution's chief financial officer, to implement the institution's supply chain management system".</p>
Gap analysis
Recommendations
Assessment criterion 6(a)(c): establish a designated, specialised procurement function with the necessary management structure, capacity and capability.*
Conclusion: No gap
Red flag: No
Qualitative analysis <p>In support to the PFMA, NT Regulation on the Framework for Supply Chain Management (2003) stipulates in its Section 4. (1) that the "accounting officer or accounting authority of an institution to which these regulations apply must establish a separate supply chain management unit within the office of that institution's chief financial officer, to implement the institution's supply chain management system".</p> <p>National Treasury further published in 2004 "Supply chain management: A guide to accounting officers/ authorities" which details how a supply chain management function should be designed within organs of State. Supply chain management units are to be created in the Chief Financial Officer structures of institutions. Therefore, according to the legislative and regulatory environment, each organ of state should be equipped with a dedicated and integrated supply chain management function covering the whole public procurement cycle.</p>
Quantitative analysis <p>// Minimum indicator // * Quantitative indicator to substantiate assessment of sub-indicator 6(a) Assessment criterion (c):</p>

Pillar II. Institutional Framework and Management Capacity

- *procuring entities with a designated, specialised procurement function (in % of total number of procuring entities).*
Source: Normative/regulatory function.

The assessors can conclude that 100% of procuring entities have a designated, specialised, procurement function.

Further, Article 28 of the Public Procurement Bill reiterates that “every procuring institution must establish a procurement function as part of its procurement system”⁸⁵.

Gap analysis

Recommendations

Assessment criterion 6(a)(d):

Decision-making authority is delegated to the lowest competent levels consistent with the risks associated and the monetary sums involved.

Conclusion: Minor gap

Red flag: No

Qualitative analysis

Treasury Regulations 8.2.1 issued in terms of the PFMA indicates that an “official of an institution may not spend or commit public money except with the approval (either in writing or by duly authorised electronic means) of a properly delegated or authorised officer”⁸⁶. The level at which procurement decision-making is delegated within each procuring entity is left to the SCM policy of each organ of State. However, based on few policies consulted^{87, 88} it seems decisions on procurement expenditure are delegated at the Director-level within the SCM Unit.

The delegation guideline which was issued by the National Treasury provides principles to guide the development of public administration and financial management delegations authorised and exercised in terms of the Public Service Act and the PFMA. The concepts and principles set out in the document equally apply to delegations authorised in terms of line function sector legislation. Financial delegations in terms of the PFMA are cascaded down to levels lower than the Head of Department (HoD) or Accounting Officer.

Gap analysis

The assessors have limited information on the extent to which decision-making authority is delegated to the appropriate competent level, as there are no general rules. Given the overall issues with timely execution of procurement procedures, it could be worth examining if the current process of delegation (or subsequently any lack of proper delegation) in decision-making represents a source of inefficiencies in the execution of procurement procedures.

Recommendations

Authorities could examine whether the current level at which decision-making is delegated represents a source for inefficiencies in procurement execution.

Assessment criterion 6(a)(e):

Accountability for decisions is precisely defined.

⁸⁵ [2011 Western Cape Bi \(parliament.gov.za\)](http://parliament.gov.za)

⁸⁶ [Gazette Version 090301.PDF \(treasury.gov.za\)](http://treasury.gov.za)

⁸⁷ [Microsoft Word - DBSA Supply Chain Management Policy - 19May22](#)

⁸⁸ [supplychain_management.pdf \(dfffe.gov.za\)](http://dfffe.gov.za)

Pillar II. Institutional Framework and Management Capacity

Conclusion: No gap

Red flag: No

Qualitative analysis

In virtue of the PFMA, accounting officers/authorities are accountable for procurement decisions made. Section 42(2)(d) further states that a delegation from the accounting officer/authority to another official “does not divest the AO of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty”.

Gap analysis

Recommendations

Sub-indicator 6(b) Centralized procurement body

Assessment criterion 6(b)(a):

The country has considered the benefits of establishing a centralised procurement function in charge of consolidated procurement, framework agreements or specialised procurement.

Conclusion: No gap

Red flag: No

Qualitative analysis

South Africa has considered the recourse to a centralised procurement function in various ways. First, referred to as “Transversal term contracts”, South Africa has in place collective procurement instruments which are managed by different institutions. Transversal term contracts are procurement instruments to which organs of State may decide to opt in. Treasury Regulations 16A6.5 provides that the “accounting officer or accounting authority may opt to participate in transversal term contracts facilitated by the relevant treasury. Should the accounting officer or accounting authority opt to participate in a transversal contract facilitated by the relevant treasury, the accounting officer or accounting authority may not solicit bids for the same or similar product or service during the tenure of the transversal term contract.”

The National Treasury issued **a guide document** for centrally facilitated contract that are arranged by the National Treasury to procure goods or services that are required by one or more than one institution. The guide was intended to assist accounting officers and accounting authorities with roles, responsibilities and procedure for participation in transversal term contracts.

Transversal term contracts are managed by different institutions depending on the nature of the procured goods and services. For general commodities, OCPO manages transversal term contracts. As of 20 May 2022, OCPO manages 61 commodities under transversal term contracts⁸⁹. Overall, the use of these contracts is optional for organs of State.

Besides those managed by OCPO, the State Information Technology Agency (SITA) is also responsible for transversal terms contracts for ICT procurement. As for OCPO, these contracts are optional for organs of state.

⁸⁹ [Transversal Contracting Contact List May 2022.pdf \(treasury.gov.za\)](#)

Pillar II. Institutional Framework and Management Capacity

However, the SITA Act (2002) introduces another form of centralisation by imposing the use of SITA services for specific categories of ICT procurement. The NT Practice Note 5 OF 2009/2010⁹⁰ clarifies that SITA must provide the following services to departments and provinces:

- provide or maintain a private telecommunication network or a value added network;
- provide or maintain transversal or departmental specific information systems;
- provide data-processing or associated services for transversal or departmental specific information systems;

provide IT (information technology) for Government.

Gap analysis

Recommendations

Assessment criterion 6(b)(b):

In case a centralised procurement body exists, the legal and regulatory framework provides for the following:

- Legal status, funding, responsibilities and decision-making powers are clearly defined.
- Accountability for decisions is precisely defined.
- The body and the head of the body have a high-level and authoritative standing in government.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

For ICT procurement, SITA acts as a central purchasing body. The SITA Act 2002 describes the legal status, funding and responsibilities of SITA. The Agency is incorporated as a private company in the sense of the Company Act where the State is the sole shareholder of the company. It is funded by contributions from participating departments and has the overall responsibility of providing information technology, information systems and related services in a maintained information systems security environment to, or on behalf of, participating departments and organs of state. SITA is headed by a Board of Directors appointed by the Minister for the Public Service and Administration after consultation with Cabinet. The Minister also designates the non-executive Chairperson of the Board and the company's Managing Director.

National Treasury Practice Note 5 of 2009/2010 provides guidance to government departments on the procedures to be followed when procuring ICT related goods and/or services through the State Information Technology Agency (SITA). The practice note also aims to alert the accounting officers and accounting authorities of the prescribed supply chain management (SCM) processes to be followed by SITA on behalf of departments, constitutional institutions and 3A and 3C public entities.

For general commodities there is no independent central purchasing body. It is a Unit within OCPO which implements and manages transversal terms contracts. As opposed to SITA, the legal and regulatory framework does not provide for details about its legal status, funding, responsibilities and decision-making powers. Only Treasury Regulations 16A6.5 provides that "The accounting officer or accounting authority may opt to participate in transversal term contracts facilitated by the relevant treasury. Should the accounting officer or accounting authority opt to participate in a transversal contract facilitated by the relevant treasury, the accounting officer or accounting authority may not solicit bids for the same or similar product or service during the tenure of the transversal term contract."

⁹⁰ [PNote5 0910.pdf \(treasury.gov.za\)](#)

Pillar II. Institutional Framework and Management Capacity

Last, there has been an attempt to centralise within National Treasury the procurement of pharmaceutical but following exchanges between the National Treasury and the Department of Health, it had been decided in April 2019 to transfer the management of these contracts back to the Department of Health.

Gap analysis

Unlike SITA, the central purchasing function of the OCPO is placed in National Treasury and the legal and regulatory framework does not provide for details about its legal status, funding, responsibilities and decision-making powers.

Further, the creation of the Public Procurement Office by the Public Procurement Bill does not seem to integrate such function. Indeed, article 5 of the Bill which lists the functions of the newly created Public Procurement Office does not include a provision on implementing and managing transversal terms contracts. It is therefore uncertain to determine where such central purchasing function will be placed and which authoritative standing it will be given.

Recommendations

Centralised procurement has proven to be an effective strategy to achieve economies of scale, reduce red tape and support competition in open bidding processes. These objectives are particularly relevant in product categories heavily standardised such as general commodities. However, ensuring the effectiveness of centralised procurement strategies requires the stewardship of an organisation with sufficient authoritative standing and adequate financial and human resources.

National Treasury could ensure that the centralised purchasing function for general commodities, irrespective of where it is located, benefit from sufficient authoritative standing and adequate financial and human resources.

Assessment criterion 6(b)(c):

The centralised procurement body's internal organisation and staffing are sufficient and consistent with its responsibilities.

Conclusion: Minor gap

Red flag: No

Qualitative analysis

According to its annual report 2022-2023⁹¹, SITA experienced numerous challenges strongly affecting the effectiveness of centralised procurement. The procurement and contracting of ICT commodities for Government stakeholders faced service delivery challenges due to several factors. Challenges faced encompassed leadership transitions, the inability to fully automate manual supply chain processes coupled with shortage and high turnover of key resources. In the same report, the number of employees dedicated to the programme which is responsible for procurement activities only accounts for 1.7% of the total number of employees (55 out of 3236 employees).

For general commodities, the Unit in OCPO counts on 28 employees, out of the 140 positions of the Office overall and is headed by a Chief Director.

Gap analysis

The assessors have limited visibility on the structure and staffing of the Unit in OCPO responsible for implementing transversal terms contracts.

The assessors have limited visibility on the structure and staffing of the Programme responsible for procurement activities in SITA.

⁹¹ [Annual Report 2022 - 2023.pdf \(sita.co.za\)](#)

Pillar II. Institutional Framework and Management Capacity

Recommendations

The OCPO could assess the alignment of staffing needs with the number of transversal terms contracts being managed by the Unit.

SITA could assess the alignment of staffing needs with the number of transversal terms contracts being managed by the Programme, especially considering that procurement of ICT by government departments needs to be conducted through SITA.

Indicator 7. Public procurement is embedded in an effective information system

Sub-indicator 7(a)

Publication of public procurement information supported by information technology

The country has a system that meets the following requirements:

Assessment criterion 7(a)(a):

Information on procurement is easily accessible in media of wide circulation and availability. Information is relevant, timely and complete and helpful to interested parties to understand the procurement processes and requirements and to monitor outcomes, results and performance.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

Most procurement information is available from three sources. Legislative and regulatory procurement information could be found on the OCPO website which lists all applicable legislation. Information is available on existing Instruction Notes, Circulars, Guidelines and PPPFA Regulations.

Besides the OCPO website, two databases/systems provide information on individual procurement. Through the SCM-ICT unit, the OCPO introduced a **Central Supplier Database (CSD) system** that provides a one-stop platform and database to serve as the source of all supplier information for all spheres of government. The purpose of centralising the government's supplier database was meant to reduce duplication of effort and cost for both supplier and government while enabling electronic procurement processes for below threshold procurement (procurement not exceeding 1,000,000 ZAR, including all applicable taxes⁹²).

Information on open competitive bidding procedures, notably on the tendering phase, is to be found on the eTender portal. The eTender portal provides information about tender opportunities free of charge. It further includes the publication of procurement plans and lists all currently advertised tender opportunities by organs of State.

The eTender portal has a subsection that provides access to information on all tenders made by all public sector organisations at all spheres of government. Detailed monthly data for public procurement can be downloaded in Open Contracting Data Standard (OCDS) compliant with CSV, JSON and Excel formats. The publication of procurement data aims to ensure that public procurement data used by the National Treasury of South Africa is accessible online and in open formats so that it can be used, reused and redistributed by any interested party.

Gap analysis

General procurement information is available on OCPO website. However, information is displayed by type of norm and by year making it complex to find procurement legislation information on specific themes. Further the website does not include information about CIDB prescripts which apply in any construction-related procurement

⁹² [PFM SCM Instruction No. 02 of 2021-22 Procurement thresholds and processes.pdf \(treasury.gov.za\)](#)

Pillar II. Institutional Framework and Management Capacity

and which are only available on the CIDB website. This results in multiple sources of information for construction-related procurement which might prevent users to easily understand applicable requirements.

Access to public procurement opportunities is limited. The e-tender portal does include the publication of procurement plans and list all currently advertised tender opportunities. However, from information available online, the timescale of published information remains unclear (some past advertisements and future not exceeding the current quarter) and this brings challenges for interested suppliers to have a good understanding of future procurement opportunities.

Further, while competitive bidding and requests for quotations could be supported by e-procurement tools (e-tender and the CSD), deviations and expansions of existing contracts are currently not managed through an electronic system and are individually reported by organs of State to relevant treasuries and to the Auditor General each month. This prevents further analysis on the extent of exceptions to competitive bidding in the South African public procurement system and prevents to compile and publish information on the amount of procurement expenditures based on exceptions.

While the subsection of the eTender portal provides useful information on individual procurement and allows interest parties to monitor outcomes and results, technical issues prevent users to download datasets in an open data format.

Recommendations

The OCPO could consider displaying on its website information related to CIDB prescripts as it would provide a one-stop-shop to gather procurement information on the normative framework irrespective of the type of procurement considered.

The OCPO could clarify information about future procurement opportunities and expand the time horizon of opportunities published.

South Africa should consider developing an electronic tool or system (whether a dedicated module in the e-tender platform or a separate, yet interconnected, tool) which would collect and aggregate detailed information about deviations and expansions (nature, amount, supplier, etc...).

While statistical information (purchasing entities, suppliers, number and value of contracts) is allegedly displayed in open data format, technical issues prevent users to download corresponding data. The OCPO should resolve these technical deficiencies.

Assessment criterion 7(a)(b):

There is an integrated information system (centralised online portal) that provides up-to-date information and is easily accessible to all interested parties at no cost.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The two main information systems providing procurement information are the CSD and the eTender portal, both being managed by the OCPO. The CSD allows interested suppliers to register and provide relevant business information. The system is integrated with the South African Service Revenue (SARS) tax system and with the Company and Intellectual Property Commission (CIPC) electronic database. The integration with these two systems

Pillar II. Institutional Framework and Management Capacity

allows for the automatic verification of business registration and bank accounts. However, the CSD is not integrated with the BBBEE database operated by the BBBEE Commission. Registration in the CSD is mandatory for businesses willing to work with organs of State. In addition to this database, the CIDB manages a dedicated business registry (the Register of Contractors) for construction procurement.

Besides being a database centralizing information about the identity of prospective bidders, the CSD allows public institutions to run Requests for Quotations (RFQ) for any procurement not exceeding 1,000,000 ZAR, including all applicable taxes⁹³. If this functionality is activated by organs of State, identified suppliers will be notified via email about the request, they can access RFQ documentation online and can upload their quotes.

Information on competitive bidding procedures, notably on the tendering phase, is to be found on the eTender portal. It further includes the publication of procurement plans and lists all currently advertised tender opportunities by organs of State.

Gap analysis

While the CSD platform provides for automated checks on tax and business registers, the information linked to the BBBEE status is based on a self-declaration (except for a very small share of certificates issued by the CIPC) and is not checked against the BBBEE database. Considering the role of the BBBEE status in being awarded additional points in the framework of the PPPFA, this leads to regular disputes and complaints about the accuracy of companies' information referred to as BBBEE fronting.

On the eTender portal, organs of state can upload bidding documents so that interested suppliers could understand specific requirements and needs covered by individual competitive bidding processes. However, organs of State may also decide to provide bidding documentation for a fee according to the "Supply Chain Management: a Guide for Accounting Officers/Authorities"⁹⁴.

Currently, information about future opportunities published on the eTender portal is not exceeding opportunities for the current quarter. However, National Treasury receives procurement plans of organs of State for the full financial year.

Recommendations

Given the influence of the BBBEE status on the award of points under the PPFA, South Africa should automate checks against the BBBEE database to avoid incorrect self-declaration by bidders and minimise the risk of disputes after the award of contracts.

Considering information gathered from organs of state on procurement plans, NT and OCPO could consider expanding the time horizon of future procurement opportunities published so interested suppliers could have better visibility.

Assessment criterion 7(a)(c):

The information system provides for the publication of: *

- procurement plans
- information related to specific procurements, at a minimum, advertisements or notices of procurement opportunities, procurement method, contract awards and contract implementation, including amendments, payments and appeals decisions
- linkages to rules and regulations and other information relevant for promoting competition and transparency.

Conclusion: Substantive gap

⁹³ [PFM SCM Instruction No. 02 of 2021-22 Procurement thresholds and processes.pdf \(treasury.gov.za\)](#)

⁹⁴ [Microsoft Word - SCM Jan900-Guidelines.doc \(dff.gov.za\)](#)

Pillar II. Institutional Framework and Management Capacity

Red flag: Yes

Qualitative analysis

The e-tender portal includes the publication of procurement plans and lists all currently advertised tender opportunities. The information system also publishes specifics of procurement plans, advertisements or notices of procurement opportunities. Within the scope of open competitive bidding processes which are advertised on the eTender portal, the specific procurement method is not published. According to NT SCM Instruction Note 9 OF 2022/2023⁹⁵, contract awards and contract implementation information, including amendments, should also be published. Conversely, no information on payments and/or appeals decisions are published on the eTender portal.

The eTender portal includes a link to the OCPO website where information on current rules and regulations is provided. However, there is no link to the CIDB website where prescripts applicable in case of construction-related procurement are displayed.

All procurement information related to contract implementation is not hosted in the eTender portal but rather managed using organs of State's internal financial management systems, including LOGIS and BAS. Supply chain management, financial management and information management are supported by disparate core systems maintained and managed by the National Treasury.

Quantitative analysis

Since the beginning of the 2023-2024 Financial Year. There were 2991 upcoming tenders identified in procurement plans published on the system from 100 organs of state. During the same period, 15 338 tenders were published by 606 organs of state and 314 contracts were captured by 35 organs of state. These numbers show that only 12% of organs of state registered on eTenders have loaded procurement plans during the period under review.

For publication of tenders, the data shows that 73% of organs of state have published tenders and only 3% captured contracts.

// Minimum indicator // Quantitative indicators to substantiate assessment of sub-indicator 7(a) Assessment criterion (c):

- *procurement plans published (in % of total number of required procurement plans)*
12% of organs of state (100 organs of state out of a total of 830 organs of state)
- *key procurement information published along the procurement cycle (in % of total number of contracts) :*
No data
- *invitation to bid (in % of total number of contracts)*
No data
- *contract awards (purpose, supplier, value, variations/amendments)*
No data
- *details related to contract implementation (milestones, completion and payment)*
No data
- *annual procurement statistics*
No data
- *appeals decisions posted within the time frames specified in the law (in %).*
No data

Source: Centralised online portal.

Gap analysis

The limited information available on the eTender portal and the absence of an information system which would

⁹⁵ [Mr X \(treasury.gov.za\)](https://www.treasury.gov.za)

Pillar II. Institutional Framework and Management Capacity

collect information on total procurement expenditures (open competitive bidding processes, RFQ, deviations and expansions) prevent to calculate most of the minimum quantitative indicators listed in the MAPS methodology.

The following minimum quantitative indicators could not be measured by the assessors:

- key procurement information published along the procurement cycle (in % of total number of contracts)
- invitation to bid (in % of total number of contracts)
- contract awards (purpose, supplier, value, variations/amendments)
- details related to contract implementation (milestones, completion and payment)
- annual procurement statistics
- appeals decisions posted within the time frames specified in the law (in %).

Many of the indicators above would require additional visibility on the contract management phase which is not supported by an integrated information system but rather by multiple financial management tools (LOGIS, BAS, PERSAL). For more than two decades, the South African administration decided to replace these various financial management systems by an integrated solution. The Integrated Financial Management System (IFMS) project was first approved in 2002. However, a complex governance structure and technical approach led to protracted delays in implementation, and an amended approach (IFMS 2) was approved and initiated in 2013. However, a decade after, the project is still suffering from implementation delays and is now subject to investigations by the Special Investigation Unit. National Treasury, the Department of Public Service and Administration and the State Information Technology Agency have presented a detailed account of the numerous implementation challenges before the SCOPA⁹⁶. At the time of writing this assessment, implementation challenges have not been resolved and the IFMS project is not rolled out.

Considering that a number of minimum quantitative indicators defined by the MAPS methodology could not be identified, this gap is assigned a red flag.

Recommendations

The fragmented nature of the existing e-procurement landscape in South Africa makes it challenging, if achievable at all, for users to navigate various tools and to minimise administrative red tape which causes direct impacts on the low uptake of e-procurement systems and possibly competition in public tenders. South Africa could consider revamping its e-tender platform to incorporate the RFQ module currently operated outside, to automate integration of information about suppliers contained in the CSD, including automated checks of the BBBEE status against the BBBEE database and to interoperate with organs of state financial management tools covering the post-award phase of the procurement cycle.

South Africa should urgently conclude the IFMS project and ensure the interoperability of the financial management tool with the e-tender portal so as to benefit from integrated tools covering the whole procurement cycle. This would avoid organs of state having to input the same procurement information in different tools, thus reducing the risk of discrepancies and ease the use of e-procurement tools.

Assessment criterion 7(a)(d):

In support of the concept of open contracting, more comprehensive information is published on the online portal in each phase of the procurement process, including the full set of bidding documents, evaluation reports, full contract documents including technical specification and implementation details (in accordance with legal and regulatory framework).

Conclusion: Substantive gap

Red flag: No

⁹⁶ [IFMS: SIU investigations & National Treasury progress; with Deputy Minister of Finance | PMG](#)

Pillar II. Institutional Framework and Management Capacity

Qualitative analysis

Statistical information on procurement is provided on data.etenders.gov.za. The website displays rankings of most procured good, services and works. It also provides a ranking of the biggest procuring entities, largest contracts, and largest suppliers. Such information can be filtered to look at specific timeframes, product categories or procuring entities.

The eTender portal does not provide more comprehensive information on each phase of the procurement process, such as evaluation reports, full contract documents including technical specifications and implementation details.

Gap analysis

On the dedicated statistical pages of the e-Tender portal (data.etenders.gov.za), search functions are limited to aggregated information such as number of contracts awarded by suppliers or number of tenders issued by an organ of State and do not allow to disaggregate information. It doesn't seem to be possible to access data on specific procurement processes (by name of procuring entity, by name of supplier, by time range, etc...). Further, links between the information displayed cannot be made, such as identifying procuring entities from which largest suppliers received contracts.

While the bidding documents could be accessed on the eTender portal (except those where organs of state decide to request a fee), additional information on other phases of the procurement process is not available.

Recommendations

The OCPO could consider expanding the type of procurement information available in its e-Procurement system to other important procurement data (evaluation reports, completion date of contracts, etc...). The OCPO could further explore the feasibility of introducing more granular search functions on the dedicated statistical pages of the eTender portal so that interested parties could access information on individual procurement processes.

Assessment criterion 7(a)(e):

Information is published in an open and structured machine-readable format, using identifiers and classifications (open data format).*

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

A section of the eTender portal is dedicated to procurement information in open data format. This information should be available in CSV, JSON and Excel formats.

Quantitative analysis

There is no available quantitative data.

* *Recommended quantitative indicator to substantiate assessment of sub-indicator 7(a) Assessment criterion (e): - Share of procurement information and data published in open data formats (in %).*

No data

Source: Centralised online portal.

Gap analysis

Pillar II. Institutional Framework and Management Capacity

In the section of the portal dedicated to open data, availability of monthly procurement datasets is not secured and the portal displays errors messages when trying to access downloads. While, theoretically, procurement information in an open data format is made available on the portal, technical deficiencies prevent interested users to access such information.

Recommendations

The OCPO should resolve these technical deficiencies and could consider expanding the type of procurement information available in an open data format to other important procurement data (bidding documents, evaluation reports, completion date of contracts, etc...).

Assessment criterion 7(a)(f):

Responsibility for the management and operation of the system is clearly defined.

Conclusion: No gap

Red flag: No

Qualitative analysis

For the eTender portal, responsibility for the management and operation of the system is granted to the OCPO and more specifically to the SCM – ICT Unit within OCPO. OCPO is further responsible for the management and operation of the CSD and defines roles and access rights granted to staff in organs of state. This is particularly prominent in the context of the Request For Quotes functionality which has been recently implemented in the system.

The segregation of duties pertaining to the CSD's RFQ functionality is clearly defined in business rules and is embedded in the system. The system provides for separate roles for creating, authorizing and distributing RFQs to identified suppliers. It also includes the possible to assign an oversight role in the process. All these roles can be defined by the primary user identified in each organ of state.

Gap analysis

Recommendations

Sub-indicator 7(b) Use of e-Procurement

Assessment criterion 7(b)(a):

E-procurement is widely used or progressively implemented in the country at all levels of government.*

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

The overall use of e-Procurement systems (eTender, CSD) is hardly quantifiable (see minimum indicator below). In the absence of more recent quantitative information, the National Treasury found in its 2016 update to the Supply Chain Management review⁹⁷ that about 45% of total supply chain activities were conducted manually.

⁹⁷ [1 \(treasury.gov.za\)](https://www.treasury.gov.za)

Pillar II. Institutional Framework and Management Capacity

NT SCM Instruction Note 9 OF 2022/2023⁹⁸ reinstates mandatory requirements about the publication on eTender of bid opportunities, bid awards and any related bid notification. However, beyond these requirements for open competitive bids, article 3.2 of the Instruction Note states that procurement through other means such as deviations or price quotations do not require the publication of procurement information on the eTender portal.

For procurement below the open bidding threshold, CSD's RFQ functionality is in the process of being rolled out national wide to all spheres of Government. The RFQ functionality has been adopted by Northern Cape provincial government, the Office of the Presidency, National Prosecuting Authority and National Housing Finance Corporation.

Quantitative analysis

(There is no available quantitative data)

*// Minimum indicator // * Quantitative indicators to substantiate assessment of sub-indicator 7(b) Assessment criterion (a):*

uptake of e-Procurement

- number of e-Procurement procedures in % of total number of procedures*
- value of e-Procurement procedures in % of total value of procedures*

Source: e-Procurement system.

Gap analysis

While, theoretically, all organs of state are required to publish procurement procedures in e-Procurement system (or at least on their websites for municipalities), low compliance with these legislative requirements put a question mark on the widespread nature of the use of existing e-Procurement systems. Further, the exclusion of RFQs and exceptions (deviations and expansions) from the requirements to use the eTender portal prevents to quantitatively assess the share of procurement procedures which are carried out online.

According to National Treasury, since the beginning of the 2023-2024 Financial Year, 2991 upcoming tenders identified in procurement plans were published on the system from 100 organs of state. During the same period, 15 338 tenders were published by 606 organs of state and 314 contracts were captured by 35 organs of state. These numbers show that only 12% of organs of state registered on e-tender have loaded procurement plans during the period under review. For publication of tenders, the data shows that 73% of organs of state have published tenders while only 3% published contract notices.

This gap is assigned a red flag considering that the use of the e-procurement system for critical stages of the procurement cycle such as contract awards is extremely low (3% in FY 2023/2024).

Recommendations

Considering that publication of mandatory of information such as contract award notice is extremely low (3% in FY 2023/2024), National Treasury could identify organs of state with the lowest adherence to publication obligations and investigate further reasons why these organs of state do not comply with such obligations. Such low compliance rate with legislative requirements to use e-Procurement systems significantly impedes the achievement of the overarching principle of transparency laid out in the Constitution.

Assessment criterion 7(b)(b):

Government officials have the capacity to plan, develop and manage e-Procurement systems.

⁹⁸ [Mr X \(treasury.gov.za\)](#)

Pillar II. Institutional Framework and Management Capacity

Conclusion: No gap
Red flag: No
Qualitative analysis A dedicated unit (SCM ICT unit) in OCPO manages the eTenders portal and the CSD.
Gap analysis
Recommendations
Assessment criterion 7(b)(c): Procurement staff is adequately skilled to reliably and efficiently use e-Procurement systems.
Conclusion: Substantive gap
Red flag: No
Qualitative analysis According to the OCPO, eTenders training sessions are conducted for the benefit of Organs of State on Tuesdays and Thursdays every week. For the recent RFQ functionality available in the CSD, organs of state users will receive online training before utilising the CSD RFQ functionality. Training material is shared after the training with officials who attended the sessions. Additional online help is embedded in the CSD system to empower the user while utilising the system.
Gap analysis While training sessions are being proposed by the OCPO, the extremely low compliance rate with publication requirements on eTenders suggests that the supply chain management function is not sufficiently equipped to reliably and efficiently use e-Procurement systems.
Recommendations The OCPO could expand the scope and assess the reach of training sessions so as to address the systemic issue of low compliance with publication requirements in the e-Procurement systems.
Assessment criterion 7(b)(d): Suppliers (including micro, small and medium-sized enterprises) participate in a public procurement market increasingly dominated by digital technology.*
Conclusion: Substantive gap
Red flag: No
Qualitative analysis The bid submission functionality has been introduced recently in e-tenders and the CSD (December 2022), thereby providing limited insights on the uptake of eProcurement within the private sector and SMEs participation.
Quantitative analysis The assessors have not been able to collect information on the below recommended quantitative indicators.
<i>* Recommended quantitative indicators to substantiate assessment of sub-indicator 7(b) Assessment criterion (d):</i>

Pillar II. Institutional Framework and Management Capacity

- bids submitted online (in %)
- bids submitted online by micro, small and medium-sized enterprises (in %)

Source: e-Procurement system.

Gap analysis

On e-tenders, published procurement opportunities identify whether e-submission is authorized or not, therefore it should be possible to at least identify the share of open competitive procedures which allowed for an online submission. However, this type of information is currently not extracted from the system and could not provide data required for the recommended quantitative indicator on the share of bids submitted online as defined in the MAPS methodology. Even when online submission is authorised, tenders could still be submitted in a paper format by standard mail, preventing to assess the share of bids submitted online.

In addition, while the CSD database where all suppliers need to be registered includes information about the classification of companies, notably whether it is a SME or not, the eTender portal does not provide similar information.

Besides not being able to provide necessary information required for the recommended quantitative indicators set out in the MAPS methodology, the absence of measurement of online submissions indicates a limited interest in promoting electronic means to carry out procurement processes. This is not without consequences on accountability and transparency.

Recommendations

The OCPO could investigate to which extent collecting statistics on the number of open competitive procedures allowing online submission and the number of bids actually submitted online is technically feasible with data available in eTenders. It could also consider cross-checking information available in the CSD with data in eTenders to develop further analysis on the level of participation of SMEs and their participation in digital procurement. Not only these initiatives would provide more granular information on participating in competitive bidding, they could also reinforce accountability and transparency of procurement processes.

Assessment criterion 7(b)(e):

If e-Procurement has not yet been introduced, the government has adopted an e-Procurement roadmap based on an e-Procurement readiness assessment.

Conclusion: Choose an item.

Red flag: No

Qualitative analysis

Not applicable

Gap analysis

Recommendations

Sub-indicator 7(c)

Strategies to manage procurement data

Assessment criterion 7(c)(a):

A system is in operation for collecting data on the procurement of goods, works and services, including consulting services, supported by e-Procurement or other information technology.

Pillar II. Institutional Framework and Management Capacity

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The Instruction Note 9 OF 2022/2023⁹⁹ mandates the use of the eTender portal for publication of bid opportunities, bid awards and any bid-related modifications. Article 3.3 mentions that “Institutions must capture the following information on e-Tender Portal as per online form requirements:

- a) Bid Information;
- b) bidders list within 10 working days of open competitive bid closing date;
- c) award information within 10 working days of successful bidder accepting the bid award;
- d) bid cancellation information; and
- e) bid amendments at least 10 working days before the bid closes”.

To support these requirements and collect data on procurement procedures, the eTender portal contains a reporting section on:

- Procurement opportunities
- Open tenders
- Awarded tenders
- Closed tenders

Further, the portal includes a section on “procurement data” which contains aggregated information on awarded contracts. This information is meant to be on an open data format and allow for bulk downloads. Other entries relate to the largest suppliers, largest contracts, largest procuring entities and largest procurement categories.

The CSD also collects procurement information on procedures below the open competitive bidding procedure. When creating an RFQ on CSD, the OoS needs to specify the goods, works or services they intent to procure, thus CSD do collect information pertaining to commodities procured by OoS.

The CSD can generate several reports on RFQs, such as:

- List of RFQs per organ of state
- RFQ detail report
- List of most invited suppliers
- RFQ supplier details highlighting all the RFQs a supplier participated in.

Gap analysis

While Instruction Note 9 OF 2022/2023 mandates organs of state to input a number of procurement information on the eTender portal, the extremely low compliance with these requirements prevents NT to have a functioning system in place to collect data on procurement procedures. Further, since Instruction Note 3 of 2021/2022 grants responsibility to accounting officers/authorities to approve procurement “by other means” (i.e., a deviation from the normal bidding process) and variations or expansions of contracts, a large proportion of procurement information is not collected through the e-Procurement system or other information technology.

In addition, the contract management phase is not covered by the e-tender portal but rather managed using procuring institutions’ internal financial management systems, including LOGIS and BAS. This prevents the collection of data on this stage of the procurement cycle.

A dedicated section of the eTender portal includes open data. However, when trying to retrieve monthly datasets in an open data format, an error message appears mentioning “no records found”.

⁹⁹ [Mr X \(treasury.gov.za\)](https://www.treasury.gov.za)

Pillar II. Institutional Framework and Management Capacity

Besides aggregated information on awarded contracts, the eTender portal doesn't allow to make linkages between the information displayed (e.g. the procuring entities from which largest suppliers received contracts cannot be identified, etc...).

Recommendations

The OCPO should completely revamp its strategy to collect data on the procurement of goods, works and services, including consulting services. The coverage of the e-Procurement systems should be expanded to procurement through other means and their scope be extended to information beyond the award phase of the procurement cycle. These reforms, alongside the enforcement of normative obligations to publish information, would allow interested stakeholders to analyse both aggregated procurement information but also more granular information.

Assessment criterion 7(c)(b):

The system manages data for the entire procurement process and allows for analysis of trends, levels of participation, efficiency and economy of procurement and compliance with requirements.

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

The eTender portal and the CSD database only manage data for the tendering phase of competitive bidding processes. Most of the information coming from the rest of the public procurement cycle is managed through internal financial management tools (BAS and LOGIS mostly) which are not interconnected.

For open competitive bidding, which is administered through the eTender portal, the procuring entity has the possibility, besides the publication of procurement opportunities, to activate the eSubmission functionality. Doing so allows bidders to submit their offers electronically in the system and therefore could provide insights on trends related to levels of participation.

For request for quotations, the CSD database could provide a list of RFQs and a list of the Most invited suppliers which would provide initial insights about the diversity of suppliers' portfolio. The CSD further integrates automatic checks on tax status, trade registration number and bank account. Compliance indicators like tax status, government employment status, restricted supplier and tender defaulter as well as possible collusion are available online during the award process. RFQ cannot be awarded to suppliers not meeting the compliance requirements.

Gap analysis

Overall, since deviations are currently not management through an electronic system and are individually reported by organs of State to relevant treasuries and to the Auditor General, aggregated information on these procurement means is not available. This impacts the development of several general indicators based on information collected from electronic systems. It directly prevents further analysis on the extent of exceptions to competitive bidding in the South African public procurement system and prevents to compile and publish information on the amount of procurement expenditures based on exceptions.

For other trends such as efficiency and economy of procurement, which could be analysed through several proxies such as the number of variations or expansions of public contracts, the low compliance of organs of State with the requirement to publish them on the eTender, prevent any interested stakeholders to carry out a meaningful analysis based on the system. So while, theoretically, the system has been designed to provide additional insights on major trends, the absence of related data prevent any use of these functionalities.

More broadly, the contract management phase is not covered by the e-tender portal but rather managed using organs of State's internal financial management systems, including LOGIS and BAS. Supply chain management,

Pillar II. Institutional Framework and Management Capacity

financial management and information management are supported by disparate core systems maintained and managed by the National Treasury, and physically hosted in the State Information Technology Agency (SITA). This results in a fragmentation of procurement information covering the post-award phase of public contracts.

This gap is assigned a red flag because it significantly impedes the achievement of the objectives of the public procurement system spelled out in Article 217 of the Constitution.

Recommendations

South Africa should urgently conclude the IFMS project and ensure the interoperability of the financial management tool with the e-tender portal and the CSD database so as to benefit from integrated tools covering the whole procurement cycle. Further, South Africa should consider developing an electronic tool or system (whether a dedicated module in the e-tender platform or a separate, yet interconnected, tool) which would collect and aggregate detailed information about exemptions and expansions (nature, amount, supplier, etc...).

Assessment criterion 7(c)(c):

The reliability of the information is high (verified by audits).

Conclusion: Minor gap

Red flag: No

Qualitative analysis

In its presentation before the Standing Committee on Finance of audits reports on the finance portfolio for the year 2021/2022, the Auditor General of South Africa noted that there were no weaknesses identified during the testing of automated controls embedded into the central supplier database (CSD)¹⁰⁰.

For information contained on the eTender portal, no assessment from the AGSA has been found.

Gap analysis

Information included in the eTender portal should reflect procurement activity across the country and all spheres of government for open competitive bidding, it is therefore essential to ensure the reliability of information entered in the system.

Recommendations

The AGSA could carry out an audit of the reliability of such information by controlling a sample of procurement processes.

Assessment criterion 7(c)(d):

Analysis of information is routinely carried out, published and fed back into the system. *

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

The most recent analysis dates back from 2018. The State of procurement spent in National and Provincial Departments provided an analysis of the government's spend on suppliers who are providing goods, services and works specifically to national and provincial government. This comprehensive analysis has not been updated since then.

¹⁰⁰ <https://static.pmg.org.za/230315pcfinancereport.pdf>

Pillar II. Institutional Framework and Management Capacity

For most of the quantitative indicators in the MAPS methodology, the assessors did not have access to the data needed for an evaluation. This demonstrates the limitations of the data and information gathered in the e-procurement system, including the quality and amenability for performance analysis.

Quantitative analysis

Given the limitations of the system discussed above, the below minimum quantitative indicators could not be assessed.

*// Minimum indicator // * Quantitative indicators to substantiate assessment of sub-indicator 7(c) Assessment criterion (d):*

- *total number and value of contracts*
- *public procurement as a share of government expenditure and as share of GDP*
- *total value of contracts awarded through competitive methods in the most recent fiscal year.*

Source: Normative/regulatory function/E-Procurement system.

Gap analysis

The following quantitative indicators were not assessed, due to a lack of data:

Minimum indicators:

- total number and value of contracts
- public procurement as a share of government expenditure and as share of GDP
- total value of contracts awarded through competitive methods in the most recent fiscal year
- key procurement information published along the procurement cycle (in % of total number of contracts)
- share of procedures where an invitation to bid was extended (in % of total number of contracts)
- contract awards (purpose, supplier, value, variations/amendments)
- details related to contract implementation (milestones, completion and payment)
- appeals decisions posted within the time frames specified in the law (in %)
- uptake of e-Procurement
- number of e-Procurement procedures in % of total number of procedures
- value of e-Procurement procedures in % of total value of procedures

Recommended indicators:

- bids submitted online (in % of all bids submitted)
- bids submitted online by micro, small and medium-sized enterprises (in %)

Considering that a number of minimum quantitative indicators defined by the MAPS methodology could not be identified, this gap is assigned a red flag.

Recommendations

National Treasury should urgently address the fragmented nature of the e-Procurement landscape and the limitations in terms of coverage of existing IT systems so that it would be able to measure basic quantitative indicators which would allow to inform future reforms.

Indicator 8. The public procurement system has a strong capacity to develop and improve

Sub-indicator 8(a)

Training, advice and assistance

There are systems in place that provide for:

Pillar II. Institutional Framework and Management Capacity

Assessment criterion 8(a)(a):

Substantive permanent training programmes of suitable quality and content for the needs of the system.

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

Treasury Regulations 16A.5.1 requires that each organ of state ensures that officials implementing the institutions SCM system are trained and deployed in accordance with the requirements of the Framework for Minimum Training and Deployment issued by the National Treasury. The Practice Note Number SCM 5 of 2004 “Guide for minimum training and deployment of supply chain management officers”, applicable to national, provincial departments, constitutional institutions and Schedule 3A, 3C entities (as defined in the PFMA), mandates the design and implementation of SCM training.

SCM training should be offered to all supply chain management officials and newcomers. The training should be structured in three modules:

- Introduction to supply chain management
- Intermediate training with the focus on intensive training on all the elements of supply chain management
- Advanced training that includes specialist skills in each element of supply chain management such as strategic sourcing.

The Chief Directorate Capacity Building within the Office of the Accountant General (OAG) in National Treasury is responsible to coordinate the research, design, development and support the delivery of the SCM Education, Training and Development (ETD) solutions. The Office designed and developed the Public Sector SCM Master Learning Curriculum (MLC) for NQF levels five (5) to eight (8) to standardise the contents of qualifications and short learning programmes in public sector SCM. The Office introduced the National Certificate: Supply Chain Management which is accredited by the South African Qualifications Authority (SAQA).

The Interim Supply Chain Management Council has been created in February 2018 to lead the work on the professionalisation of the supply chain management function. It includes members representing key stakeholder groups, namely private and public sector, academia, professional bodies, and associations.

Training courses are then implemented by the National School of Government (NSG). The course directory which can be found on NSG website displays several trainings dedicated to supply chain management¹⁰¹. These trainings mostly target new entrants and middle managers in public institutions and typically involve a 5-days training programme. Further, for more senior managers and from the 2022 booklet of NSG’s executive training portfolio¹⁰² it appears that several executive trainings relate to financial management or exercising an oversight function which arguably contain elements related to supply chain management.

Gap analysis

While the Interim Supply Chain Management Council was created in February 2018 for the purpose of developing a strategy to advance the professionalisation agenda in the South African Public Procurement system, it seems that this body has not been active after the project financed by GIZ and which led to its creation¹⁰³.

While the South African public procurement system includes provisions aiming at governing the development of dedicated permanent training programmes, these provisions leave out significant stakeholders. Indeed, Schedule 2 and 3B entities in the sense of PFMA are excluded from the provisions contained in the Practice Note SCM 5 of 2004 which is only applicable to national and provincial departments, constitutional institutions, Schedule 3A and 3C

¹⁰¹ [Course Directory \(thensg.gov.za\)](https://www.thensg.gov.za)

¹⁰² [Web \(thensg.gov.za\)](https://www.thensg.gov.za)

¹⁰³ [giz2021-en-gsp-ii-public-procurement-f.pdf](https://www.giz2021-en-gsp-ii-public-procurement-f.pdf)

Pillar II. Institutional Framework and Management Capacity

entities (as defined in the PFMA). There is no special provision set out for SCM training that are laid down for Schedule 2 and 3B entities (SOEs).

Considering the importance for an effective public procurement system of a skilled procurement workforce and the gaps identified both in terms of professionalisation strategies and coverage of capacity-building programmes, these gaps are assigned a red flag.

Recommendations

A skilled workforce is paramount to an effective public procurement and the development of professionalisation strategies require strong stewardship. While the Interim SCM Council was precisely created to steer this agenda, it does not seem that it had been active in recent years. National Treasury should reactivate this Council so a professionalisation roadmap can be developed and effectively implemented across the South African public procurement system.

Considering the economic significance of SOEs in the South African public procurement system and the systemic nature of abuse in supply chain management in these entities, it is critical that dedicated training is regulated and provided to their supply chain management function.

Assessment criterion 8(a)(b):

Routine evaluation and periodic adjustment of training programmes based on feedback and need.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

In accordance with Practice Note Number SCM 5 of 2004 National Treasury is responsible for validating the training material developed by training providers through the Validation Board. Evaluation reports and details about officials having successfully completed a course should be sent to NT.

Gap analysis

While the Practice Note SCM 5 of 2004 mandates the implementation of training programmes and National Treasury takes the lead to develop and pilot the delivery of various SCM education and training programmes, the implementation of these programmes are not monitored. According to stakeholders, NT does not have quantitative information such as the number of trained individuals, the type of training courses or the number of training providers validated.

Recommendations

While the Practice Note SCM 5 of 2004 mandates the submission of reports on the implementation of training programmes to National Treasury, it does not seem that this obligation is complied with. Indeed, NT states that it does not have quantitative information such as the number of trained individuals, the type of training courses or the number of training providers validated. To ensure efforts invested in developing a full course of training programmes are paying off, NT should enforce the provision contained in the Practice Note SCM 5 of 2004 and ensure that such information is provided.

Assessment criterion 8(a)(c):

Advisory service or help desk function to resolve questions by procuring entities, suppliers and the public.

Conclusion: No gap

Red flag: No

Pillar II. Institutional Framework and Management Capacity

Qualitative analysis

The OCPO has an advising process or help desk function that responds to various requests for guidance from the procurement entities, the general public, and suppliers. Each Chief Directorate within the OCPO has built in a process to handle queries.

The Governance, Monitoring and Compliance (GMC) Unit in OCPO received in the third quarter of FY 2023/2024 a total of 318 requests from national departments, provinces and municipalities. The Unit provides mostly advice on the common interpretation of rules and instruction notes published by the OCPO.

In contrast, the SCM ICT Unit of OCPO received a total of 186 413 requests for the period 1 Oct 2022- 30 Sep 2023. These requests focused mainly on issues relating to the use of the CSD (registration process, lost password, supplier identifier, user update, etc...).

Gap analysis

Recommendations

Assessment criterion 8(a)(d):

A strategy well-integrated with other measures for developing the capacity of key actors involved in public procurement.

Conclusion: No gap

Red flag: No

Qualitative analysis

The Chief Directorate Capacity Building within the Office of the Accountant General (OAG) is responsible to coordinate the research, design, development and support the delivery of the SCM Education, Training and Development (ETD) solutions. The Competency Framework, Technical Competency Dictionary, general functional structures, standardization of job descriptions and job profiles, Standard Operating Procedure Manuals, and competency evaluation statements form the basis for the development of SCM capacity and capability. There is this iDevelop toolkit that the Capacity Building unit uses as a competency assessment toolkit and training needs analysis.

Gap analysis

Recommendations

Sub-indicator 8(b)

Recognition of procurement as a profession

The country's public service recognises procurement as a profession:

Assessment criterion 8(b)(a):

Procurement is recognised as a specific function, with procurement positions defined at different professional levels, and job descriptions and the requisite qualifications and competencies specified.

Conclusion: Minor gap

Red flag: No

Qualitative analysis

In support to the PFMA, NT Regulation on the Framework for Supply Chain Management (2003) stipulates in its Section 4. (1) that the "accounting officer or accounting authority of an institution to which these regulations

Pillar II. Institutional Framework and Management Capacity

apply must establish a separate supply chain management unit within the office of that institution’s chief financial officer, to implement the institution’s supply chain management system”. Therefore, according to the legislative and regulatory environment, each organ of state should be equipped with a dedicated and integrated supply chain management function covering the whole public procurement cycle.

Further, the National Treasury has developed a series of technical competency dictionaries (the Competency Framework for Financial Management - CFFM) covering the major occupational groups in the field of public financial management. These dictionaries set out a series of descriptions of the skills and knowledge required from a competent practitioner in carrying out a number of standard tasks at various levels of responsibility within the overall function. One Technical Dictionary deals with Supply Chain Management for the procurement of goods and services¹⁰⁴. The Dictionary details competences in SCM and different proficiency levels based on roles.

Gap analysis

While the Dictionary details competences in SCM and different proficiency levels based on roles, it does not apply to construction procurement.

Recommendations

The National Treasury should consider working with the CIDB to ensure that job descriptions, including the identification of key competencies, are developed for SCM officials involved in construction procurement.

Assessment criterion 8(b)(b):

Appointments and promotion are competitive and based on qualifications and professional certification.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

Every appointment for SCM professional or practitioner is based on a competitive appointment process in every public sector environment. The vacancy is advertised internally and externally, with a clear description of the job duties and responsibilities, the requisite qualifications and competencies, and the application process. The process also includes a selection process for all the applications to identify a shortlist of candidates who meet the minimum requirements. All shortlisted candidates are interviewed and appointed procedurally.

Gap analysis

While appointments and promotion follow standard practices in the public sector, several reports of the Auditor-General emphasize systemic issues around poor procurement practices hindering the effective use of public funds. As noted in its last report¹⁰⁵, these practices are caused by a number of factors, including ineffective resource management. According to the Auditor-General this issue can only be addressed by further “ensuring qualified and competent officials are appointed and equipped to perform public functions conscientiously and with a strong sense of public service and ethical disposition. Achieving this goal requires support for the implementation of the professionalisation framework that prioritises meritocracy (merit-based management) as its foundation.”

Recommendations

NT and the DPSA could further invest in the professionalisation of the supply chain management function, ensuring that officials are equipped with the right set of skills and competences to effectively use public funds. Doing so might further help to address the systemic issue of vacant positions in supply chain management units.

¹⁰⁴

<https://oag.treasury.gov.za/Publications/18.%20Competency%20Framework%20for%20Public%20Financial%20Management/%28New%29%20Implementation%20of%20the%20Revised%20SCM%20Technical%20Competency%20Dictionary%20and%20the%20Expl%20Note/Annexure%20B%20-%20SCM%20Explanatory%20Note.pdf>

¹⁰⁵ [PFMA Report 2022-23 FINAL INTERACTIVE PDF.pdf \(agsa.co.za\)](#)

Pillar II. Institutional Framework and Management Capacity

Assessment criterion 8(b)(c):

Staff performance is evaluated on a regular and consistent basis, and staff development and adequate training is provided.

Conclusion: No gap

Red flag: No

Qualitative analysis

Each procuring entity or government department has established a performance management system for procurement staff. This system is used to identify areas where staff need additional training or support. The procuring entity or government department also conduct regular performance reviews for all procurement staff. The Department of Public Service and Administration (DPSA) is responsible for issuing norms and standards for the performance management and development system (PMDS) in the public service in terms of the Public Service Act, 1994. The National Treasury has adopted its own policy that establishes a systematic performance management and development process. This policy is in line with the Public Service Act that has provided a broad framework for performance management and development systems.

Gap analysis

Recommendations

Sub-indicator 8(c)

Monitoring performance to improve the system

Assessment criterion 8(c)(a):

The country has established and consistently applies a performance measurement system that focuses on both quantitative and qualitative aspects.

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

The country has established a performance measurement system that focuses on both quantitative and qualitative aspects. The system is designed to track the progress of the procurement system towards its goals and objectives. It also used to identify areas where the performance of each individual can be improved.

The monitoring of the performance of the South African public procurement system has been devolved to National Treasury in accordance with the Constitution and the PFMA. The report on the state of procurement spent in national and provincial departments¹⁰⁶ published in 2018 highlights major trends in the South African public procurement system based on data from FY 2016/17 and FY 2017/18.

Using data from the CSD, the report analysed procurement spend between different spheres of government, the performance of procurement processes in achieving socio-economic objectives spelled out by the B-BBE Act and the PPPFA, the share of registered suppliers doing business with the government, the level of SMEs participation and a number of other detailed procurement spend analytics.

Gap analysis

¹⁰⁶ [2018 State of procurement spent.pdf \(treasury.gov.za\)](#)

Pillar II. Institutional Framework and Management Capacity

While the 2018 report published by NT provided a wealth of insightful evidence to inform future procurement improvements, no follow-up comprehensive assessment has been conducted in the last 5 years. This absence of regular monitor impedes a concrete and adequate understanding of trends, strengths and weaknesses of the public procurement system, hence a red flag is assigned.

Recommendations

Considering that National Treasury and the OCPO host and manage the two main public procurement databases (eTenders and CSD), engaging in more regular monitoring of the performance of the public procurement system should be considered. Such analysis would provide key insights on the ability of the public procurement system to achieve the overall objectives spelled out in the Constitution, including socio-economic objectives.

Assessment criterion 8(c)(b):

The information is used to support strategic policy making on procurement.

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

While the report on the state of procurement spent in national and provincial departments¹⁰⁷ published in 2018 ends with forward-looking conclusions calling for policy changes, the assessors could not find a direct link between the results of this analysis and the development of specific procurement policies.

Gap analysis

The absence of a comprehensive and regular monitoring impedes a concrete understanding of trends, strengths and weaknesses of the public procurement system. It thus does not provide a basis to inform future policy making in public procurement. This gap is assigned a red flag because the absence of a comprehensive and up to date monitoring significantly impede the main goals of the South African public procurement system.

Recommendations

Engaging in more regular monitoring of the performance of the public procurement system should be considered. Such analysis would provide key insights on the ability of the public procurement system to achieve the overall objectives spelled out in the Constitution, including socio-economic objectives.

Assessment criterion 8(c)(c):

Strategic plans, including results frameworks, are in place and used to improve the system.

Conclusion: No gap

Red flag: No

Qualitative analysis

Strategic Planning, Monitoring and Evaluation is embedded into National Treasury's approach to 5 Year Strategic Plan. This includes short, medium and long term strategic and operational planning processes and ensuring that plans are aligned to legislative mandates and broader government imperatives. The unit responsible for this function within the National Treasury develops and administers systems and processes that entrench impactful monitoring, evaluation and reporting on departmental and outcomes performance delivery. The current National

¹⁰⁷ [2018 State of procurement spent.pdf \(treasury.gov.za\)](#)

Pillar II. Institutional Framework and Management Capacity

Treasury Strategic Plan 2020-2025¹⁰⁸ includes goals, actions, indicators with baselines and targets, and timelines for reform.

The annual performance reports provide an update on the achievements of the goals described in the strategic plan.

Gap analysis

Recommendations

Assessment criterion 8(c)(d):

Responsibilities are clearly defined.

Conclusion: No gap

Red flag: No

Qualitative analysis

The strategic plan for the National Treasury provides the mandate, functions, powers and responsibilities of the National Treasury including the divisional objectives and roles. In the National Treasury Strategic Plan 2020-2025, each indicator and the achievement of targets are clearly assigned to respective role players.

Gap analysis

Recommendations

¹⁰⁸ [Strat Plan 2020-25.pdf \(treasury.gov.za\)](#)

Pillar III. Public Procurement Operations and Market Practices

Indicator 9. Public procurement practices achieve stated objectives

Sub-indicator 9(a) Planning

Assessment criterion 9(a)(a):

Needs analysis and market research guide a proactive identification of optimal procurement strategies.

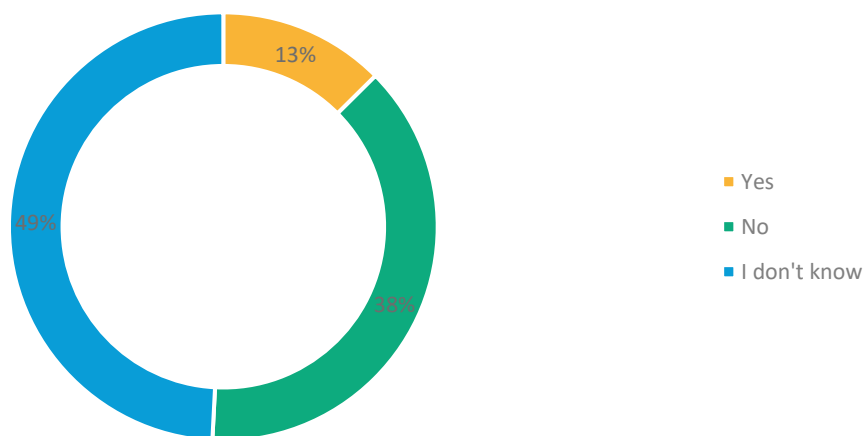
Conclusion: Substantive gap

Red flag: No

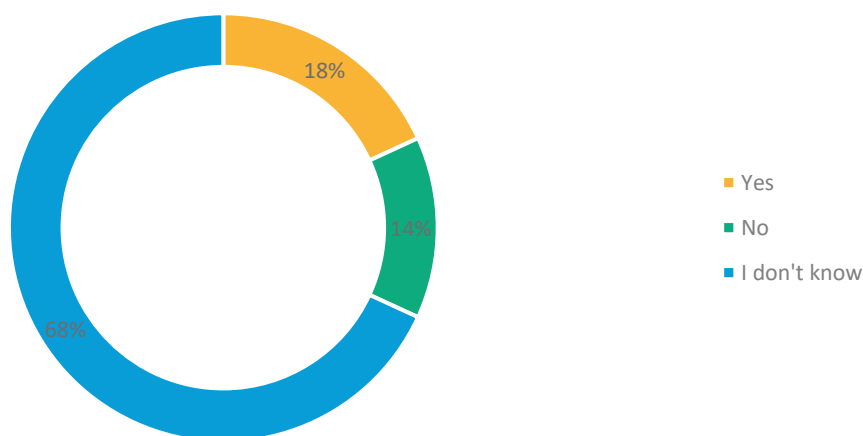
Qualitative analysis

Organs of State stated that they dedicate their bidding process preparation time to preparing requirements, while the majority of economic operators considered in the Private Sector Survey that **market research is not carried out** and can be **used to "steer" specifications** in a particular direction.

In your opinion, Organs of State conduct market studies before starting a procurement?

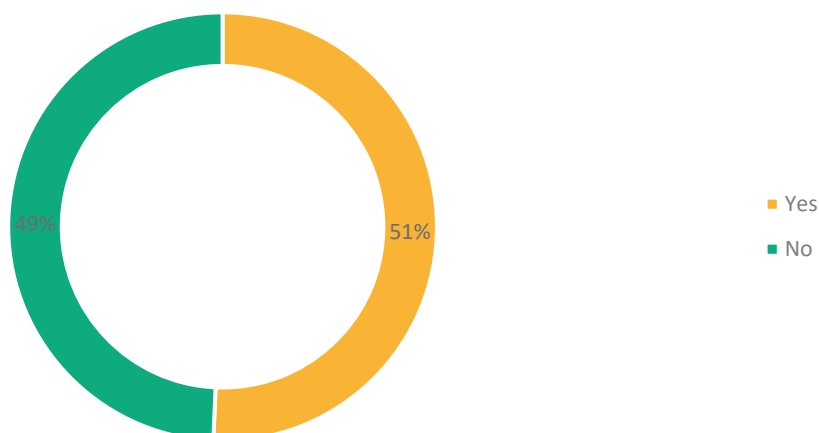


In your opinion, are there market studies rigorous and effective?



Pillar III. Public Procurement Operations and Market Practices

From your perspective, are there market studies used to "steer" specifications in a particular direction?



Gap analysis

Conducting market research is not common practice.

Recommendations

Consider implementing a requisite and furnishing resources such as tools and templates to facilitate needs analysis and market research, aimed at delineating optimal procurement strategies.

Assessment criterion 9(a)(b):

The requirements and desired outcomes of contracts are clearly defined.

Conclusion: No gap

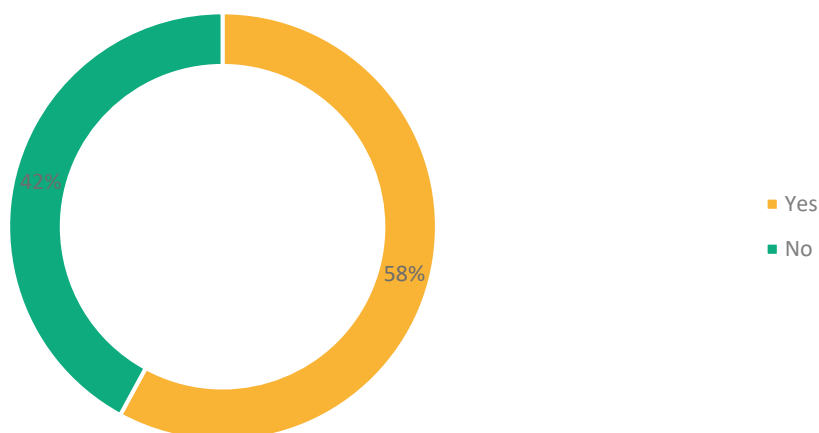
Red flag: No

Qualitative analysis

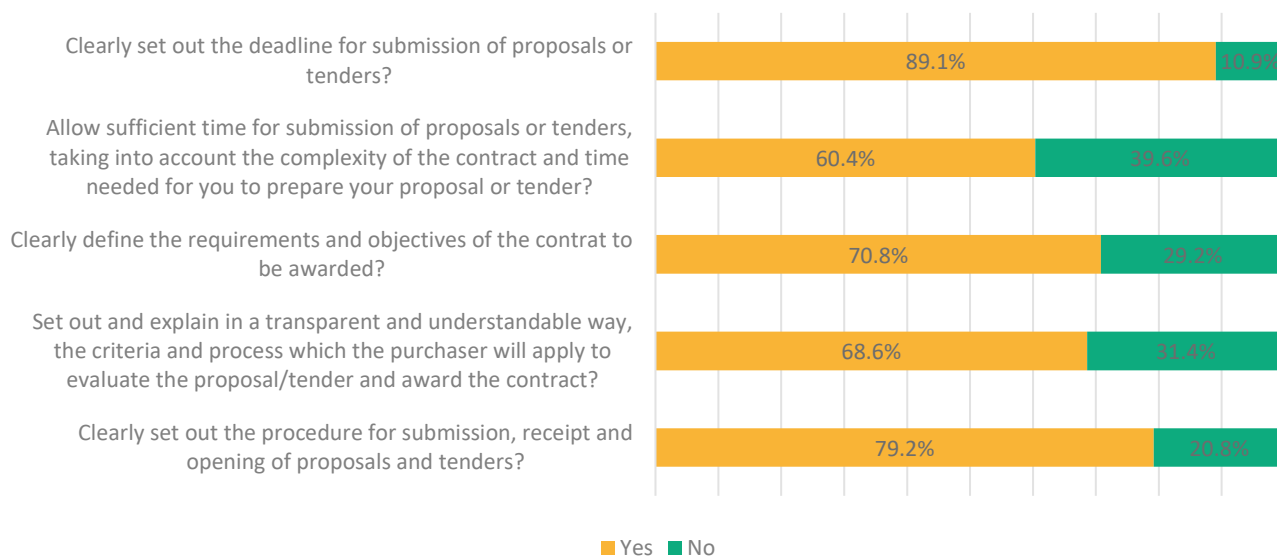
The requirements and expected results are clearly defined by the Organs of State in the tender documents. This is also the perception of the economic operators who took part in the Private Sector Survey, 58 per cent of whom believe that the bidding documents are clear and 70.8 per cent of whom believe that the requirements and expected results are clear.

Pillar III. Public Procurement Operations and Market Practices

Are the bidding documents issued by Organs of State clear and easy to understand?



Do bidding documents issued by Organs of State:



Gap analysis

Recommendations

Assessment criterion 9(a)(c):

Sustainability criteria, if any, are used in a balanced manner and in accordance with national priorities, to ensure value for money.

Conclusion: Minor gap

Red flag: No

Qualitative analysis

Concerns about sustainability, especially social and economic, are common and used in a way that is consistent with national policies, observed in practice by the consistent application of BBB-EE policy.

Pillar III. Public Procurement Operations and Market Practices

Gap analysis

Environmental concerns are not usually considered.

Recommendations

The implementation of Green Public Procurement guidelines should be considered, and its execution monitored to ensure alignment with other priorities.

Sub-indicator 9(b) Selection and contracting

Assessment criterion 9(b)(a):

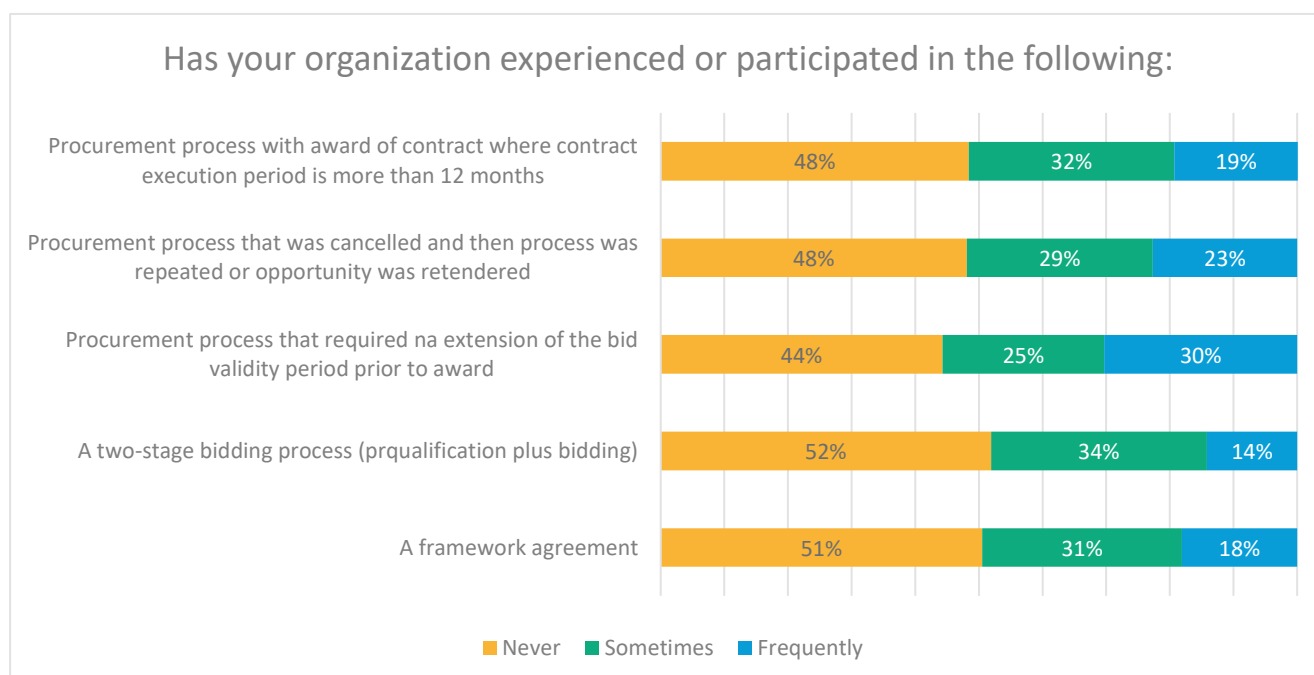
Multi-stage procedures are used in complex procurements to ensure that only qualified and eligible participants are included in the competitive process.

Conclusion: No gap

Red flag: No

Qualitative analysis

The use of multi-stage bidding, although not frequent, is applied by the Organs of State, a fact reinforced by almost 50 per cent of the respondents to the Private Sector Survey.



Gap analysis

Recommendations

Assessment criterion 9(b)(b):

Clear and integrated procurement documents, standardised where possible and proportionate to the need, are used to encourage broad participation from potential competitors.

Conclusion: Minor gap

Pillar III. Public Procurement Operations and Market Practices

Red flag: No

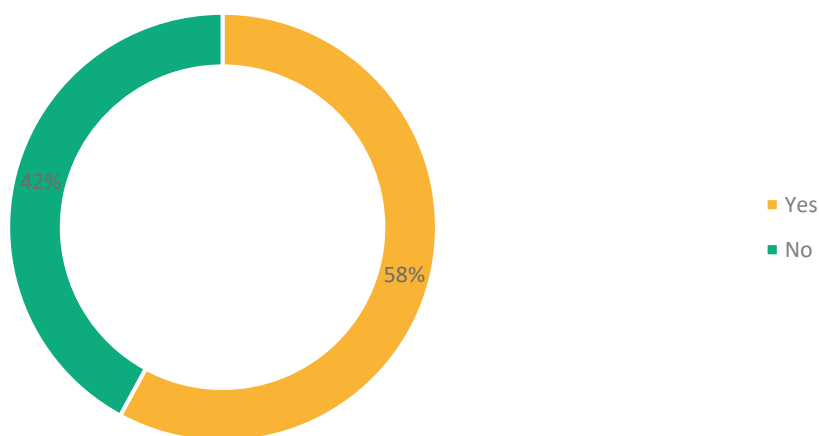
Qualitative analysis

Procurement documents are considered clear by the majority of respondents to the Private Sector Survey. They contain the necessary information to allow potential bidders to participate. The use of standardized documents is observed.

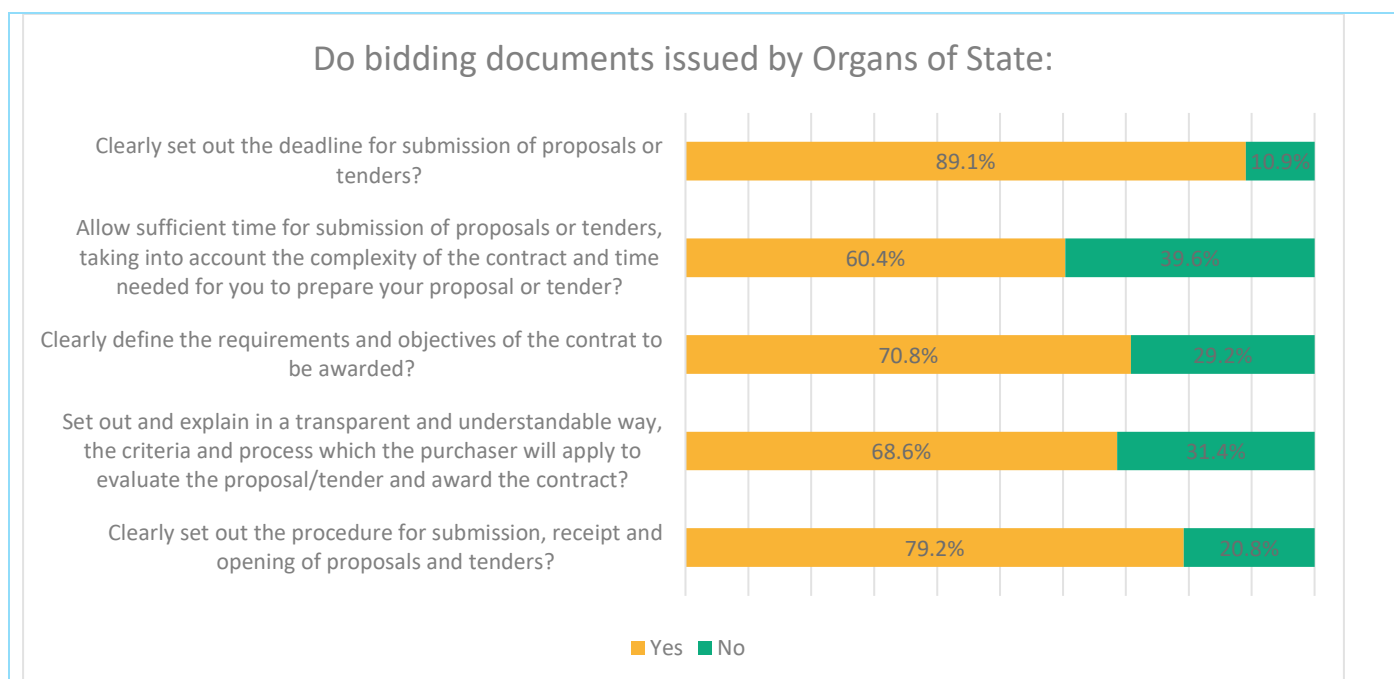
Gap analysis

42 per cent of respondents to the Private Sector Survey believe that procurement documents are not clear or easy to understand. In addition, almost 40 per cent of respondents say that the time available for submitting proposals or tenders is not enough. As for the way in which the criteria/process for evaluating the proposals or tenders is presented, or the clarity or requirements of the contract to be awarded, around 30 per cent rate the procurement documents negatively.

Are the bidding documents issued by Organs of State clear and easy to understand?



Pillar III. Public Procurement Operations and Market Practices



An analysis focussing on suppliers working in the construction sector reveals that the percentage of suppliers who consider procurement documents to be unclear drops to 32%.

Recommendations

Despite the positive signs regarding the clarity of the documents, there is an opportunity for improvement. The positive points of the existing procurement documents should be exploited so that the documents can be perceived as clearer by the economic operators.

Assessment criterion 9(b)(c):

Procurement methods are chosen, documented and justified in accordance with the purpose and in compliance with the legal framework.

Conclusion: No gap

Red flag: No

Qualitative analysis

Procurement methods are chosen, documented and justified in accordance with the purpose and with the Procurement and Supply Chain Management system of each Organ of State.

Gap analysis

Recommendations

Assessment criterion 9(b)(d):

Procedures for bid submission, receipt and opening are clearly described in the procurement documents and complied with. This means, for instance, allowing bidders or their representatives to attend bid openings, and allowing civil society to monitor bid submission, receipt and opening, as prescribed.

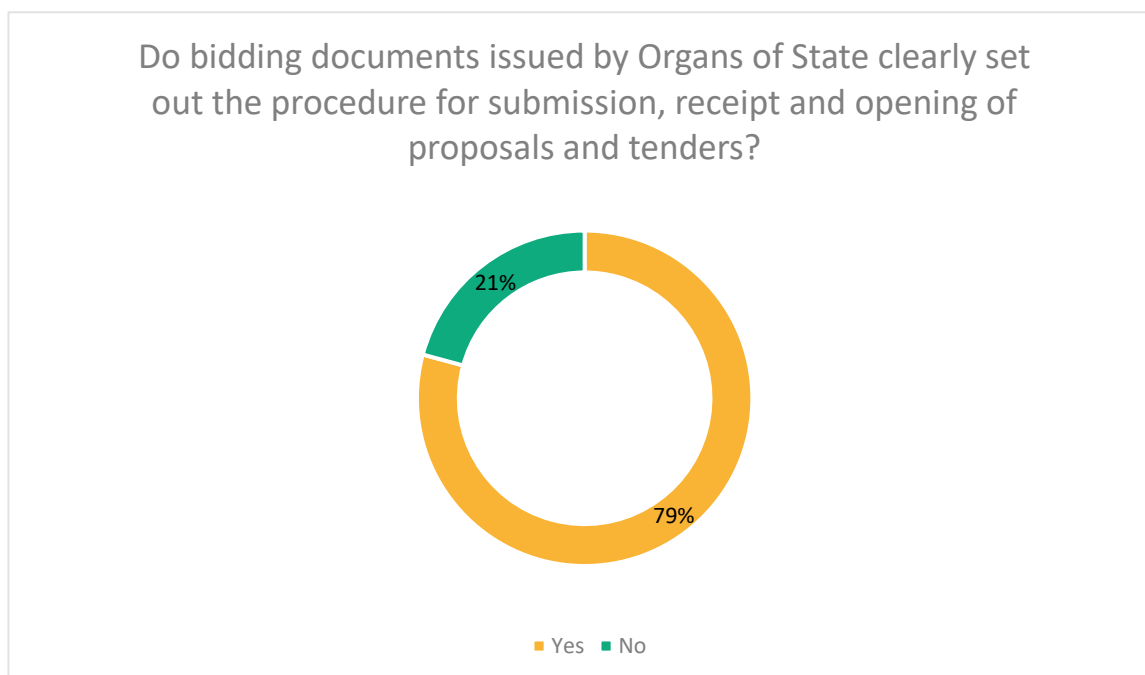
Conclusion: No gap

Red flag: No

Pillar III. Public Procurement Operations and Market Practices

Qualitative analysis

Procedures for bid submission, receipt and opening are clearly described in the procurement documents and complied with. This is confirmed by 79.2 per cent of respondents to the Private Sector Survey.



The second part of the assessment criterion, "This means, for instance, allowing bidders or their representatives to attend bid openings, and allowing civil society to monitor bid submission, receipt and opening, as prescribed" cannot be assessed, as not applicable since there is no procedure prescribed for opening of tenders in Treasury Regulations or Instructions, although there is more detail in the SCM Guide. See 1(g)(a) for context.

Gap analysis

Recommendations

Assessment criterion 9(b)(e):

Throughout the bid evaluation and award process, confidentiality is ensured.

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

Generally, confidentiality is ensured during submission, evaluation and award.

For paper submissions there are Bid Boxes outside or at the reception of the Organs of State. These boxes are locked and in places where surveillance is ensured and have elements for recording the submission of tenders. When bids are opened, the bid evaluation committee is responsible for transporting the documents to secure facilities where the tenders are evaluated. Confidentiality is ensured by restricting access to the premises where the evaluation process takes place.

Gap analysis

In some locations/Organs of State, the size of the bid boxes may not be sufficient to accommodate all the bids, forcing the bid evaluation committee to manipulate their contents during the bidding period.

Administrative simplification practices have been detected in some Organs of State that do not ensure the confidentiality of the process.

Pillar III. Public Procurement Operations and Market Practices

These practices include submitting bids to e-mail boxes, shared or not, without ensuring the necessary encryption of their content until the deadline for submitting bids or the deadline for opening bids.

A Red Flag is assigned because it is considered that the existence of even a single case where confidentiality cannot be ensured, can significantly impede achieving the objectives sought through public procurement.

Recommendations

The submission of tenders without being able to ensure that they are encrypted and secured until they are opened by the bid evaluation committee should be banned. Alternatively, the use of an e-Government Procurement solution that ensures confidentiality should be promoted.

Assessment criterion 9(b)(f):

Appropriate techniques are applied, to determine best value for money based on the criteria stated in the procurement documents and to award the contract.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The tender evaluation process is usually divided into two stages.

Initially, to assess the *quality* of the proposals, a functionality score is applied. At a second stage, a preference score and a pricing score are applied. Only those proposals that reach a predetermined minimum functionality score go through to the second stage. In the second phase, the contract is awarded to the bid that obtains the best sum of the preference and pricing score. The functionality score is thus ignored in the award (as it is assumed that all the tenders evaluated have met a minimum requirement).

Gap analysis

The scoring system doesn't capture the full value of tenders as it excludes the functionality score from the final evaluation, preventing to capture the increase in quality obtained through marginal price increases.

Recommendations

The inclusion of the functionality score in the final weighting, which includes price and preferences, should be considered.

Assessment criterion 9(b)(g):

Contract awards are announced as prescribed

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

Some Organs of State publish some procurement information on their portals, albeit inconsistently. Deviations and expansions are published on the National Treasury website¹⁰⁹.

Gap analysis

In many cases, the information is published in formats that are not user-friendly (they are not machine-readable formats). There is no centralised solution for publishing award notices.

Recommendations

Procurement information, including award notices, must be published centrally in a machine-readable format.

¹⁰⁹ http://ocpo.treasury.gov.za/Suppliers_Area/Pages/Deviations-and-Expansions.aspx

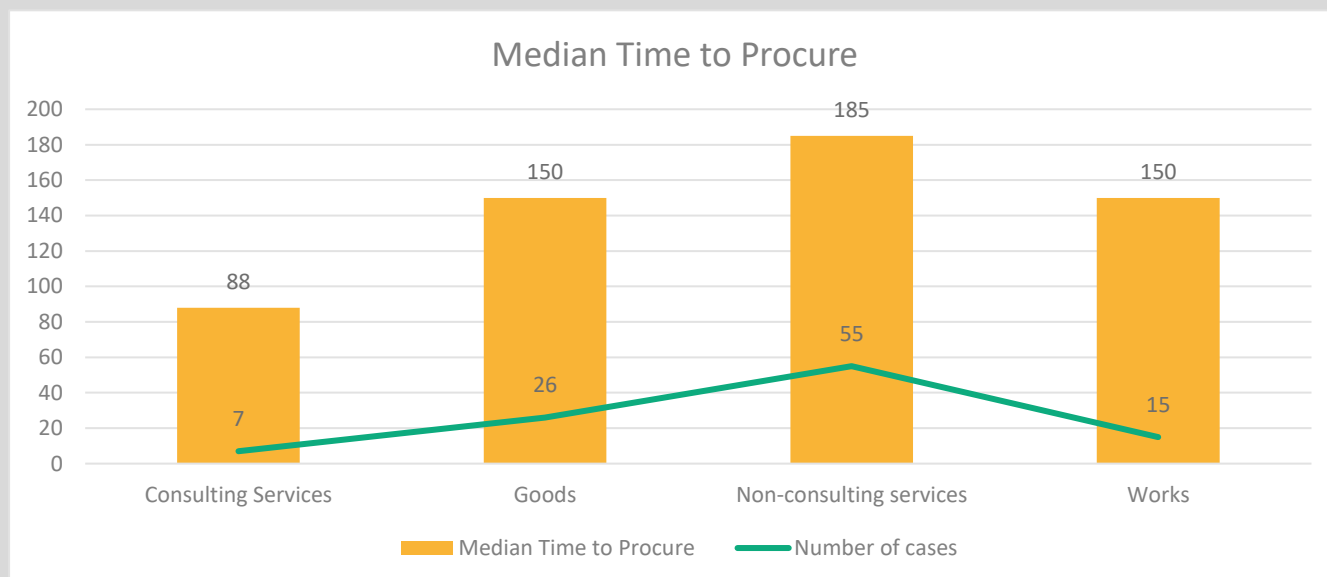
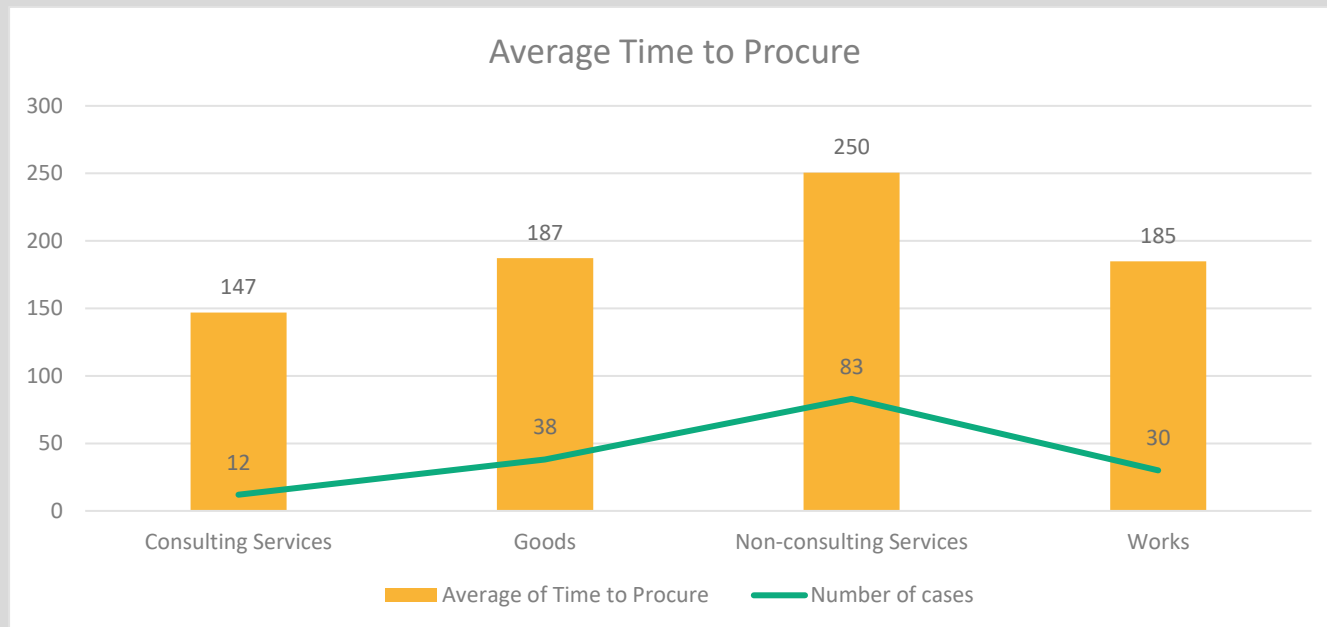
Pillar III. Public Procurement Operations and Market Practices

Assessment criterion 9(b)(h): Contract clauses include sustainability considerations, where appropriate
Conclusion: Minor gap
Red flag: No
Qualitative analysis Contracts contain preferences-related (BBB-EE) clauses.
Gap analysis There are no generic sustainability clauses other than the preferences-related ones.
Recommendations Once a SPP policy/strategy is drafted, Guidance notes on how to implement environmental considerations (not currently covered) should be designed.
Assessment criterion 9(b)(i): Contract clauses provide incentives for exceeding defined performance levels and disincentives for poor performance
Conclusion: Minor gap
Red flag: No
Qualitative analysis Contracts usually include clauses that penalise poor performance. However, no examples were found where good performance is rewarded.
Gap analysis
Recommendations Positive performance, when agreed expectations are exceeded, should be rewarded. This measure should be accompanied by the implementation of effective systems for monitoring contract execution.
Assessment criterion 9(b)(j): The selection and award process is carried out effectively, efficiently and in a transparent way*
Conclusion: Substantive gap
Red flag: No
Qualitative analysis The average time to procure non-consulting services is up to 250 days, highly influenced by a number of contracts with extreme values. If we choose to remove these extremes by using the median, the time to acquire non-consulting services still reaches 185 days, settling at 88 days for consulting services and 150 days for goods and works. Analysing the same indicator with a focus on Open Tenders, the values rise considerably. As far as competitiveness is concerned, in the sample there were a high number of bids for both non-consulting services and works, resulting in only around 30 per cent responsiveness. The responsiveness rate rises to 55 per cent for goods and consulting services. In terms of transparency, i.e. compliance with publication requirements, 44 per cent of cases are not complied with. This is exacerbated by the responses to the Private Sector Survey, in which 61 per cent of respondents say that they do not receive sufficient information to support the decisions of the Organs of State. In the sample analysed, only 99% of cases were successfully awarded.

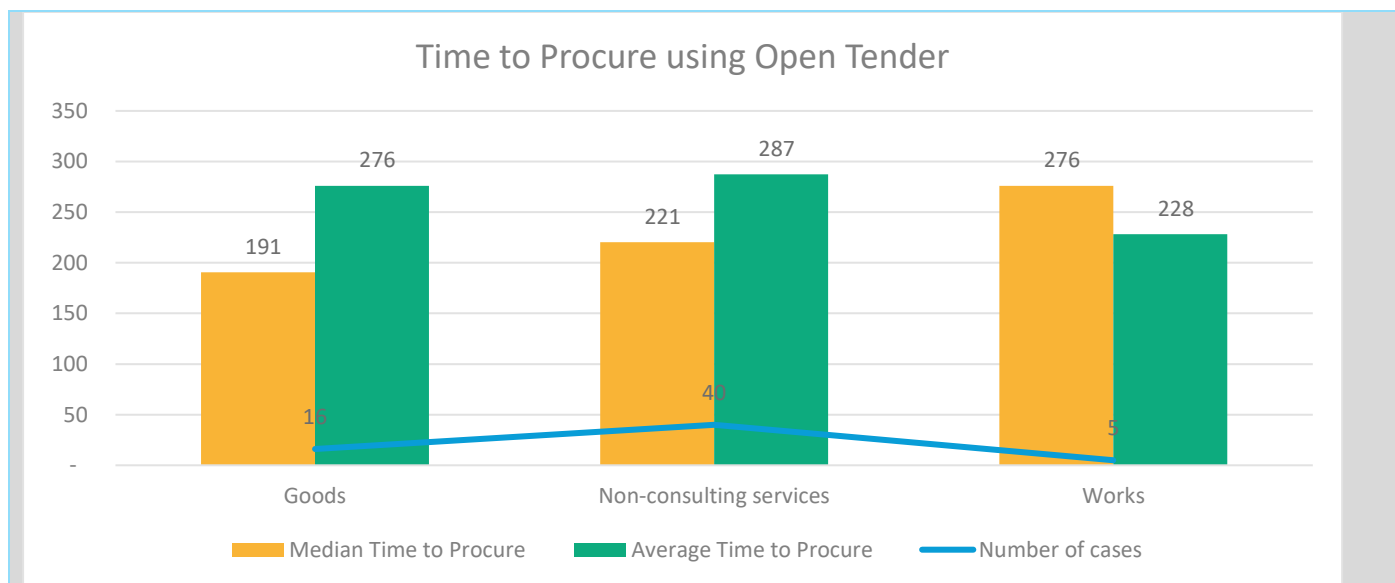
Pillar III. Public Procurement Operations and Market Practices

Quantitative analysis

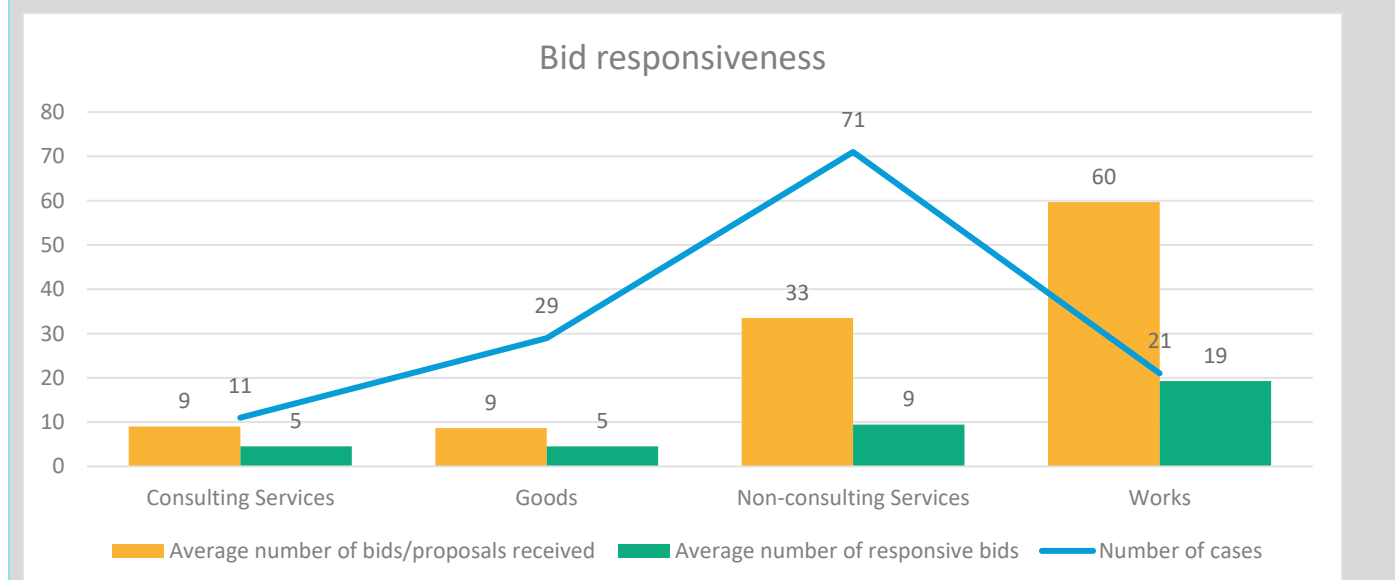
**Recommended quantitative indicators to substantiate assessment of sub-indicator 9(b) Assessment criterion (j):*
- average time to procure goods, works and services
number of days between advertisement/solicitation and contract signature (for each procurement method used)



Pillar III. Public Procurement Operations and Market Practices



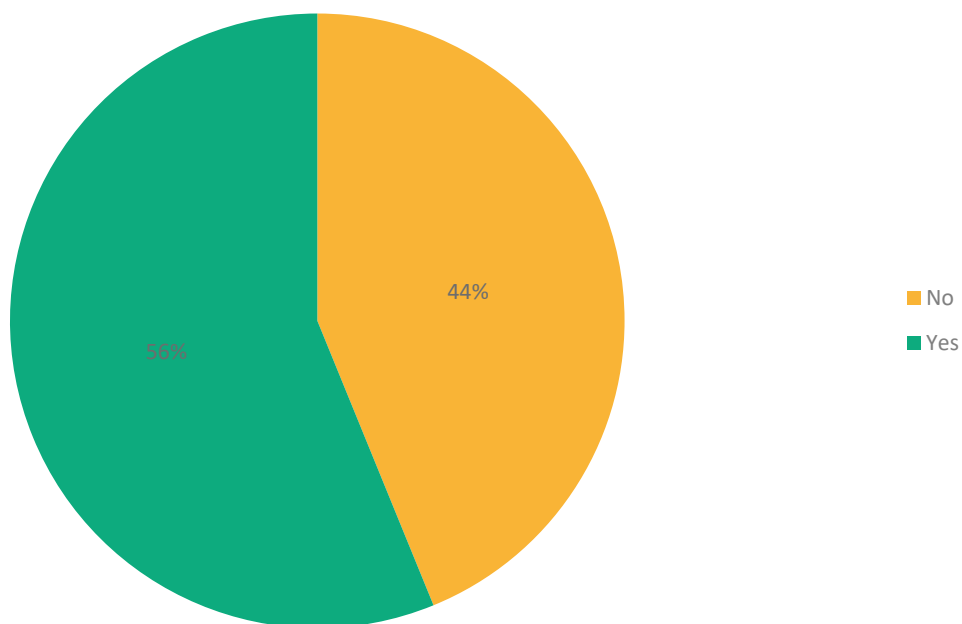
- average number (and %) of bids that are responsive (for each procurement method used)



- share of processes that have been conducted in full compliance with publication requirements (in %)

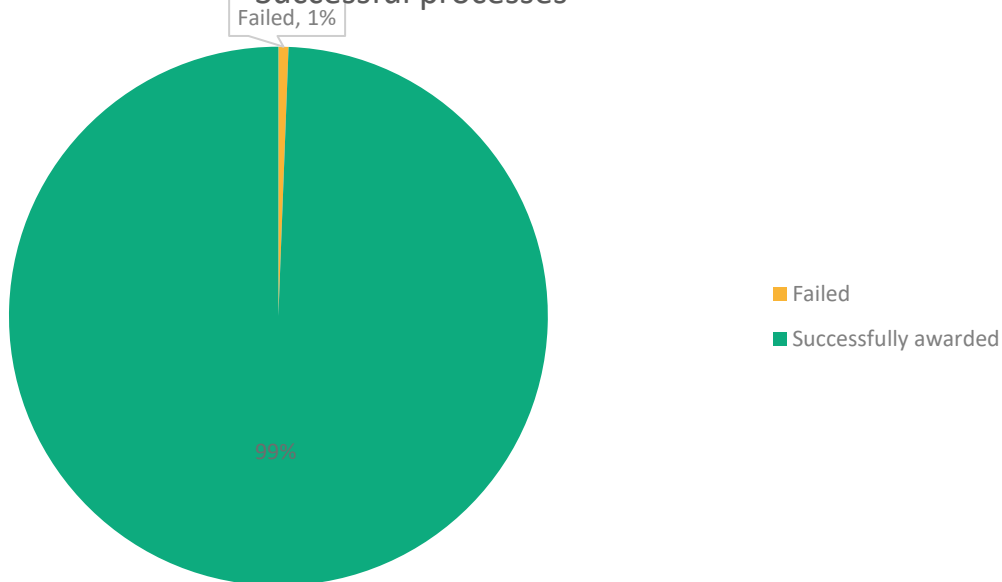
Pillar III. Public Procurement Operations and Market Practices

Share of processes that have been conducted in full compliance with publication requirements



- number (and %) of successful processes (successfully awarded; failed; cancelled; awarded within defined time frames)

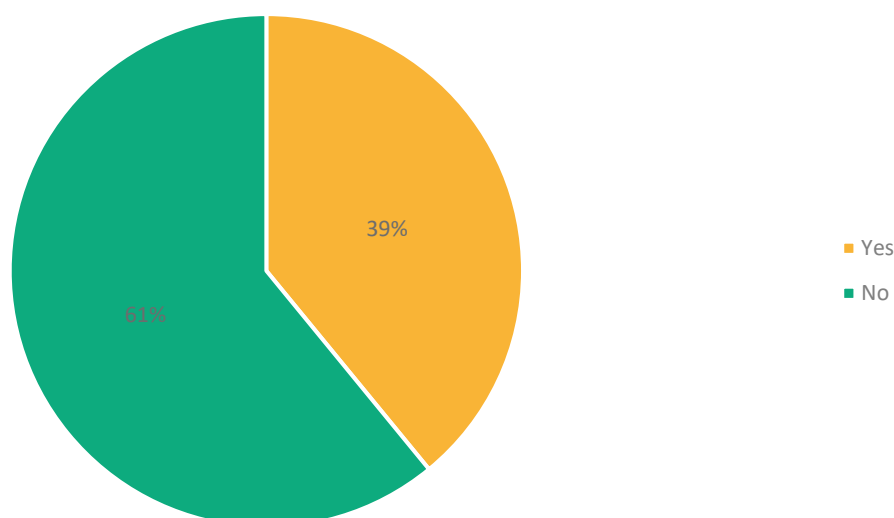
Successful processes



Source for all the above: Sample of procurement cases.

Pillar III. Public Procurement Operations and Market Practices

Are you given sufficient information about the reasons for decisions made by the Organs of State throughout the procurement?



Source: Private Sector Survey.

Gap analysis

The average time to procure is high. Publication requirements are not generally met and the responsiveness rate is low.

Recommendations

The reasons behind the gaps must be identified and monitored, particularly regarding the average time to procure and the responsiveness rate. The latter will have a strong impact on the former, as the number of bids received is high for a low rate of responsiveness.

Verification of fulfilment of publication requirements should be intensified.

Sub-indicator 9(c) Contract management

Assessment criterion 9(c)(a):

Contracts are implemented in a timely manner.*

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The process of collecting information from the sample cases revealed strong gaps with regard to information on the execution phase of contracts.

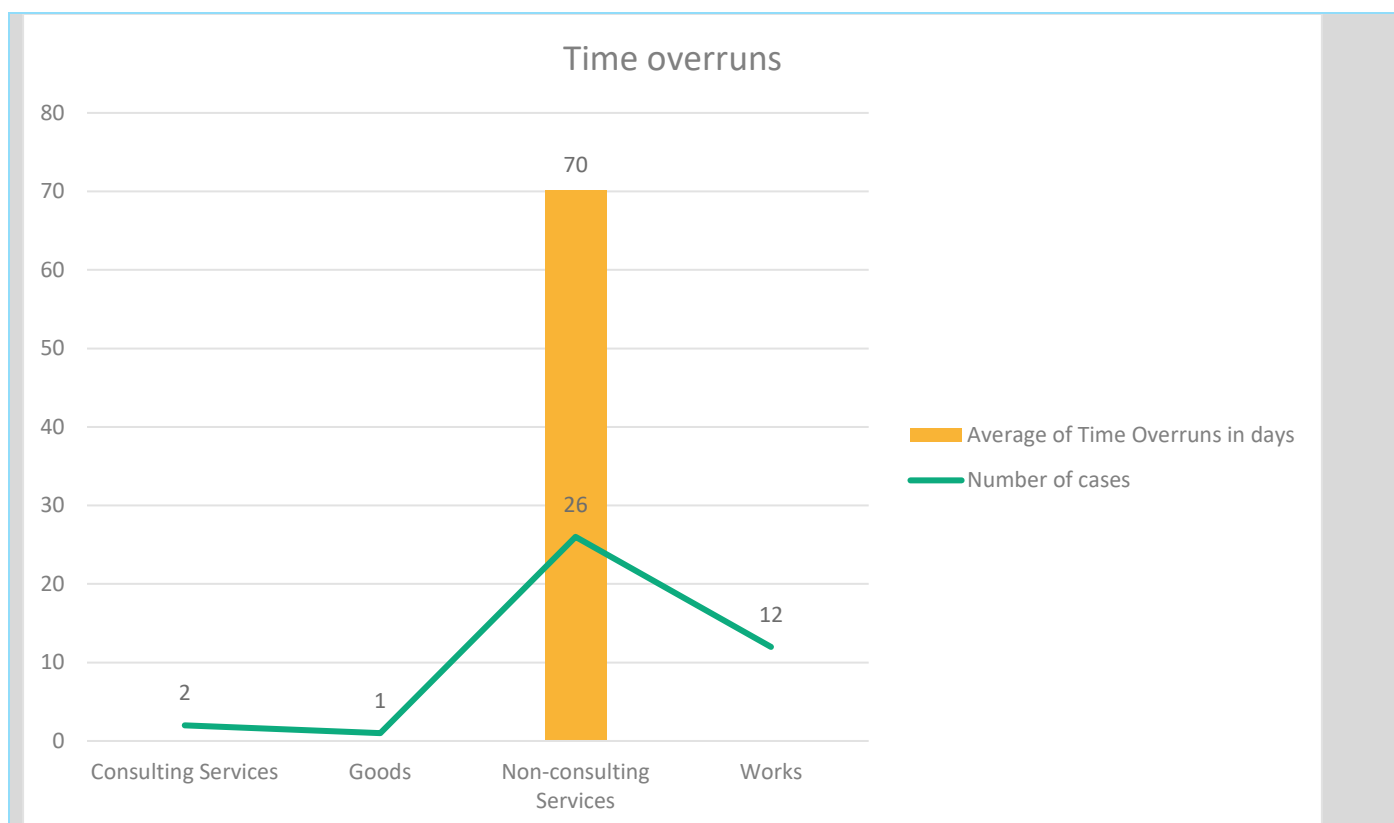
In the specific case of the assessment criterion, it was only possible to collect and validate information on 41 cases out of the 166 considered for analysis.

In these 41 cases, only delays in the execution of non-consulting services contracts were identified, with an average delay of 70 days in finalising the contract.

Quantitative analysis

Recommended quantitative indicator to substantiate assessment criterion (a): time overruns (in %; and average delay in days).

Pillar III. Public Procurement Operations and Market Practices



Source: Sample of procurement cases.

Gap analysis

The process of collecting information from the sample cases revealed strong gaps with regard to information on the execution phase of contracts.

Recommendations

The Organs of State must ensure monitoring and quality control mechanisms during the execution phase of the contracts.

Assessment criterion 9(c)(b):

Inspection, quality control, supervision of work and final acceptance of products is carried out.*

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

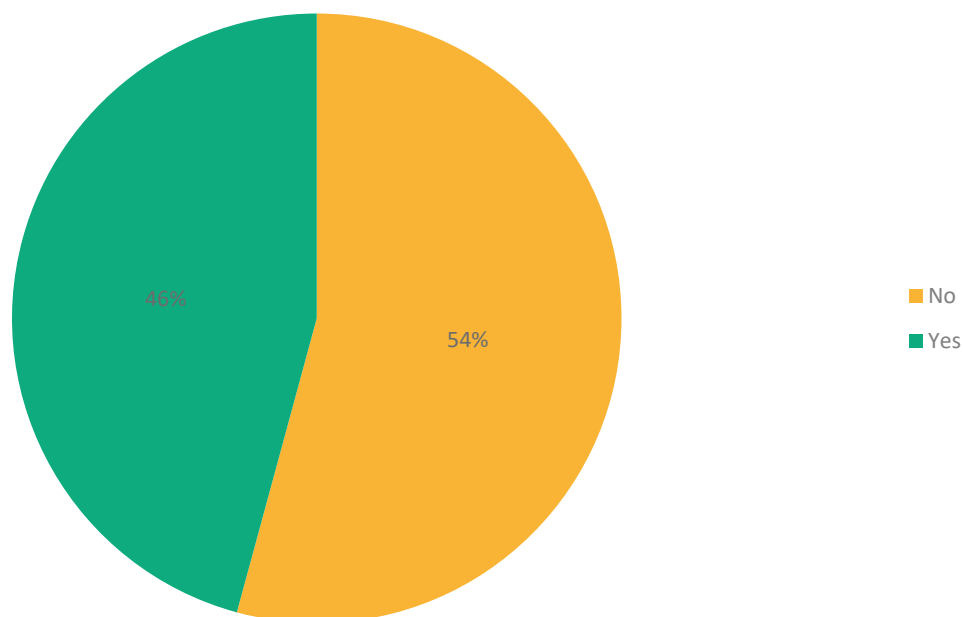
Both the analysis of the sample cases and the perception of 54% of the respondents to the Private Sector Survey allowed identifying several instances in which inspection, quality control, supervision of work and final acceptance of products was carried out.

Quantitative analysis

Recommended quantitative indicator to substantiate assessment criterion (b): quality-control measures and final acceptance are carried out as stipulated in the contract (in %).

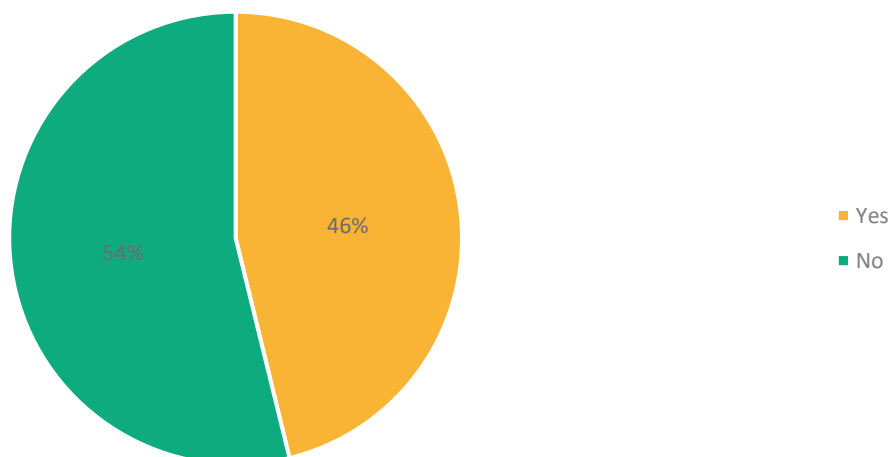
Pillar III. Public Procurement Operations and Market Practices

Share of contracts in which quality control measures were carried out (as defined by the contract)



Source: Sample of procurement cases.

In your opinion, are inspection, quality control, supervision of work and final acceptance carried out effectively by government or public entity/enterprise purchasers?



Gap analysis

Application of inspection, quality control, supervision of work and final acceptance is not visible to SCM units, as it is delegated to the business units. Due to this, and to the absence of a single file - refer to Assessment criterion 9 (c)(g) – there is no visibility on the application of the quality assurance mechanisms.

Recommendations

The Organs of State must ensure monitoring and quality control mechanisms during the execution phase of the contracts.

Pillar III. Public Procurement Operations and Market Practices

Assessment criterion 9(c)(c):

Invoices are examined, time limits for payments comply with good international practices, and payments are processed as stipulated in the contract.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

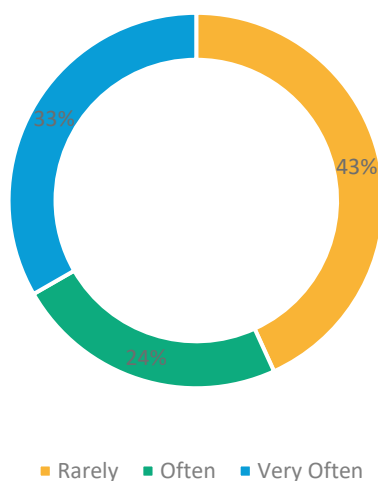
Payment terms are defined in the Special Contract Conditions and the time limit for payments complies with good international practices – under 30 days.

Quantitative analysis

Recommended quantitative indicator to substantiate assessment criterion (c): invoices for procurement of goods, works and services are paid on time (in % of total number of invoices).

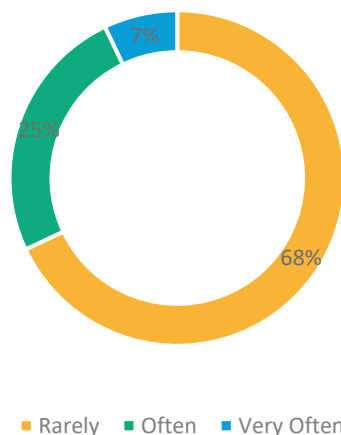
Source: Sample of procurement cases.

How often has your organization experienced delayed payment of issued invoices?



Pillar III. Public Procurement Operations and Market Practices

How often has your organization experienced that the contract price was amended by a decision of the government or public entity/enterprise purchasers?



Source: Private Sector Survey.

Gap analysis

The perception of more than half of the respondents to the Private Sector Survey is that payments are delayed. In addition, there is also the perception that changes are made to the value of the contract by unilateral decision of the public entities.

Recommendations

Payment terms must be respected. Public entities must transparently demonstrate their compliance by publishing their average payment times and overdue payments.

Assessment criterion 9(c)(d):

Contract amendments are reviewed, issued and published in a timely manner.*

Conclusion: No gap

Red flag: No

Qualitative analysis

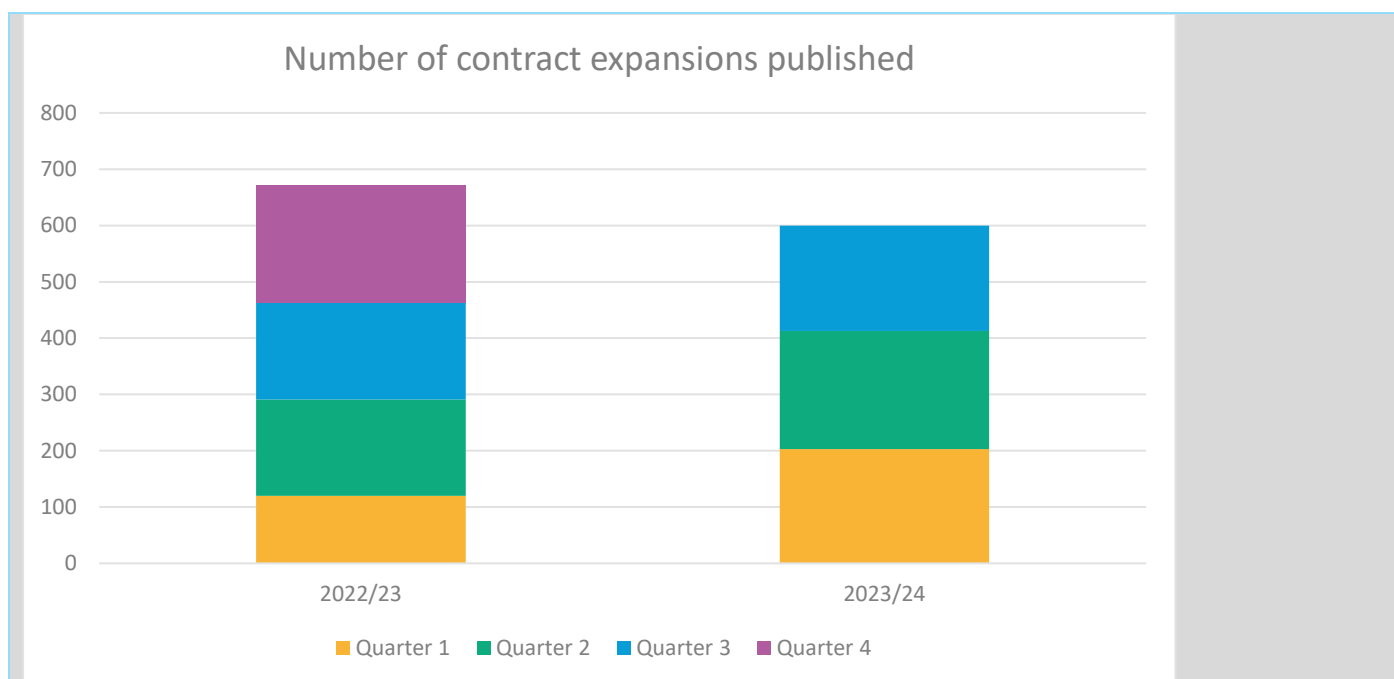
Contract amendments are reviewed, issued and published quarterly.
[Deviations and expansions are published on the National Treasury website.]

Quantitative analysis

Recommended quantitative indicator to substantiate assessment criterion (d): contract amendments (in % of total number of contracts; average increase of contract value in %).

Source: Sample of procurement cases.

Pillar III. Public Procurement Operations and Market Practices



Source: National Treasury¹¹⁰

Gap analysis

Recommendations

Assessment criterion 9(c)(e):

Procurement statistics are available and a system is in place to measure and improve procurement practices.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The availability of ready-to-use procurement statistics is very limited. Some State Agencies provide limited ready-to-use statistics, while at a central level, the transparency portal¹¹¹ provides versioned procurement data in a format compatible with the Open Procurement Data Standard (OCDS), also available via a JSON REST API for consumption by tools such as PowerBI, Tableau and QlikView. The API specification is available in OpenAPI format and provides more than 40 data schemas. Data scope is limited to:

Dates 1 April 2022 onwards

Buyers Organs of state, which have shared their procurement data with the National Treasury.

Process types All Tender types.

Stages Procurement planning, tendering, awards and contracting.

Change History A change history for each contracting process is provided through releases associated with each contract's id (OCID).

¹¹⁰ http://ocpo.treasury.gov.za/Suppliers_Area/Pages/Deviations-and-Expansions.aspx

¹¹¹ <https://data.etenders.gov.za/Home/LearnMore>

Pillar III. Public Procurement Operations and Market Practices

Gap analysis

Ready-to-use procurement statistics is very limited.

*“The scope of the data published on the transparency portal is drawn from applicable procurement legislation and its obligations placed on procuring entities to share procurement data with the National Treasury. **The scope is limited to the data, in fact, shared with the National Treasury.**”*

Recommendations

Considering that making data available on the transparency portal is a result of applicable legislation and the resulting obligations for Organs of State, a mechanism should be put in place to ensure that the information available is not only that which is in fact shared.

In addition, sets of ready-to-use procurement statistics should be made available.

Assessment criterion 9(c)(f):

Opportunities for direct involvement of relevant external stakeholders in public procurement are utilised.*

Conclusion: Substantive gap

Red flag: No

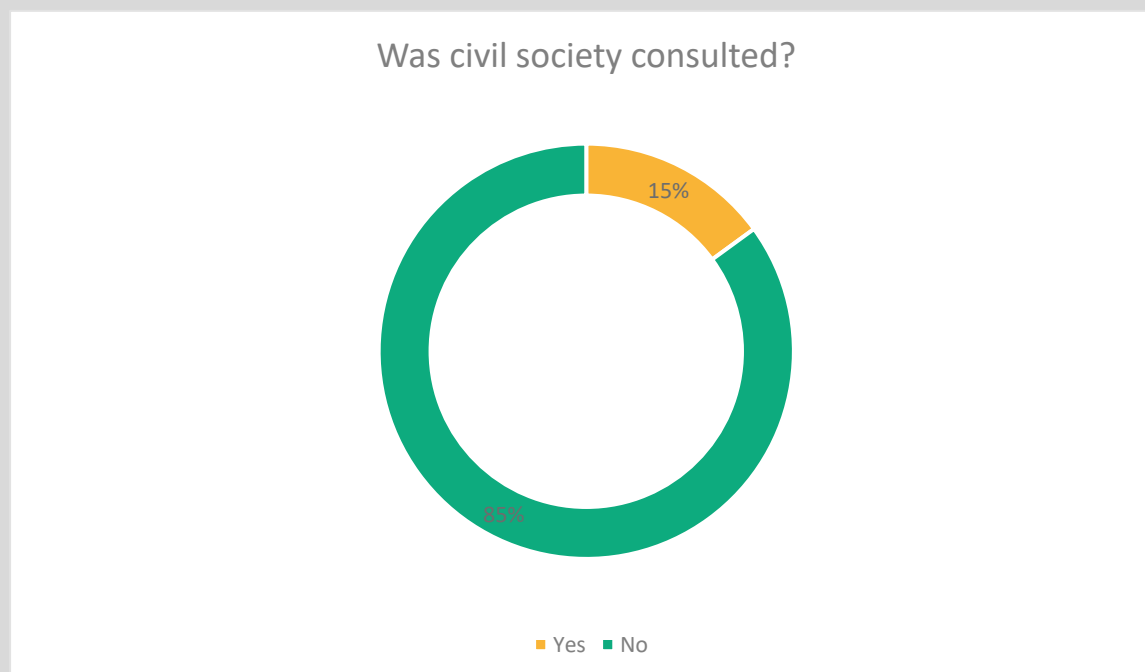
Qualitative analysis

The participation of external stakeholders, particularly civil society organisations, is almost non-existent.

Quantitative analysis

Recommended quantitative indicator to substantiate assessment criterion (f): percentage of contracts with direct involvement of civil society: planning phase; bid/proposal opening; evaluation and contract award, as permitted; contract implementation)

Source: Sample of procurement cases.



Gap analysis

The involvement of external stakeholders, particularly civil society organisations, is almost non-existent.

Pillar III. Public Procurement Operations and Market Practices

<p>Recommendations</p> <p>The participation of external stakeholders, namely Civil Society Organisations, in all stages of the procurement process should be promoted.</p>
<p>Assessment criterion 9(c)(g):</p> <p>The records are complete and accurate, and easily accessible in a single file.*</p>
<p>Conclusion: Substantive gap</p>
<p>Red flag: Yes</p>
<p>Qualitative analysis</p> <p>When the procurement and selection process is considered, the records are generally complete and reliable. When considering the contract execution phase, however, in many situations responsibility within the Organs of State is transferred to the beneficiary business units. This detachment from the supply chain management units means that the contract is lost.</p>
<p>Quantitative analysis</p> <p><i>// Minimum indicator // * Quantitative indicators to substantiate assessment of sub-indicator 9(c) Assessment criterion (g):</i></p> <p><i>- share of contracts with complete and accurate records and databases (in %)</i></p> <p><i>Source: Sample of procurement cases.</i></p> <p>The quantitative indicator is not calculated due to a lack of data.</p>
<p>Gap analysis</p> <p>When considering the contract execution phase, however, in many situations responsibility within the Organs of State is transferred to the beneficiary business units. This detachment from the supply chain management units means that the contract is lost.</p> <p>A Red Flag is assigned because it is considered that the absence of complete, accurate and easily accessible records hinders the achievement of public procurement objectives.</p>
<p>Recommendations</p> <p>Contract execution reporting mechanisms should be set up to ensure that all information relating to procurement processes is available, both in the pre- and post-contract phases.</p>

Indicator 10. The public procurement market is fully functional

<p style="text-align: center;">Sub-indicator 10(a)</p> <p style="text-align: center;">Dialogue and partnerships between public and private sector</p>
<p>Assessment criterion 10(a)(a):</p> <p>The government encourages open dialogue with the private sector. Several established and formal mechanisms are available for open dialogue through associations or other means, including a transparent and consultative process when formulating changes to the public procurement system. The dialogue follows the applicable ethics and integrity rules of the government.*</p>
<p>Conclusion: Substantive gap</p>
<p>Red flag: No</p>
<p>Qualitative analysis</p> <p>The government seeks to create mechanisms for dialogue with the private sector. To this end, it promotes</p>

Pillar III. Public Procurement Operations and Market Practices

public consultation processes, open to general participation, but also to dialogue with sectoral associations. In the recent process of amending the Public Procurement Bill, this approach was followed.

Through the Private Sector Survey, economic operators were asked to answer questions related to these dialogue mechanisms. It was clear that economic operators' **perception of effectiveness is negative**, with an **average score of 2.29** (out of 5). Indeed, only 14 per cent of respondents give a score of 4 or 5 and the majority, **36 per cent, give the worst possible score.**

Taking advantage of the opportunity related to the amendment to the Public Procurement Bill, economic operators were asked if they had been contacted by the government on this matter, with **61 per cent of respondents revealing that they were not aware of this amendment**, rising to 89 per cent who answered that they had not been involved in consultation processes. Of those who said they had taken part in consultations on the new Public Procurement Bill, 71 per cent said they had done so through an industry association or interest group. On the other hand, 66 per cent of respondents believe that their contributions were not taken into account.

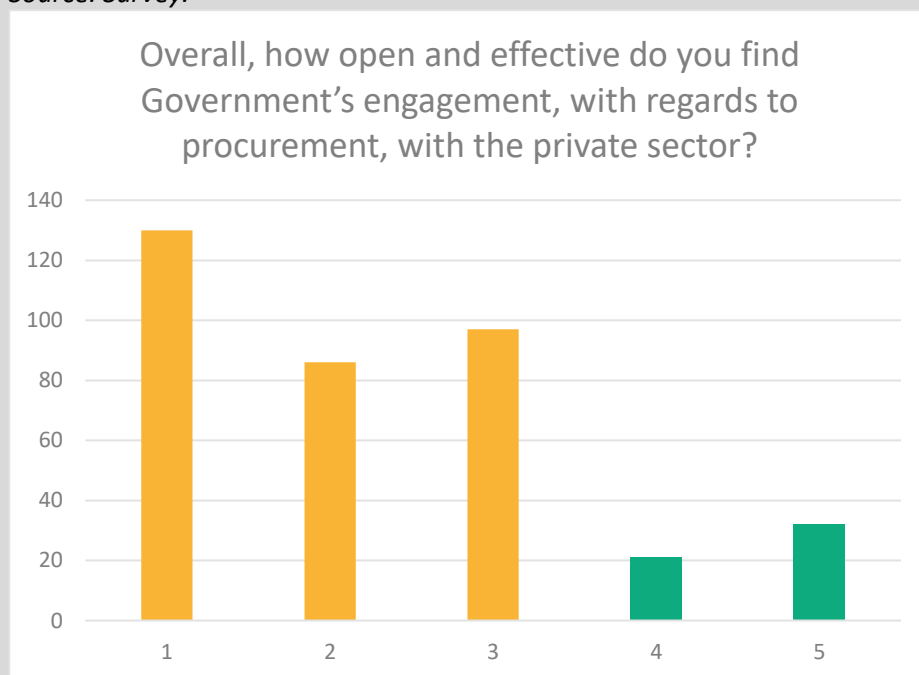
The Assessment Team extended this analysis to other areas. Only 8 per cent of respondents indicated that they had ever been informed of the Government/Treasury's intentions to amend the Treasury Regulations or to obtain their views on this matter, or on changes to SCM instructions or other procurement-related instructions, such as Standard Bidding Documents or Standard Contract Conditions. Perhaps for this reason, **69 per cent of respondents find it difficult to keep up with changes to the legal and regulatory public procurement framework.**

Quantitative analysis

* *Recommended quantitative indicator to substantiate assessment of sub-indicator 10(a) Assessment criterion (a):*

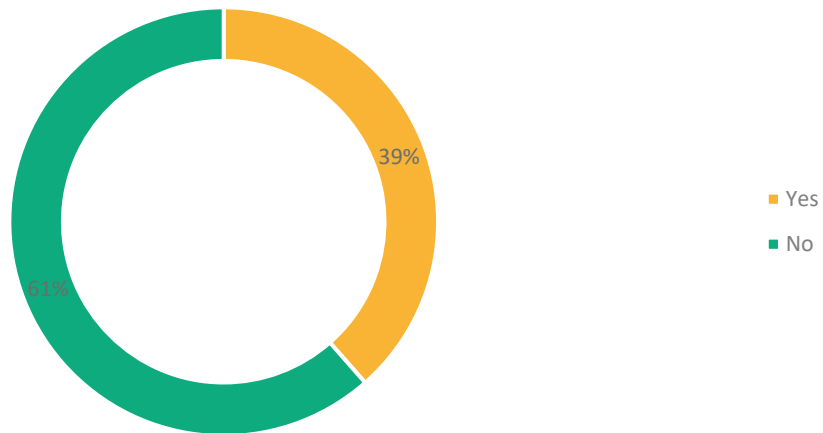
- *perception of openness and effectiveness in engaging with the private sector (in % of responses).*

Source: Survey.

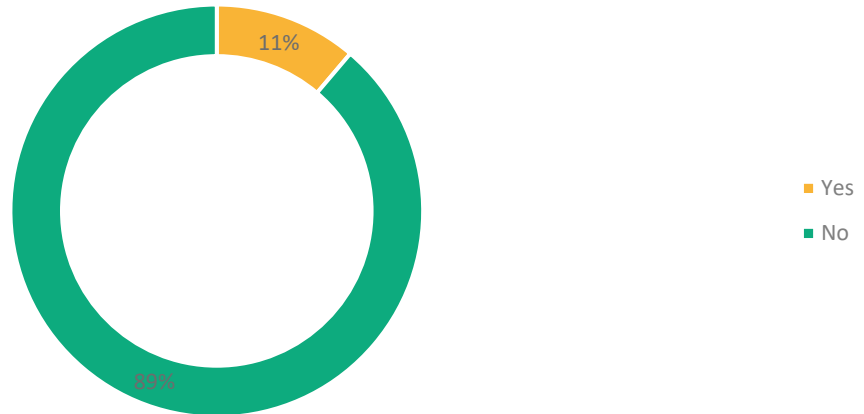


Pillar III. Public Procurement Operations and Market Practices

Are you aware of the proposals for a new Procurement Bill/Act?

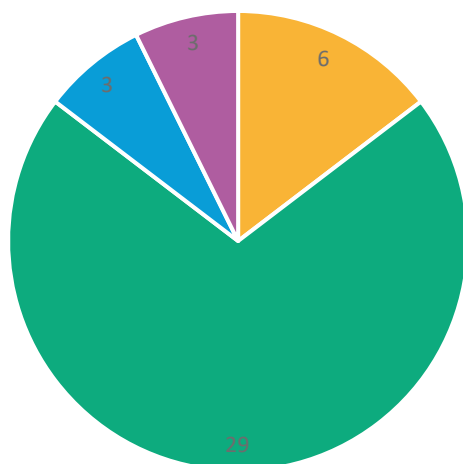


Have you been involved in the consultations on the Procurement Bill, either directly or indirectly (i.e. through an industry body or civil society)?



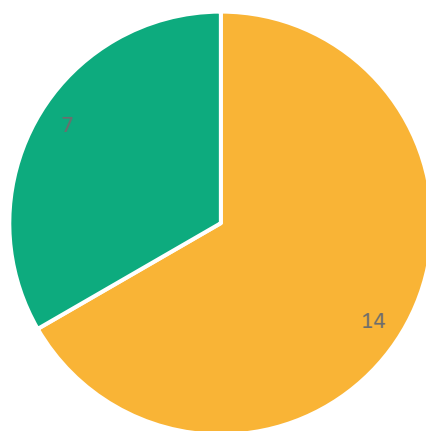
Pillar III. Public Procurement Operations and Market Practices

How did you get involved?



- We were contacted and asked for our opinion/contribution by government (National Treasury or other department)
- We were contacted and asked for our opinion/contribution by an industry association or interest group
- We provided our opinion/contribution
- Other

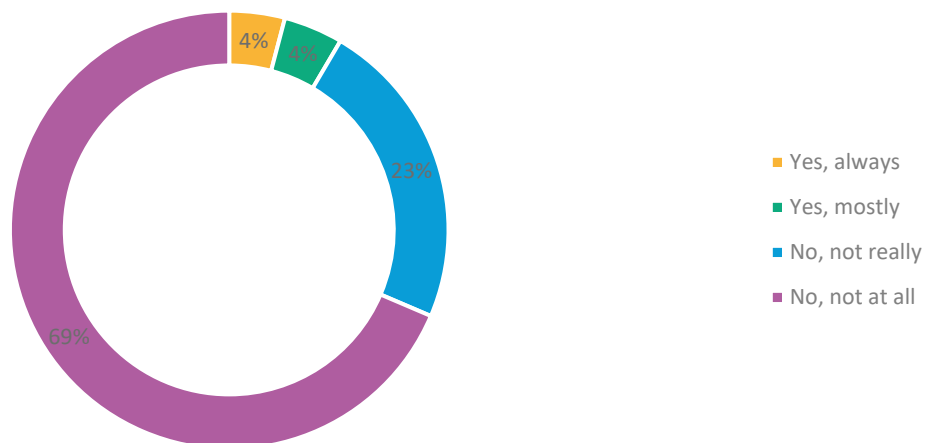
Do you think that your opinions/contributions were taken into account in the drafting process for the new Procurement Bill/Act?



- Yes
- No

Pillar III. Public Procurement Operations and Market Practices

Has the Government/National Treasury ever contacted you to communicate intended change to Treasury Regulations and to obtain your views?

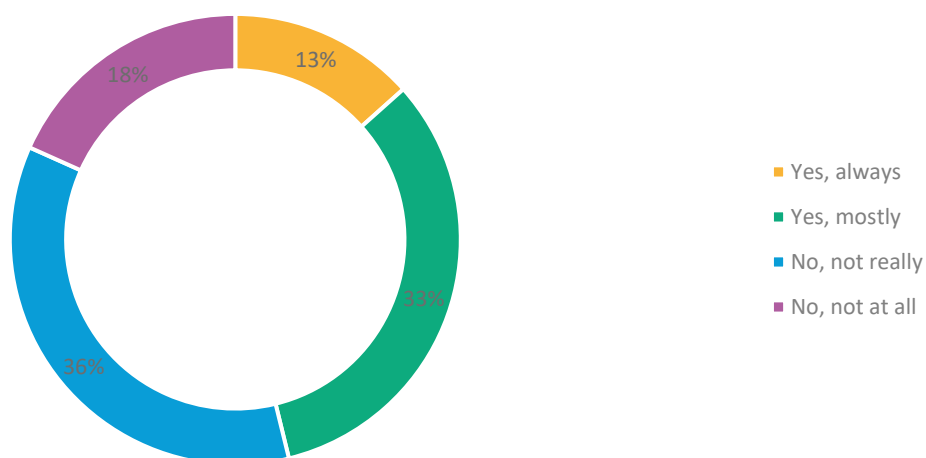


Has the Government/National Treasury ever contacted you to communicate intended changes to Treasury Instructions, SCM Instructions or other procurement related rules, to standard bidding documents or standard contract conditions?



Pillar III. Public Procurement Operations and Market Practices

Do you find the changes to the legal and regulatory framework for public procurement difficult to follow?



Gap analysis

The mechanisms for dialogue with the private sector are not perceived as effective.

Recommendations

The OCPO should engage with the private sector in outreach programmes whenever it intends to promote changes to the public procurement framework. These outreach programmes should result in public and transparent analysis and feedback for all participants.

Relevant geographical and sectoral coverage should be ensured.

Assessment criterion 10(a)(b):

The government has programmes to help build capacity among private companies, including for small businesses and training to help new entries into the public procurement marketplace.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

On the OCPO website, in the area dedicated to state suppliers, there is no area dedicated to capacity building, as there is in the area dedicated to public buyers¹¹².

The Small Enterprise Development Agency (SEDA) runs SEDA's Supplier Development Programme¹¹³, which "is aimed at strengthening the performance of supplier firms by enabling them to acquire the skills and capabilities required to make them globally competitive. The programme attempts to raise awareness on opportunities available to supply to corporates and state-owned enterprises."

However, there are no programmes strictly dedicated to public procurement. This is reinforced by the responses obtained in the Survey, where only 10 per cent of respondents say that they keep abreast of changes to the regulatory framework through forums hosted by Organs of State, through information sharing by business development support agencies such as SEDA.

¹¹² <http://ocpo.treasury.gov.za/Careers/Pages/Training-Opportunities.aspx>

¹¹³ <https://www.seda.org.za/Programmes/Pages/EnterpriseDevelopment.aspx>

Pillar III. Public Procurement Operations and Market Practices

<p>Gap analysis There are no programmes strictly dedicated to public procurement.</p>																																								
<p>Recommendations The OCPO must create comprehensive and specific training programmes on procurement issues. This can be delivered in partnership with other institutions that, due to their scope, have better conditions or capillarity. The implementation of the training programme should be monitored.</p>																																								
<p>Sub-indicator 10(b) Private sector's organisation and access to the public procurement market</p>																																								
<p>Assessment criterion 10(b)(a): The private sector is competitive, well-organised, willing and able to participate in the competition for public procurement contracts.*</p>																																								
<p>Conclusion: No gap</p>																																								
<p>Red flag: No</p>																																								
<p>Qualitative analysis The OCPO has developed a centralised supplier database (CSD)¹¹⁴ with more than 1 million registered and verified suppliers, which serves “as the single source of key supplier information for organs of state from 01 April 2016 providing consolidated, accurate, up-to-date, complete and verified supplier information to procuring organs of state”.</p>																																								
<p>Quantitative analysis</p> <p>* Recommended quantitative indicator to substantiate assessment of sub-indicator 10(b) Assessment criterion (a):</p> <ul style="list-style-type: none"> • number of registered suppliers as a share of total number of suppliers in the country (in %) The number of suppliers in the country is not available. • share of registered suppliers that are participants and awarded contracts (in % of total number of registered suppliers) <table border="1"> <thead> <tr> <th>Financial Year¹¹⁵</th> <th>Payments¹¹⁶</th> <th># Registered Suppliers</th> <th># Paid Suppliers</th> <th>% Paid Suppliers</th> </tr> </thead> <tbody> <tr> <td>2017/18</td> <td>R 123.10bn</td> <td>462 499</td> <td>57 990</td> <td>12,54%</td> </tr> <tr> <td>2018/19</td> <td>R 149.07bn</td> <td>605 410</td> <td>65 900</td> <td>10,89%</td> </tr> <tr> <td>2019/20</td> <td>R 185.96bn</td> <td>737 376</td> <td>76 040</td> <td>10,31%</td> </tr> <tr> <td>2020/21</td> <td>R 186.08bn</td> <td>884 206</td> <td>65 590</td> <td>7,42%</td> </tr> <tr> <td>2021/22</td> <td>R 228.96bn</td> <td>1 002 084</td> <td>67 270</td> <td>6,71%</td> </tr> <tr> <td>2022/23</td> <td>R 190.71bn</td> <td>1 116 462</td> <td>57 090</td> <td>5,11%</td> </tr> <tr> <td>2023/24¹¹⁷</td> <td>R 170.72bn</td> <td>1 203 183</td> <td>61 210</td> <td>5,09%</td> </tr> </tbody> </table> <ul style="list-style-type: none"> • total number and value of contracts awarded to domestic/foreign firms (and in % of total) The total number and value of contracts awarded is not available. <p>Source: Supplier Database and National Treasury.</p>	Financial Year ¹¹⁵	Payments ¹¹⁶	# Registered Suppliers	# Paid Suppliers	% Paid Suppliers	2017/18	R 123.10bn	462 499	57 990	12,54%	2018/19	R 149.07bn	605 410	65 900	10,89%	2019/20	R 185.96bn	737 376	76 040	10,31%	2020/21	R 186.08bn	884 206	65 590	7,42%	2021/22	R 228.96bn	1 002 084	67 270	6,71%	2022/23	R 190.71bn	1 116 462	57 090	5,11%	2023/24 ¹¹⁷	R 170.72bn	1 203 183	61 210	5,09%
Financial Year ¹¹⁵	Payments ¹¹⁶	# Registered Suppliers	# Paid Suppliers	% Paid Suppliers																																				
2017/18	R 123.10bn	462 499	57 990	12,54%																																				
2018/19	R 149.07bn	605 410	65 900	10,89%																																				
2019/20	R 185.96bn	737 376	76 040	10,31%																																				
2020/21	R 186.08bn	884 206	65 590	7,42%																																				
2021/22	R 228.96bn	1 002 084	67 270	6,71%																																				
2022/23	R 190.71bn	1 116 462	57 090	5,11%																																				
2023/24 ¹¹⁷	R 170.72bn	1 203 183	61 210	5,09%																																				

¹¹⁴ <https://secure.csd.gov.za>

¹¹⁵ The Financial Year period is from 1 April to 31 March

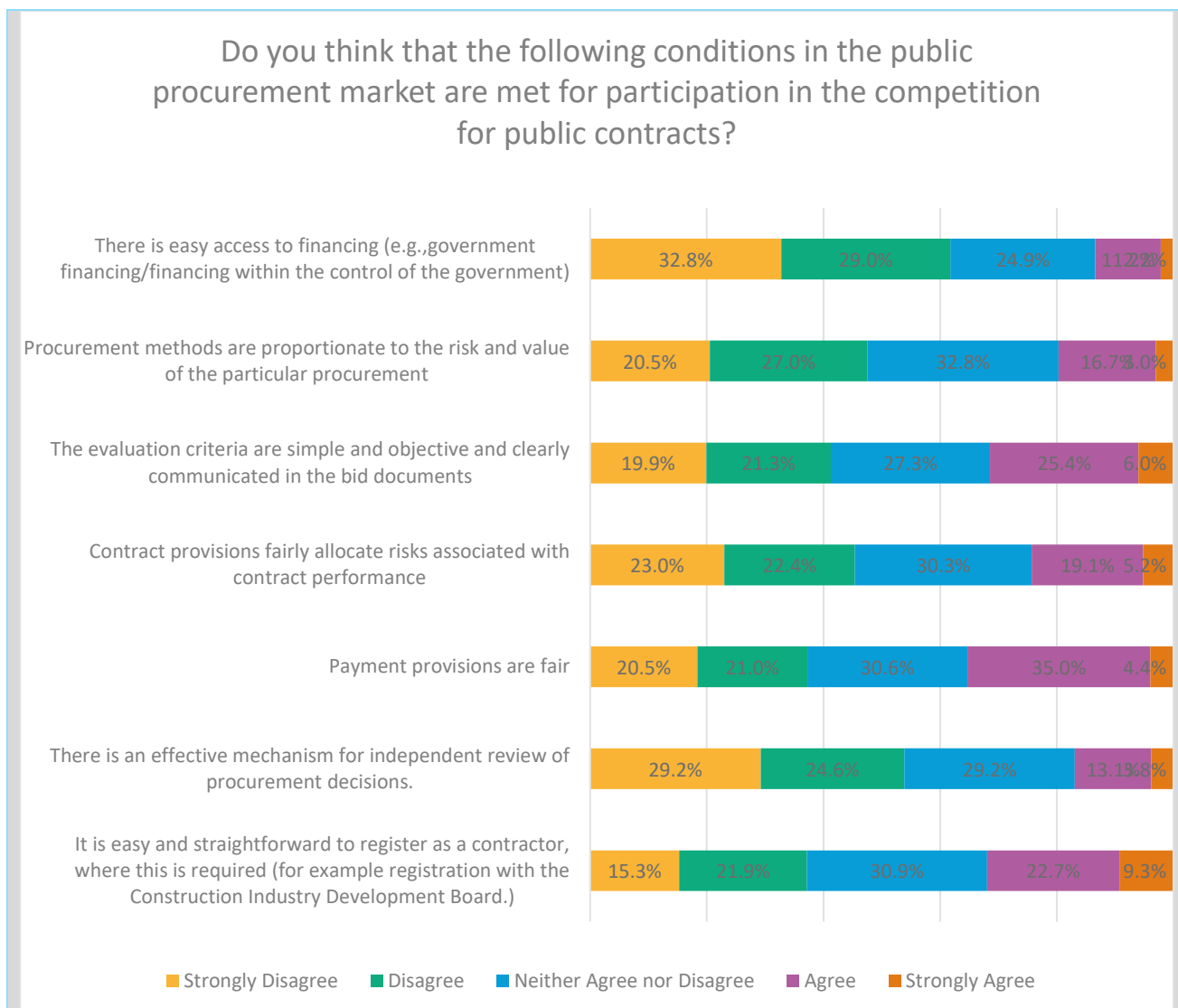
¹¹⁶ Only reflect Goods and Services related payment information for National and Provincial departments.

¹¹⁷ From 1 April 2023 to 31 January 2024.

Pillar III. Public Procurement Operations and Market Practices

Gap analysis
Recommendations
Assessment criterion 10(b)(b): There are no major systemic constraints inhibiting private sector access to the public procurement market. Conclusion: Substantive gap
Red flag: No
Qualitative analysis Registering as a potential supplier with the CSD is simple and free of charge and is a facilitator and condition for access to the public procurement market. On the other hand, in the private sector survey, there is a neutral or positive perception on a number of questions that affect access to the public procurement market, namely: <ul style="list-style-type: none">- Procurement methods are proportionate to the risk and value of the particular procurement, with 52.5%;- (Fair) allocation of risks associated with contract performance in the contract provisions, with 54.6%;- Payment provisions are fair, with 58.5%;- It is easy and straightforward to register as a contractor, where this is required, with 62.9%.
Quantitative analysis <i>* Recommended quantitative indicator to substantiate assessment of sub-indicator 10(b) Assessment criterion (b):</i> <i>- perception of firms on the appropriateness of conditions in the public procurement market (in % of responses).</i> <i>Source: Survey.</i>

Pillar III. Public Procurement Operations and Market Practices



Gap analysis

There is a negative perception of the ease of access to finance (61.8 per cent of respondents). In addition, 53.8 per cent of respondents also perceive the existence of an independent mechanism for reviewing procurement-related decisions negatively.

The SA procurement market entry requires several conditions to be met, including B-BBEE policies (preferential treatment), CIBD registrations and NIPP obligatory requirements. The impact and achievements of these socioeconomic imperatives may necessitate data-based analysis to conclude and recommend reform actions. Otherwise, whether the aspired policy objectives are met or whether some of these requirements are creating systematic constraints inhibiting private sector access to the public procurement market, at least for open international procedures, is not definite.

See also 1(d)(b) and 3(a).

Recommendations

As recommended under 3(a), an assessment of whether the range of current local preference (local production and local content), enhance or hinder domestic and international competition, achieve stated aims and contribute effectively to Sustainable Development Goals and does not create barriers to access to procurement markets.

A study should be carried out to analyse the impact of the lack of access to funding in order to see in which situations this occurs.

Pillar III. Public Procurement Operations and Market Practices

The issue revealed by the private sector survey regarding the effectiveness of appeal mechanisms should also be addressed.

See also 1(d)(b) and 3(a).

Sub-indicator 10(c) Key sectors and sector strategies

Assessment criterion 10(c)(a):

Key sectors associated with the public procurement market are identified by the government.

Conclusion: No gap

Red flag: No

Qualitative analysis

The key sectors in terms of public procurement have been identified by the government. Firstly, by the OCPO itself, that identifies 6 strategic areas, from which 2 are sectors: Transversal Contracting, Governance, Monitoring and Compliance, Strategic Procurement, **Information and Communication Technology**, Stakeholders & Clients Management, and **Infrastructure Procurement**.

On the other hand, there is the **Construction Industry Development Board (CIDB)**¹¹⁸ “created to lead industry stakeholders in construction development” and to “to facilitate and promote the improved contribution of the construction industry to SA’s economy and society”.

In addition, the Government created, through the Act 88 of 1998, the **State Information Technology Agency (SITA)**¹¹⁹ to “improve service delivery to the public through the provision of information technology, information systems and related services in a maintained information system security environment to the departments and public bodies; and to promote the efficiency of departments and public bodies through the use of information technology.”

Gap analysis

Recommendations

Assessment criterion 10(c)(b):

Risks associated with certain sectors and opportunities to influence sector markets are assessed by the government, and sector market participants are engaged in support of procurement policy objectives.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The government's recognition of critical sectors, such as infrastructure procurement and information technology, indicates an intent to adopt a sectoral approach to procurement. These sectors are recognised in existing legislation which states that the CIDB prescripts must be followed for Infrastructure Procurement, and the SITA Act that specifies the IT services that must be procured through a centralised State Information Agency. Whilst infrastructure procurement is meant to be done in accordance with CIDB prescripts, the procurement units tasked with conducting infrastructure procurement are often the same as those tasked with procuring non-works, hence a sectoral focused approach often fails to materialise in practice. With regards to the mandatory use of single agency for certain IT services, notwithstanding its benefits, it has also introduced a number of risks and challenges associated with the performance of the prescribed entity.

¹¹⁸ <https://www.cidb.org.za/about-us/our-construction-mandate/>

¹¹⁹ <https://www.sita.co.za>

Pillar III. Public Procurement Operations and Market Practices

Beyond infrastructure and IT, National Treasury and the Department of Health have entered into a number of Transversal Contracts in sectors such fleet services, learner teacher support material (LTSM), and pharmaceuticals. Whilst these contracts may have been successful in securing better pricing for procuring entities across the government, contract management is devolved to procuring entities and systems and/or capacity to monitor contract utilisation and adherence to contract terms need to be strengthened.

Gap analysis

Whilst the intent to adopt a sector approach is clear, the systems and capacity to fully realise the intended benefits are not fully developed and/or functioning adequately.

Recommendations

Checks and balances need to be put in place to mitigate the risk of failure associated with the performance of the prescribed entity. Further, where transversal contracts are concluded appropriate systems and capacity must be in place to effectively monitor the utilisation of these contracts.

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Indicator 11. Transparency and civil society engagement strengthen integrity in public procurement

Sub-indicator 11(a) Enabling environment for public consultation and monitoring
Assessment criterion 11(a)(a): A transparent and consultative process is followed when formulating changes to the public procurement system.
Conclusion: Substantive gap
Red flag: No
Qualitative analysis The importance of the public participation is captured in section 195(1)(e) of the Constitution, which states that “people’s needs must be responded to, and the public must be encouraged to participate in policy-making’. Section 59, 72 and 118 of the Constitution further mandate both the National and Provincial levels of Government to facilitate public participation. Several consultation processes related to public procurement have been ongoing in recent years, namely regarding the preparations of the Draft Public Procurement Bill 2020 ¹²⁰ and the Draft Preferential Procurement Regulations 2022 ¹²¹ , as well as the Draft Municipal Finance Management Act 2015 ¹²² . These take the form of submission of public comments on draft legislation. Specifically, the consultation process for the draft Public Procurement Bill was open from 19 February 2020 until the 31 st May 2020. To initiate a consultation process, National Treasury issues media statement or notice through a dedicated portal (e.g. https://web.treasury.gov.za/publiccomments/PublicProcurementBill/), which publicly invite comments on the draft legislation within a closing date for submission of comments. After the closing dates, all comments received are consolidated for further consideration and deliberation by the relevant Parliamentary Committees (civil society organizations are also represented) before finalizing the draft legislation. Comments received from the Public are published on the National Treasury’ website (www.treasury.gov.za). Section 78 of the Public Finance Management Act 1 of 1999 calls for the publishing of Draft Treasury regulations for public comments in the national Government Gazette prior to their enactment.
Gap analysis According to stakeholders, regulations do not undergo a rigorous consultation process similar to the one for primary legislation. This risks to undermine trust in the regulation. Furthermore, considering that many questions are left open in the primary legislation, the lack of strong, institutionalised consultation mechanisms for regulations poses even greater risks in terms of acceptance and adequacy of the regulatory framework. Several questions are still open for assessors to have a complete picture of consultation processes in practice. It is not clear whether any secondary legislation describes the consultation process in greater detail beyond the constitutional requirement. Hence, it is not clear whether consultation processes are conducted in a harmonized way. Furthermore, it is not clear whether stakeholders are actively invited to provide comments or draft legislation is simply accessible online for comments. Furthermore, the scope of the consultation process does not appear to

¹²⁰ Government Gazette, 19 February 2020, No. 43030, Draft Public Procurement Bill, 2020: Publication of draft Public Procurement Bill for public comment

¹²¹ GOVERNMENT GAZETTE, 10 March 2022, No. 46026, Preferential Procurement Policy Framework Act, 2000 (the Act): Publication of Draft Preferential Procurement Regulations, 2022 for Public Comment.

¹²² Government Gazette, 27 November 2015, No. 39460, Local Government: Municipal Finance Management Act, 2003 – Proposed Amendment of Regulations Regarding Supply Chain Management

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

be clearly defined, i.e. whether consultation only occurs for primary legislation or also for secondary legislation (e.g. instruction notes).

Finally, the consultations process with National Economic, Development and Labour Council (NEDLAC) is not clearly described. It is not clear whether there is an ongoing consultation process with NEDLAC (in addition to the processes held in conjunction with new legislation) and how the NEDLAC process intersects with the “regular” consultation process.

The assessors could not identify the specific webpage in which the results of consultation processes are published.

Public sector stakeholders consider that overall opportunities for participating in the procurement reform process are sporadic, as opposed to institutionalised.

Recommendations

Clearly define the scope of consultations including expanding consultations to secondary legislation. Provide transparency with the results of consultation processes, informing participants about reasons for acceptance or disregard of comments.

Assessment criterion 11(a)(b):

Programmes are in place to build the capacity of relevant stakeholders to understand, monitor and improve public procurement.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

Several trainings are organised by National Treasury to organs of state on supply chain management (SCM). Namely, within the Office of the Accountant-General at National Treasury, the ETD Directorate lists a comprehensive offer of trainings around Public Financial Management, Supply Chain Management, Internal audit and risk management. However, the training offer appears to be outdated (updated in 2010 according to the website). These trainings do not target external stakeholders.

Gap analysis

There are no formal programmes organised by National Treasury dedicated to the capacity building of civil society in South Africa. Training and capacity building by NT focuses on developing capacity of organs of state. Stakeholder noted that small CSOs often lack capacity and knowledge around public procurement. Typically, only large CSO have the knowledge, skills and resources to be active on public procurement. The private sector survey also highlights limited confidence by the business sector in civil society’s capacity to act as a watch dog.

Recommendations

Introduce capacity-building programmes to support CSO’s role to monitor and improve the public procurement system.

Assessment criterion 11(a)(c):

There is ample evidence that the government takes into account the input, comments and feedback received from civil society.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The government issues public notices for obtaining comments from members of the public before the finalisation of public procurement regulations/policies/acts. As part of the preparation of the draft Public Procurement Bill,

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

consultations have been taking place with various stakeholders, i.e. civil society groups and businesses. Both these stakeholder groups had opportunities to comment on the draft legislation. The assessors have been able to review some of the written input provided by civil society on the draft procurement bill. Hence, there is evidence that civil society participated to the policy-making process.

Gap analysis

Participation framework

Overall, stakeholders consider that their views have been insufficiently included in the consultation process for the new Public Procurement Bill. Despite some constructive engagement, stakeholders lamented difficulties around the consultation process and the transparency thereof. In particular, civil society organizations denounced difficulties in their ability to build coordination across civil society to shape reform more effectively. Specifically, civil society organisations lacked information about which organisations participated with other public comments, which would have allowed for better coordination to support procurement reform goals. Furthermore, civil society organizations were not able to obtain information requested during the consultation process. Stakeholders also denounced short timeframes to provide their comments.

Incorporation of feedback from the consultation process

There does not seem to be a formal and publicly available process, whereby National Treasury provides feedback to stakeholders on how their input has been taken into account. Hence, the assessors have limited evidence to determine to what extent feedback from civil society has been taken into account.

Furthermore, specific concerns were voiced around section 26 on access to procurement processes of the new Public Procurement Bill (Version B18 2023). Stakeholders consider that the wording of the new bill may limit access to civil society to procurement information, instead of increasing it. It does not appear that these particular concerns by civil society have been taken onboard in the consultation process.

Recommendations

Provide transparency with the results of consultation processes, informing participants about reasons for acceptance or disregard of comments. A minimum of 30 days could be articulated as the timeframe for commentary on draft legislation. Timely notification could be provided to stakeholders to engage in updates once inputs have been addressed by National Treasury.

Sub-indicator 11(b)

Adequate and timely access to information by the public

Assessment criterion 11(b)(a):

Requirements in combination with actual practices ensure that all stakeholders have adequate and timely access to information as a precondition for effective participation.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

As indicated in Indicator 7, there are several sources of information available to procurement stakeholders, including civil society. Legislative and regulatory procurement information could be found on the OCPO website which lists all applicable legislation.

Information related to the identity and status of potential bidders is available in the Central Supplier Database platform where all interested suppliers must register.

Information on the tendering phase is to be found on the e-Tender portal (<https://www.etenders.gov.za/>). NT SCM Instruction Note 9 of 2022/2023 reinstates the mandatory requirements about the publication on e-Tender of bid

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

opportunities, bid awards and any related bid notification. However, beyond these requirements for open competitive bids, paragraph 3.2 of the Instruction Note states that procurement through other means such as deviations or price quotation do not require the publication of procurement information on the e-Tender portal. Statistical information on procurement is provided on data.etenders.gov.za.

It is possible to download monthly datasets in an open data format however the functionality seems to be frequently inaccessible. Further, low publication of procurement data in important stages of the procurement cycle (e.g. award decision) could put into question the accuracy of statistical information.

Gap analysis

Overall, civil society stakeholders criticize the lack of transparency and access to relevant procurement information as a key challenge to their ability to perform their role as watchdogs. In particular, stakeholders from civil society denounce lack of transparency in terms of ability to access various SCM policies of South African departments. While they can be obtained through a request under the Promotion of Access to Information Act of 2000, there is no systematic obligation to make SCM policies publicly accessible. SCM policies contain important details for civil society to monitor, including for instance how a particular organ of state addresses forms of non-competitive bidding (“procurement by other means”). Systematic access to SCM policies would allow for civil society to better scrutinize the overall regulatory framework.

Furthermore, civil society considers that access to procurement data is patchy and limited. Despite the constitutional requirement to have an open procurement system, civil society considers that such a system is failing and does not live up to an “open” standard. It should be noted that procurement data that is not available on the National Treasury' website or Organ of the State' websites can be requested by civil society through the use of the J750 form as issued in terms of section 18 (1) of the Promotion of Access to Information Act 02 of 2000.

For instance, stakeholders have limited access to tender specifications through the e-procurement system. In fact, there may be costs associated in accessing those documents, thus limiting access. Furthermore, it is well established that compliance with publication of tender information on the e-tender platform is patchy at best. Civil society organisations consider that too few departments publish sufficient tender information to be able to conduct effective oversight. Furthermore, the available data is not always easily machine-readable and hence poses problems for further analysis. As such, there are too many loopholes in terms of data availability and data quality to ensure effective monitoring by civil society and the public. Vested interests prevent the increase in transparency to enhance oversight function by civil society, according to stakeholders. In fact, tenders that are subject to tipoffs for suspected corruption or irregularity, are typically those that are not published on the e-Tender platform. The patchy use of e-Tenders by procuring authorities allows officials the freedom to not comply with reporting obligations when they know the process is irregular.

Going forward, the new Public Procurement Bill raises some concerns about potentially decreasing transparency under certain circumstances. In fact, the section around access to procurement processes states that the Minister [of Finance] “may introduce measures to ensure candid deliberations and to protect officials from undue influence and threats and to provide for disallowing or terminating access by the public or a specific category of persons or a specific person if such access resulted in, or is likely to, inhibit candid deliberations or result in undue influence of, or threats to, officials;”. This provision would allow for restriction of transparency in terms that appear overly discretionary and unjustified.

Recommendations

Enhance all levels of transparency, from procurement data in machine-readable format, to mandatory access to SCM policies of all organs of state. Build a coalition for strengthening transparency to combat vested interests that favour an opaque system. Refrain from allowing discretionary decision-making to eliminate or restrict access to procurement transparency obligations, as currently foreseen in the upcoming Public Procurement Bill.

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Sub-indicator 11(c) Direct engagement of civil society
<p>Assessment criterion 11(c)(a): The legal/regulatory and policy framework allows citizens to participate in the following phases of a procurement process, as appropriate:</p> <ul style="list-style-type: none">• the planning phase (consultation)• bid/proposal opening (observation)• evaluation and contract award (observation), when appropriate, according to local law• contract management and completion (monitoring).
<p>Conclusion: Substantive gap</p>
<p>Red flag: No</p>
<p>Qualitative analysis</p> <p>The legal framework does not explicitly allow for citizen participation throughout the procurement process. Nevertheless, citizen can theoretically participate through access to some data available on the e-tender portal and through the public opening of bids. In the planning phase, citizens are able to view published annual procurement plans of the e-Tender portal. It should be noted that the publication of procurement plans is encouraged as per NT SCM Instruction No. 09 of 2022/2023 (it will be made mandatory in a separate NT instruction). Furthermore, Citizens have access to view bid opportunities on the e-tender portal but have to register as a supplier in order to respond or participate to bid opportunities.</p> <p>Public Opening of bids is foreseen according to Paragraph 4.10 of the National Treasury SCM Guide for Accounting Officers. As such, direct participation in the procurement process by Civil Society Organizations and other interests' group is possible at this stage of the procurement process. The Guide for Accounting Officers foresees that the place for bid opening should be announced together with the invitation to bid. Bids should be opened in public, i.e. bidders or their representatives should be allowed to be present. If requested by any bidder, civil society organization or interest group, the name of the bidders and if practical the total amount of each bid and of any alternative bids, should be read aloud.</p> <p>Citizen participation is not foreseen by the legal framework during the evaluation and contract award phase. Members of the Public, Civil Society Organizations or Interest group are able to interrogate the outcomes of bid evaluation and contract awards as published on the e-tender portal. It should be noted, however, that such information may not always be available due to low compliance with publication requirements.</p> <p>Regarding the contract management phase, citizens have limited opportunities for direct participation. For infrastructure procurements, the Online Portal named "Vulekamali"¹²³ established by National Treasury allows access for citizen's participation in Government' budgetary and procurement planning process. The Portal focuses on budget transparency for infrastructure projects, allowing to browse through different stages of the project implementation, including the contract implementation phase. The portal also provides useful public procurement resources for practitioners, covering all stages of the procurement process (from planning to implementation).¹²⁴</p>
<p>Gap analysis</p> <p>Opportunities for direct engagement by civil society are limited in the legal framework and in practice. For the most part, participation and engagement is only possible through the e-Tender portal. As discussed in other parts of the assessment, access and quality of data in the e-Tender portal presents serious limitations, thereby reducing opportunities for direct engagement. The assessors were not able to get a sense of how often civil society monitors the procurement process through participating in the public opening of bids. Furthermore, it is not clear whether a</p>

¹²³ <https://vulekamali.gov.za>

¹²⁴ <https://procurement.vulekamali.gov.za/>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

public tender opening is mandatory. As some stakeholders noted, there is uneven transparency across the country, particularly at provincial level with respect to public opening of tenders and probity audits. Similarly, some provinces have practices of collaborating with civil society to monitor integrity, but this development is uneven across the country. CSO stakeholders lament the lack of access to procurement information as a critical barrier to be able to conduct oversight of public procurement.

Common good practices to ensure monitoring of procurement and deter corruption, such as social witnesses or integrity pacts, are not carried out in South Africa. These could provide a powerful tool to ensure oversight of public procurement.

While open budgeting appears as a strength of the South African system, available portals for contract monitoring in infrastructure could allow for reporting by citizens on the advancement of the project. This does not seem possible in the current format.

The legal framework does not mandate consultations with the public prior to large-scale or environmentally or socially sensitive procurements.

Recommendations

Introduce clear legislative structures to formalise mechanisms that allow for direct oversight of procurement procedures and contract implementation by civil society (e.g. social witnesses, integrity pacts). These practices could initially be piloted for high-risk projects before a wider roll-out. In the long term, South Africa could aim at implementing a procurement monitoring system framework between government, civil society and members of the public that can serve as a guideline for meaningful public participation and engagement.

Assessment criterion 11(c)(b):

There is ample evidence for direct participation of citizens in procurement processes through consultation observation and monitoring.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

As discussed, the opportunities for direct participation of citizens in procurement processes are limited from a regulatory and practical point of view. In practice, the data gaps are one hurdle to limit observation and monitoring by civil society. Consultation of draft legislation is possible and submissions of input by civil society and the business sectors have been recorded.

The Online Portal “Vulekamali”¹²⁵ is evidence of collaboration between government and civil society on monitoring public procurement, although the scope of this monitoring is limited to infrastructure projects, and the primary focus of the portal is monitoring budget execution and less procurement contract implementation.

Gap analysis

As highlighted in other parts of this assessment, opportunities for participating by citizens and civil society considered not sufficiently institutionalised and sporadic in nature. In this context, civil society organisations observe a culture of fear, in which participation is overall limited, in particular with respect to whistleblowing giving the strong risks that reporting allegations may bring to the lives of whistleblowers.

Recommendations

Same recommendation as 11(c)(a).

¹²⁵ <https://vulekamali.gov.za>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Indicator 12. The country has effective control audit systems

Sub-indicator 12(a) Legal framework, organisation and procedures of the control system The system in the country provides for:
Assessment criterion 12(a)(a): laws and regulations that establish a comprehensive control framework, including internal controls, internal audits, external audits and oversight by legal bodies.
Conclusion: Substantive gap
Red flag: Yes
Qualitative analysis The control framework is comprised by the following audit and control structures established by a number of different laws and regulations: <ol style="list-style-type: none">1) Accounting Officers and Accounting Authorities as established in the Public Finance Management Act (PFMA - section 38 (a) (ii) and 51 (a)(ii)) – <i>responsible for setting up internal audit</i>2) National Treasury – <i>overseeing the implementation of the PFMA</i><ol style="list-style-type: none">a. Office of the Accountant General (OAG)3) The Auditor General South Africa (AGSA) established by the Auditor General Act 12 of 1995 – <i>performs external audit by the Supreme Audit Institution</i> <p>Under PFMA, every department and every constitutional institution must have an accounting officer, which have responsibility for financial and risk management and internal control. Accounting Officers are Heads of National Departments as per section 38 of the Public Finance Management Act. As part of their mandate, accounting officers set up the internal audit system under the control and direction of an audit committee. Accounting officers are also responsible for the set-up of the procurement system within their entity. Their mandate includes effective, efficient, economical and transparent use of the resources of the department. Accounting officers must report unauthorised, irregular or fruitless and wasteful expenditure to the relevant treasury. They also are mandated to take disciplinary steps against officials in case of lack of compliance or wrongdoing.</p> <p>The PFMA also provides for the establishment of accounting authorities within public entities. Accounting Authorities are Heads of PFMA Scheduled Public Entities/Institutions (boards of directors) section 56 of the PFMA. Accounting authorities have responsibility for effective, efficient and transparent systems of financial and risk management and internal control. They oversee the system of internal audit in compliance with the rules set out in the PFMA.</p> <p>The PFMA vests four key responsibilities to Accounting Officers/Accounting Authorities, which are¹²⁶:</p> <ol style="list-style-type: none">a. the operation of basic financial management systems, including internal controls in departments and any entities they control;b. to ensure that departments do not overspend their budgets;c. to report on a monthly and annual basis, including the submission of annual financial statements two months after the end of a financial year; andd. to publish annual reports in a prescribed format which will introduce performance reporting. Accounting officers who are negligent and make no effort to comply with these responsibilities will face strict disciplinary sanctions, including dismissal. Similar sanctions will apply to treasury officials failing to carry out their responsibilities. The new Public Service Act regulations and the trend towards performance contracts will complement this approach. Accounting officers are expected to appoint chief financial officers as part of their senior management to enable them to fulfill these responsibilities.

¹²⁶ <https://www.treasury.gov.za/legislation/pfma/Default.aspx>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

An Audit Committee is an independent committee constituted to review the control, governance and risk management within the Institution, established in terms of section 77 of the Public Finance Management Act (PFMA). As per PFMA, audit committees must consist of at least 3 people and meet twice yearly. In case of a department, one member of the AC must be outside of the public service, while the majority and the chairperson must come from outside the department. The AC assists the Accounting Officer (AO) in the effective execution of his/her responsibilities with the ultimate aim of the achievement of the organisation's objectives. The roles and responsibilities of AC are determined by the AO.

National Treasury is part of the control system with its oversight role regarding the implementation of the PFMA. Within NT, the Office of the Accountant General (OAG) is tasked with internal audit support, specialised audit services as well as risk management. The responsibility of the Office of the Accountant General is to promote and enforce transparency and effective management in respect of revenue expenditure, assets and liabilities of institutions in all three spheres of Government. This includes the administration of the National Revenue Fund (NRF) and the Reconstruction and Development Programme Fund (RDPF), as well as Banking Services for national departments. The OAG is also responsible for developing policies and frameworks on Accounting, Internal Audit and Risk Management¹²⁷.

The Auditor-General of South Africa (AGSA) has a constitutional mandate to act as the external auditor of all national and provincial state departments and municipalities, and any other institutions or accounting entities required to be audited (at national or provincial level). The Constitution guarantees the independence of AGSA, stating that AGSA must be impartial and must exercise its powers and perform its functions without fear, favour or prejudice. Section 188 of the Constitution outlines the functions of the AGSA. These are further regulated in the Public Audit Act, 2004 (Act No. 25 of 2004) (PAA). As part of its constitutional functions, AGSA must audit and report on the accounts, financial statements and financial management of:

- a. all national and provincial state departments and administrations;
- b. all constitutional institutions;
- c. the administration of Parliament and of each provincial legislature;
- d. all municipalities;
- e. all municipal entities; and
- f. any other institution or accounting entity required by other national or by provincial legislation to be audited by the Auditor General.

Similarly, the Auditor General must audit and report on the consolidated financial statements of:

- a. the national government as required by section 8 of the Public Finance Management Act;
- b. all provincial governments as required by section 19 of the Public Finance Management Act; and
- c. a parent municipality and all municipal entities under its sole or effective control as required by section 122 (2) of the Municipal Finance Management Act.

In fulfilling its mandate, the AGSA annually produces audit reports on all government departments, public entities, municipalities and public institutions. Beyond entity-specific reports, the audit outcomes are analysed in general reports that cover both the Public Finance Management Act (PFMA) and Municipal Finance Management Act (MFMA) cycles. Section 4 of the PAA makes a further distinction between mandatory and discretionary audits.

AGSA also has the right to review and investigate efficiency and effectiveness of internal control and management measures (Auditor General Act, 1995). Through the enhanced powers effective from 1 April 2019, the AGSA also issues material irregularities. If the AA/AO does not appropriately deal with material irregularities, AGSA's mandate allows to a) refer material irregularities to relevant public bodies for further investigation b) recommend actions in

¹²⁷ <https://oag.treasury.gov.za/Pages/default.aspx>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

the audit report to resolve the material irregularity and taken binding remedial action for failure to implement the recommendation c) issue certificate of debt for failure to implement remedial action if financial loss was involved.¹²⁸

Gap analysis

The decentralized nature of the PFMA hands over significant responsibility and accountability for the functioning of the SCM system to accounting officers and accounting authorities, building a system that rests in large part on the integrity and capacity of those entities. In the context of procurement, AA/AO are granted important discretionary powers, notably with respect to procurement “by other means”. They are also charged with follow up on irregularities identified at audit.

However, it is evident that AA/AO present severe weaknesses in upholding their role as guarantors of the PFMA—not least due to the fact that AGSA repeatedly singles out the ‘lack of consequence management’ as an issue, i.e. inaction by AA/AO in implementing recommendations in response to findings about irregularities. The strengthening of the role of the AGSA is a step in the right direction, but it also illustrative of systemic weaknesses of the overall control system.

Not least, internal control and internal audit functions appear weak, as described in other sections of this report. Support to harmonizing and strengthening internal control and internal audit capacity also appears insufficient to address the weaknesses. In particular, it appears that NT does not have a sufficiently clear view of what the specific problems are, and how those could be addressed.

Finally, a paradox is observed by the assessors: despite strong evidence for poor outcomes in service delivery, high number of irregularities, severe challenges in addressing recommendations by AGSA etc., on overly controlled environment is lamented by some stakeholders, whereby control by the Auditor-General may lead to inaction due to fear of audits.

This gap is assigned a red flag given the fact that it pertains to systemic weaknesses of the control system and hence lies outside the sphere of public procurement.

Recommendations

Mitigate risks posed by systemic weaknesses of control system

The challenges of addressing a decentralised system go beyond this report (and hence warrant a red flag), but some actions may reduce the inherent risks posed a decentralised system that relies on accounting authorities / officers for its lawful functioning. For instance, further attention could be paid that these entities have the qualifications, skills and capacity needed to perform their jobs. South African authorities could also consider areas in which limiting discretion may prove beneficial (e.g. rules on procurement ‘by other means’).

Assessment criterion 12(a)(b):

internal control/audit mechanisms and functions that ensure appropriate oversight of procurement, including reporting to management on compliance, effectiveness and efficiency of procurement operations

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

Framework for internal control / audit

The PFMA provides for the establishment of AO/AA with responsibilities for financial, risk management and internal control as well as internal audit. Namely, Section 38 of the PFMA states that “the accounting officer for a department must ensure that that department has and maintains a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions

¹²⁸ <https://mfma-2022.agsareports.co.za/pages/mi-explained>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

prescribed in terms of sections 76 and 77". Furthermore, NT as the custodian of the PFMA, has responsibility in overseeing the implementation of PFMA, which includes provide support with internal control and internal audit through the Office of the Accountant General.

The National Treasury may make regulations or issue instructions applicable to **departments**, concerning fruitless and wasteful, unauthorised and irregular expenditure (PFMA Section 76 (2)(e))

The National Treasury may make regulations or issue instructions applicable **to all institutions to which this Act applies** concerning (PFMA section 76 (4)):

(b) financial management and internal control

(c) the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective

(d) audit committees, their appointment and their functioning;

(e) internal audit components and their functioning;

As per Treasury Regulations, Audit Committees play an important role in regarding internal control (see 3.1)¹²⁹. Namely, the Audit Committee must review the effectiveness of the internal control system, in addition to review the internal audit and risk management, among other tasks (3.1.10). Furthermore, the Audit Committee must report in the annual report of the institution provide comments on the effectiveness of internal control, among other reporting (3.1.13).

Treasury Regulations 3.2 also allow for internal audit activities to be outsourced (3.2.4). Furthermore, the purpose, authority and responsibility of the internal audit function must, in consultation with the audit committee, be formally defined in an audit charter and be consistent with the Institute of Internal Auditors ("IIA") definition of internal auditing (3.2.5). Internal audit must be conducted in accordance with the standards set by the Institute of Internal Auditors (3.2.6).

The Office of the Accountant General within NT plays a role at harmonizing the internal control/audit system. It assists and supports agencies of government and public sector (national, provinces and entities level) and ensures that they have and operate effective internal audit functions. All auditors in government have membership in the Institute of Internal Auditors (IIA).

The Accountant General determines mandatory standards for internal audit, including the **National Treasury Internal Audit Framework**. This is a mandatory document as it is derived from the provisions of the Public Finance Management Act 1 of 1999 and the Municipal Finance Management Act 53 of 2003. The document is designed and implemented by the Office of the Accountant General on behalf of Internal Auditors within the South African Public Services.

As outlined in the NT Internal Audit Framework, AC members need to have a good understanding of the control framework. This understanding will enable the AC to evaluate the adequacy of the organisation's control environment and will be a basis from which reasonable assurance can be provided that the organisation's objectives and goals will be achieved efficiently and economically (National Treasury Internal Audit Framework).

Furthermore, internal auditors are bound by a code of ethics for internal audits¹³⁰.

¹²⁹ Treasury Regulations, for departments, constitutional institutions and public entities Issued in terms of the Public Finance Management Act, 1999 (2005)

¹³⁰ <https://www.theiia.org/globalassets/documents/content/articles/guidance/implementation-guidance/implementation-guides-for-code-of-ethics-principles/ig-code-of-ethics-combined.pdf>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

In the National Treasury's Annual Report 2022-2023¹³¹, the Office of the Accountant General reports having conducted so-called state of readiness reviews to determine the effectiveness of the internal audit functions and measure the quality of work performed within them. Reportedly, surveys were conducted on the status of internal audit and audit committees in PFMA and MFMA institutions, focusing on areas such as institutional arrangements, quality control, and the resourcing of internal audit units and audit committees. These reports were used to determine focus areas for additional technical support. Various activities in support of internal auditors in the public sector were undertaken in collaboration with the Institute of Internal Auditors (IIA SA).

Reporting on compliance, effectiveness and efficiency of procurement operations

It is not clear to the assessors what kind of reporting on procurement operations is prepared for management within organs of state, and if there are any kind of standardised processes. Nonetheless, reporting requirements apply to National Treasury in terms of annual submission to procurement plan, quarterly progress reports and periodic amendments of the procurement plan as per National Treasury SCM Instruction No 2 of 2016/2017). Furthermore, section 55(2)(b) of the PFMA provides that the annual report and financial statements of a public entity must include any material losses through criminal conduct and any irregular expenditure, and fruitless and wasteful expenditure, that occurred during the financial year. The reporting data received by NT has not been shared with the assessors.

Procurement "by other means" must be reported to NT within 14 days of its finalization, as per PFMA SCM Instruction No 03 of 2021/2022: Enhancing Compliance, transparency and accountability in Supply Chain Management. Furthermore, the AA/AO must ensure that procurement "by other means" recorded in the annual report of the organization.

Practices from Internal Audit Units

Internal audit practices from the organs of state vary depending on the structure and entity. For instance, SOEs may be subject to corporate governance rules in addition to compliance with PFMA. As mentioned above, all auditors in government need to be members of the Institute of Internal Auditors (IIA) and comply with standards set by the SA International Professional Practice Framework (IPPF)¹³². In some organs of state, so-called life-style audits of officials have been introduced. Certain audit findings point to lack of compliance with the rules, e.g. splitting the transaction value into smaller contracts so that approval happens at a lower hierarchy level.

Preventive Control Guides

AGSA also developed and shared a series of Preventative Control Guides to assist oversight structures to diagnose weaknesses in preventative mechanisms and focus their oversight efforts on.

Gap analysis

Lack of capacity in internal control/audit highlighted by State Capture Commission Report

The State Capture Commission Report documents glaring failures of internal (and external) audit, particularly as evidenced by the case of South African Airways (SAA). The report highlights that "the auditors appointed to SAA for the 2012 to 2016 financial years failed dismally to detect any of this fraud and corruption. The internal audit function within SAA was also hopelessly ineffective in identifying or limiting these criminal acts." Strong weaknesses in capacity contributed to the weak control environment, in which key executive management positions were vacant and the Chief Procurement Officer was suspended. Furthermore, SAA officials also lacked appropriate competencies, particularly in the preparation of financial statements and SCM. As reported in testimonies, the legal department "was incapable of ensuring that tenders were awarded in accordance with process [...] This represented an enormous risk to SAA because there was no way to hold suppliers accountable. Nevertheless, these suppliers were simply paid by SAA".

¹³¹ https://www.gov.za/sites/default/files/gcis_document/202310/national-treasury-annual-report.pdf

¹³² <https://www.theiia.org/en/standards/international-professional-practices-framework/>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Furthermore, severe problems with record keeping and poor internal controls are also particular points highlighted in the State Capture Commission Report¹³³. Testimony from the case shows that no consequences were imposed for transgression around compliance with legislation, including with instances around irregular, fruitless and wasteful expenditure.

While the State Capture Commission documents in detail the example of extremely ineffective internal controls at SAA, the assessors consider it a strong case in exemplifying severe weaknesses in the control environment across organs of state, as reported by stakeholders and widely documented by AGSA.

Weak control environment documented by AGSA

In addition to the findings of the Judicial Commission of Inquiry into Allegations of State Capture, the AGSA's 2021-2022 Report on National and Provincial Audit Outcomes confirms findings around weak control environment and overall problems with the accountability value chain¹³⁴. Specifically, the 2021-2022 report highlights systemic weaknesses in senior management and accounting officers' slow (or lack of) responsiveness to improve internal controls and root causes for poor audit outcomes. According to AGSA, only 20% of auditees have effective senior management in place. Similarly, the function of accounting officers and authorities shows instability, with consequences for its effectiveness, such as completion of action plans, projects and initiatives and implementation of consequence management for identified shortcomings.

AGSA further notes that while internal audit units and audit committees are established and largely functional, the impact of their work is not fully visible, given poor quality of financial statements and annual performance reports reviewed by the external auditor. In fact, the value of the internal audit function is often not achieved because management does not implement recommendations.

Furthermore, the overall accountability value chain suffers from poor annual performance reporting, and credibility of reporting. In fact, AGSA finds that auditees in the key service delivery portfolios struggled to produce useful and reliable reports, with 45% receiving material findings on the quality of their performance reporting, while 40% included information that was not reliable and 25% included information that was not useful. Poor monitoring of performance and reporting has an impact throughout the accountability value chain. Namely, accounting officers and authorities and oversight bodies (such as portfolio committees) also use in-year reporting for monitoring purposes; without reliable information, their monitoring process will be ineffective.

Despite the existence of performance management and reporting frameworks that clarify requirements, most departments and public entities are not able to produce such reporting with sufficient levels of quality to assure credibility, usefulness and reliability.

The AGSA considers that ineffective reporting severely impacts the entire accountability value chain, as follows:

- 1) At the level of senior management, internal audit units and audit committees (responsible for designing and implementing required performance management controls), there is a lack of prevention and detection of misstatements, enabled by a poor control environment. Such misstatements are not corrected promptly
- 2) Accounting officers and authorities (depend on senior management for designing and implementing the required performance management controls, but are responsible for creating an environment that helps improve performance management controls):

¹³³ "The record keeping problem at SAA was so bad that it would sometimes take three months for SAA to comply with a request and this resulted in a significant limitation in the scope of the audit that could be performed – without critical source documents. This was particularly so with respect to SCM and assets."

¹³⁴ AGSA, PFMA 2021-2022, CONSOLIDATED GENERAL REPORT ON NATIONAL AND PROVINCIAL AUDIT OUTCOMES <https://pfma-2021-2022.agsareports.co.za/wp-content/uploads/2022/12/22253B-2021-22-PFMA-General-Report-interactive-V3.pdf>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

- do not always create a conducive environment for performance management controls
 - continue to sign off on annual performance reports that are not credible.
- 3) Those responsible for support, oversight, accountability and governance (executive authorities; Department of Planning, Monitoring and Evaluation; offices of the premier; legislatures; and portfolio committees):
- make decisions based on annual performance reports that are not credible because they: – do not always pay sufficient attention or ask the right questions by interrogating information to identify the issues – do not follow up on identified issues

Limited visibility of internal audit capacity by NT

National Treasury implements yearly strategies to assess the outcomes of internal audit work ('state of readiness reports'), as highlighted in the NT's annual report. It should be noted that assessors were not able to access the state of readiness reports conducted by the Office of the Accountant General on the strength and weaknesses of internal audit functions. Furthermore, NT appears to have a limited overview on the overall effectiveness of internal audit work despite its efforts. In part, limited visibility may be due to lack of data analytics or limited data to determine trends in internal audits.

Code of ethics for internal auditors

To date, the assessors have not been able to access this document. It is not clear whether it is mandatory and what is the scope of application of this code of ethics, i.e. does it apply to all internal auditors or for a limited sub-set of the profession. Furthermore, it is not clear which is the institution that has developed and owns this code of ethics.

Reporting on deviations

It is not clear to the assessors how such reporting takes place in practice. As highlighted in Indicator 7, deviations are currently not managed through an electronic system; instead, they are individually reported by organs of state to relevant treasuries or the Auditor General.

This raises several issues and questions: namely whether NT or AGSA consider the scope of reporting to be complete, and how effective analysis about the nature of deviations can be conducted without electronic reporting. National Treasury conducts Bid review processes based on Deviation reports or Procurement by other means that appear unjustified or where there is an element of abuse of the Procurement System. The outcomes of such reviews and their recommendations are then presented to the AA/AO for implementation. However, no additional information on processes and actions taken by National Treasury related to reporting of deviations has been provided to the assessment team. AGSA further conducts a Reasonability Test on all unjustified procurement by other means reports and issued findings. Similarly, these results by AGSA have not been shared with the assessment team for review.

This gap is assigned a red flag given the fact that it pertains to systemic weaknesses of the internal control system and hence lies outside the sphere of public procurement.

Recommendations

Address weaknesses in internal control and audit

Strong action to address weaknesses in control and audit are needed to ensure that this internal function performs in a way to support the lawful execution of public procurement. First, NT should have clear visibility about the issues faced and develop targeted actions. Harmonisation of practices through a central hub is important in this context. Greater focus could be paid to making available resources much more practical and developing user-friendly manuals. Importantly, managers should also be aware of the role of internal control and audit. Dedicated capacity building activities could also address management's role.

Increase the effectiveness of compliance reporting

NT could consider using the data it receives as part of mandatory compliance exercises (reporting on deviations) for analysis of potential lack of compliance. To do so, the reporting data needs to be automated and digitalised. Such

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

an analysis could guide future restrictions and greater harmonisation of rules regarding procurement deviation, with a view of creating a single regulatory system that moves away from ad hoc approvals by AA/AO. In the interim period, NT could ensure that any suspicious deviation is analysed and referred to competent institutions. AGSA could also enhance the monitoring of deviations and assess related trends.

Assessment criterion 12(a)(c):

internal control mechanisms that ensure a proper balance between timely and efficient decision-making and adequate risk mitigation

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

As per Treasury Regulations (3.1) Audit Committees play an important role in internal control, notably in reviewing the effectiveness of internal control systems. The Audit Committee, however, does not have responsibility for the implementation of its recommendations. This responsibility lies with the accounting officer. In an annual report, the Audit Committee must report on the effectiveness of internal control. Concerns by the Audit Committee may be escalated to the Auditor-General, with whom the Audit Committee must meet at least annually.

Treasury Regulations outline the role of the accounting officer with respect to internal controls and internal audit (3.2). Specifically, the accounting officer must ensure that risk management is conducted, which includes a fraud prevention plan, and is meant to support managers and staff to improve controls and manage risks.

There are many resources available from OAG on risk management among other topics. It is not clear to assessors how these resources are being used in practice, and whether AA/ AO require additional support.

Gap analysis

Effectiveness of internal controls appears limited

Overall, effectiveness of internal control mechanisms, including ensuring a timely balance between decision-making and adequate risk mitigation, appears mixed at best. While some stakeholders do not report any specific challenges in implementing the control system, evidence from numerous AGSA reports highlights weaknesses in the internal control environment¹³⁵. Furthermore, the State Capture Report documents such instances in great detail¹³⁶.

Similarly, to the issues and gaps identified under sub-indicator 12(a)(b), a vast amount of evidence points to grave and systemic weaknesses in the control environment of South African organs of state, including the lack of consequences and responsiveness when irregularities are identified¹³⁷. This required the expansion of powers of AGSA to address material irregularities. It is not clear to assessors how available guidance material, for instance on preventive controls, are implemented in practice and support day-to-day activities of AA/AO. As highlighted by AGSA, most departments and public entities did not have adequate systems to collate and report on their performance information. Performance management and reporting requirements were also not properly applied¹³⁸.

¹³⁵ AGSA, PFMA Consolidated General Report on National and Provincial Audit Outcomes 2022-23, AGSA, PFMA Consolidated General Report on National and Provincial Audit Outcomes 2021-22

¹³⁶ Judicial Commission of Inquiry into State Capture Report: Part 1, Volume 1, South African Airways and its Associated Companies

¹³⁷ See for instance AGSA's 2021-2022 Report on National and Provincial Audit Outcomes

¹³⁸ AGSA, PFMA 2021-2022, Consolidated General Report on National and Provincial Government Audit Outcomes

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

South Africa's highly decentralized system also makes it challenging to have an overview of shortcomings across the system, which is an issue that National Treasury faces. Similarly, ensuring harmonized practices may be a challenge in a decentralized system, in which each the Audit Committee may operate under potentially different mandates. The assessors have not been able to review some of the reporting carried out regularly by NT around the maturity of control systems.

Balancing operational effectiveness with necessary external audit scrutiny

While evidence points to severe issues in the implementation of effective internal controls, stakeholders also report being strongly constrained in their day-to-day operations by restrictive audit practices. As reported by stakeholders, there is a generalized fear of external auditors, which leads to inefficient operations and inaction. Receiving a so-called "clean audit" is perceived as out of reach. This finding appears as paradoxical to the assessors. In a context where corruption is perceived as rampant, and accountability in case of non-compliance is still a severe issue, limiting the external scrutiny of organs of state does not appear to be an effective way forward.

Recommendations

Promote an increased understanding of AGSA's audit methods

In the short term, while irregularities are high and the internal controls and audit of the procurement system are weak, reliance on external audit to minimise unlawful practices is essential. Over time, once significant improvements are experienced, external audit could focus on a more targeted risk-based approach in their audits. In the meantime, continuous communication between the AGSA and auditees is necessary to reduce lack of clarity and define common pathways for ensuring compliance based on AGSA's standards.

Assessment criterion 12(a)(d):

independent external audits provided by the country's Supreme Audit Institution (SAI) that ensure appropriate oversight of the procurement function based on periodic risk assessments and controls tailored to risk management.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

As per section 20 of the Public Audit Act (PAA), AGSA is required to prepare an annual audit report which, amongst others, reflect the following¹³⁹:

- findings on Compliance with applicable legislation relating to financial matters, financial management and other related matters.
- Such findings include findings on procurement and contract management which forms part of AGSA's key focus areas tested under the compliance engagement.
- Entity specific findings are reported in the Management report and/or Auditors report, which include the details of audit findings and recommendations to assist management in addressing the root cause of these findings.

In its work, AGSA applies an auditor report template for all auditees to promote consistent reporting, clarity and relevance. It also uses a management report template that applies to public sector auditees audited by AGSA. The management report is addressed to the AO /AA, but should also be shared with the executive authority, the audit committee and the head of the internal audit unit¹⁴⁰.

As of 2018, the Public Audit Act introduced the notion "material irregularity", which is defined as "any noncompliance with, or contravention of, legislation, fraud, theft or a breach of a fiduciary duty identified during an audit performed under this Act that resulted in or is likely to result in a material financial loss, the misuse or

¹³⁹ AGSA, Presentation Integrity in public procurement

¹⁴⁰ AGSA, Reporting Guide 2022-2023

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

loss of a material public resource or substantial harm to a public sector institution or the general public” (Chapter 1, Public Audit Act 2005).

The amendment of the Public Audit Act also gave an expanded mandate to AGSA to take direction actions in report material irregularities, if the AA / AO does not appropriately deal with them. The expanded mandate allows AGSA to 1) Refer material irregularities to relevant public bodies for further investigations 2) Recommend actions in the audit report to resolve the material irregularity 3) Take binding remedial action for failure to implement recommendations 4) Issue certificate of debt for failure to implement remedial action if financial loss was involved.

The reform process for the expanded powers of AGSA was initiated in 2016, in light of concerns related to the growing extent of unauthorised, irregular, and fruitless and wasteful expenditure reported every year at all tiers of government. Hence, the standing committee on the auditor-general (Scoag) – the multiparty parliamentary committee that oversees the AGSA – initiated the process to expand our mandate beyond just auditing and reporting.

The material irregularity (MI) processes expanded the Auditor- General work’s significantly in 2022-23 by implementing the MI process at 431 national and provincial government auditees – from 202 in 2021-22. A further expansion is foreseen to 570 in 2023-24. From the time of activation of the material irregularity process in April 2019 to 30th September 2023, AGSA identified 266 material irregularities. A large share of those irregularities (60%) are connected to procurement and payments (non-compliance with PP process, uneconomical procurement, payment for goods and services not received or of poor quality/ not in line with contract or to ineligible beneficiaries)¹⁴¹.

AGSA has set up formal arrangements (Memoranda of Understanding) with several public bodies to facilitate follow-up and investigation in case of suspected corruption and fraud. This includes MoUs with the Special Investigations Unit (SIU), the Competition Commission, Department of Public Service and Administration, Public Service Commission. The MoU are not a pre-requisite for referral of finding, but rather aim at streamlining the process of follow-up by the relevant authorities.

In a given year, AGSA produces entity-specific reports (Auditor’s report and management report). Furthermore, audit outcomes are analyzed in general reports (GR) that cover both the Public Finance Management Act (PFMA) and Municipal Finance Management Act (MFMA) cycles. AGSA also produces reports on discretionary audits, performance audit, and other special audits, including reports on material irregularities.

The audit methodology of AGSA incorporates the International Standards on Auditing (ISA)240 which deals with the auditors’ responsibilities relating to fraud in an audit. As part of ISA 240 the primary responsibility for detection of fraud lies with the those charged with governance and management of the entity in question. Nevertheless, AGSA relies on several sources of information to conduct risk assessment of certain audits. This includes:

- Inquiring from management and others within the entity (including internal audit), to determine whether they have knowledge of any actual, suspected or alleged fraud affecting the entity.
- Evaluating whether unusual or unexpected relationships exists while performing analytical procedures which could indicate possible fraud.
- Evaluating other information obtained which may indicate risks of fraud for example external reports (e.g. State Capture Commission Report), media articles etc.

¹⁴¹ AGSA, Consolidated General Report on National and Provincial Audit Outcomes 2022-2023, <https://www.agsa.co.za/Portals/0/Reports/PFMA/2022-23/Updates/PFMA%20Report%202022-23%20FINAL%20INTERACTIVE%20PDF.pdf?ver=JW4XlsvSZPV6Okai588yaA%3d%3d>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

- Additionally, a mechanism is in place for receiving complaints and requests for information from the public which is also considered in our risk assessment where applicable¹⁴².

Gap analysis

Limited effectiveness of external audit, despite resource-intensive approach

The scope of AGSA's work is very comprehensive as all authorities are audited yearly. At the same time, the effectiveness of this intense audit work appears limited, given the reported lack of implementation of audit recommendations, and limited "consequence management." The expanded powers of AGSA appear to have led to gradual improvements over the years.

At the same time, public entities perceive a heavy burden from external audit, in particular since the introduction of AGSA's extended mandate. According to stakeholders, the evaluation process has become more punitive, whereby it is likely for SCM practitioners to receive disciplinary letters. Similarly, stakeholders, report that there is an overly strict enforcement, whereby administrative lack of compliance results in irregular expenditure.

Growing irregular expenditure

Over the past decade, irregular expenditure¹⁴³ has ballooned from R20.63 billion in 2011/12 to R423.63 billion in 2021/22 according to the Government Technical Advisory Centre (GTAC), which is an entity dedicated to improving public finance management and is overseen by National Treasury. However, there is contradictory data by AGSA, which reports irregular expenditure at R166,85 billion for 2021/22¹⁴⁴. According to stakeholders, reporting in Annual Financial Statements of this irregular expenditure is burdensome and does not contribute to a nuanced understanding of its root causes, which may lie in administrative non-compliance. The perception, however, instead of fraud, corruption or other criminal practice. Organs of state may be at odds with the Auditor-General as to what is considered irregular expenditure. Overall, stakeholders consider that the external audit function is punitive towards minor irregularities, yet does not sufficiently address substantive issues, such as corruption red flags, that would require more intensive scrutiny at audit.

Furthermore, it is important to note that AGSA observe critical limitations in its ability to conduct audit work due to missing information and documentation. As per its report of 2021-2022, AGSA was not able to audit contracts worth R2,53 billion because of missing or incomplete information¹⁴⁵. Data quality is considered a challenge, too.

While risk considerations are part of AGSA's approach, it is not clear how oversight is tailored to risk management, and what kind of risk management tools are applied in practice to determine the focus of various audits.

Recommendations

Address the root causes of irregular expenditure

South African authorities could aim at having a very clear understanding of the root causes for growing irregular expenditure, in particular, in which cases it constitutes administrative non-compliance, and when irregular expenditure is likely to constitute deliberate non-compliance (hence exposing risks of corruption, fraud or other prohibited practices).

¹⁴² AGSA, Presentation Integrity in public procurement

¹⁴³ As per PFMA, "irregular expenditure" means expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation- a) this Act; or b) the State Tender Board Act, 1968 (Act No. 86 of 1968), or any regulations made in terms of that Act; or c) any provincial legislation providing for procurement procedures in that provincial government;

¹⁴⁴ <https://pfma-2020-2021.agsareports.co.za/wp-content/uploads/2021/12/Audit-Outcomes-Tab-005-Compliance-G011.svg>

¹⁴⁵ AGSA, PFMA 2021-2022, Consolidated General Report on National and Provincial Government Audit Outcomes <https://pfma-2021-2022.agsareports.co.za/wp-content/uploads/2022/12/22253B-2021-22-PFMA-General-Report-interactive-V3.pdf>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

As noted in several parts of this assessment, South Africa's complex regulatory framework is very likely to contribute to difficulties in ensuring compliance with laws and regulations, particularly if SCM practitioners are not fully professionalized. The starting point for increased compliance, and therefore less irregular expenditure, is a streamlined and simplified regulatory framework, which avoids internal discrepancies and contradictions.

The second point to reduce irregular expenditure is related to increasing the capacity in the SCM system. Increased capacity and professionalization are needed for SCM practitioners, but also for the internal control function, which could put in place routine mechanisms aimed at reducing irregular expenditure. Capacity should be supported by digital systems that reduce the margin for human error and improve the quality of data (i.e. address issues regarding missing audit trail).

A better understanding of frequent patterns and causes of non-compliance would give better indications to NT regarding the support it can provide SCM practitioners, such as dedicated guidance. By improving issues related to administrative non-compliance, auditors would be able to focus on more substantive issues related to the performance of the SCM system, and areas that are particularly considered at risk.

Assessment criterion 12(a)(e):

review of audit reports provided by the SAI and determination of appropriate actions by the legislature (or other body responsible for public finance governance)

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

AGSA is accountable to the National Assembly in terms of section 181(5) of the Constitution and section 3(d) of the PAA. It reports to the National Assembly annually on activities and the performance of our functions by tabling two main accountability instruments, namely our business plan and budget and our annual report. The Standing Committee on the Auditor-General (Scoag), established in terms of the Constitution and the PAA, oversees our performance on behalf of the National Assembly¹⁴⁶. Records of meetings of Scoag are posted online.¹⁴⁷

AGSA also contributes to the Budgetary Review and Recommendations Reports (BRRR) to support parliamentary oversight with the standing committees within parliament.

The auditor-general must account to the National Assembly on all matters referred to public bodies for investigation¹⁴⁸.

Gap analysis

As a general note, the State Capture Commission Report devotes several recommendations to the improvement of parliamentary oversight, including more forceful rules to ensure attendance by ministers, monitoring of corrective action proposed in reports adopted by Parliament, commitment of additional resources to oversight, as well as protect parliamentarians engaged in oversight activities, among others. The scope of the recommendations as well as the recommendation to enact stricter rules for parliamentary oversight, suggests an overall weak parliamentary oversight system¹⁴⁹.

¹⁴⁶ AGSA Strategic Plan and Budget, 2023-2026

¹⁴⁷ For instance: Standing Committee on Auditor General, Auditor-General on 2022/23 National & Provincial Audit Outcomes, 29 November 2023 <https://pmg.org.za/committee-meeting/38122/>

¹⁴⁸ AGSA Strategic Plan and Budget, 2023-2026

¹⁴⁹ Judicial Commission of Inquiry into State Capture Report: Part IV All the recommendations

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

That said, parliament did initiate the process to enhance the Auditor-General's powers in 2016, following growing extent of unauthorized, irregular and fruitless and wasteful expenditure being reported at all levels of government¹⁵⁰. Namely in 2018, the Public Audit Amendment Act was signed into law, providing AGSA extended powers to go beyond auditing and reporting in order to strengthen accountability mechanisms. The amendments introduce the concept of 'material irregularity' and aim at enhancing consequence management. The amendments came into effect in April 2019. The AGSA reports that improvements have occurred since its expanded powers.

Recommendations

Strengthen parliamentary oversight in procurement and audit matters

Weak parliamentary oversight does not apply only in public procurement, nor regarding audit practices. However, MAPS methodology asks for the handling of audit findings by the legislative. Hence, increased attention in ensuring that procurement and audit matters are addressed is vitally important. This would allow for necessary legislative reform action to take place.

Assessment criterion 12(a)(f):

clear mechanisms to ensure that there is follow-up on the respective findings.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

As per amended Public Audit Act (2004), the "Auditor-General must, within a reasonable time after the issuing of an audit report in terms of section 20, follow up on whether the accounting officer or accounting authority has implemented the recommendations contained in the audit report relating to any material irregularity, within the timeframe stipulated in the audit report." (Section 5A) Furthermore, section 5A (2) stipulates that if the AA/AO has failed to implement recommendations contained in the audit report, the Auditor General must take appropriate remedial actions to address the failure of to implement recommendations.

Gap analysis

Lack of consequence management has been reported by AGSA on numerous occasions as a critical weak point of South Africa's control system, necessitating the expansion of the Auditor General's powers to address rampant inaction and impunity. Furthermore, it is important to note that section 5A of the Public Audit Act on remedial action is part of the amended version inserted in 2018, indicating that less clearer rules about follow up were in place previously. Overall, the new amendments and expanded powers of AGSA seem to bear some fruits as the 2022-2023 PFMA report shows improved audit outcomes¹⁵¹.

Recommendations

Combined recommendation with 12(c):

Monitor the impact of AG reform on enforcement and accountability

Recent reforms of AGSA's mandate have shown improvements in enhancing accountability of AA/AO for not addressing audit recommendations. South African authorities could monitor the evolution of the implementation of 'material irregularities' and take additional action if necessary. Introduce specific time frames for implementation of recommendations.

¹⁵⁰ <https://www.agsa.co.za/Reporting/SpecialAuditReports/MaterialIrregularities.aspx>

¹⁵¹ AGSA (2023) CONSOLIDATED GENERAL REPORT ON NATIONAL AND PROVINCIAL AUDIT OUTCOMES 2022-2023 https://www.agsa.co.za/Portals/0/Reports/PFMA/2022-23/Updates/PFMA%20Report%202022-23%20FINAL%20FULL%20REPORT.pdf?ver=9md_i1D0jJp2wdnQEeYbA%3d%3d

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Sub-indicator 12(b) Coordination of controls and audits of public procurement
Assessment criterion 12(b)(a): There are written procedures that state requirements for internal controls, ideally in an internal control manual.
Conclusion: Substantive gap
Red flag: No
Qualitative analysis The National Treasury Internal Audit Framework is the reference document for internal audit and internal control. The Framework is a mandatory document as it is derived from the provisions of the Public Finance Management Act 1 of 1999 and the Municipal Finance Management Act 53 of 2003. The document is designed and implemented by the Office of the Accountant General on behalf of Internal Auditors within the South African Public Services. As per National Treasury Internal Audit Framework, the operation of internal control systems is the responsibility of the relevant line managers. Internal controls are not limited to financial matters but apply to operations as well. Essentially, it is a management system, culture and set of values designed to ensure that the organisation is managed efficiently and effectively, with the appropriate policies and procedures that promote the achievement of its overall goals and objectives. As outlined in the PFMA and Treasury Regulations, the Audit Committee plays a role with respect to internal control, as it is meant as an independent governance structure whose function is to provide an oversight role on the systems of internal control, risk management, and governance. AGSA developed Preventive Control Guides as part of an effort to assist oversight structures to diagnose weaknesses in preventative mechanisms and focus their oversight efforts on. ¹⁵²
Gap analysis The National Treasury Internal Audit Framework refers to international standards applicable for internal control such as COSO ¹⁵³ and Institute of Internal Auditors (ISPPIA 2130). At the same time, the document is high-level and describes best practice in theoretical way, without providing any practical examples for implementation. It does not specify any written procedures for internal control. No other manual for internal control has been identified by the assessors. Importantly, Treasury Regulation (Section 3.2) on Internal Controls and Internal Audit barely give any consideration to the function of internal controls and do not refer to international good practice standards, highlighting a potential gap in the regulatory framework. The 'Three Lines of Defence Model' ¹⁵⁴ , as established governance tools for internal control and internal audit, is not referred to in any official documentation reviewed by the assessors. The 'Three Lines of Defence Model' highlights the role of functions that own and manage risks (first line of defence) for implementing day-to-day risk management activities and applying controls. The level of implementation and effectiveness of AGSA's Preventive Control is not clear to the assessors.
Recommendations <u>Support capacity building and harmonisation of internal audit practices</u>

¹⁵² <https://www.agsa.co.za/AuditInformation/PreventativeControlGuides.aspx>

¹⁵³ Committee of Sponsoring Organisations (COSO) <https://www.coso.org/>

¹⁵⁴ IIA Policy Paper, Internal audit, risk and corporate governance – the Three Lines of Defence Model <https://www.iaa.org.uk/media/1042665/three-lines-of-defence-march-2015.pdf>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

South African authorities could consider building up the capacity of internal audit units building on currently available instruments and structures. The OAG could play a harmonisation role by setting the standards for compliance, developing training and capacity building, and routinely identifying challenges and related solutions.

Assessment criterion 12(b)(b):

There are written standards and procedures (e.g. a manual) for conducting procurement audits (both on compliance and performance) to facilitate co-ordinated and mutually reinforcing auditing.

Conclusion: Minor gap

Red flag: No

Qualitative analysis

In line with PFMA Act 38(1)(a)(ii), Treasury Regulations 2005 (3.2.6) mandate the use of standards set by the Institute of Internal Auditors (IIA), namely the SA Professional Practice Framework (IPPF). All auditor in government have membership in the IIA and are therefore bound to compliance with standards set at the IIA. Furthermore, AGSA's audit methodology incorporates the International Standards on Auditing (ISA)240 which deals with the auditors' responsibilities relating to fraud in an audit.

The National Treasury Internal Audit Framework also is designed to ensure a minimum guideline for the development and operation of internal auditing in the Public Service, including compliance with the Institute of Internal Auditors' (IIA) International Standards for the Professional Practice of Internal Auditing (ISPPIA).

Guidance for audits to be performed on behalf of AGSA foresees the following: "In terms of section 13(1)(a) of the PAA, the AGSA has determined that the International Quality Control, Auditing, Review, Other Assurance and Related Services Pronouncements issued by the International Auditing and Assurance Standards Board of the International Federation of Accountants have to be applied in performing the audits conducted by the AGSA."¹⁵⁵

State Owned Enterprises (SOEs) also follow corporate governance frameworks, namely the King IV Report. In particular King IV principle 15 deals with ensuring that assurance services and functions enable an effective control environment, and that these support the integrity of information for internal decision-making and of the organisations external reports.

The Independent Regulatory Board of Auditors (IRBA) provides for Code of Professional Conduct for Registered Auditors¹⁵⁶.

Gap analysis

There seem to be no gaps in the availability of standards. Challenges are related to implementation. The level of skills of auditors across the public administration is also difficult to assess. Continuous findings from AGSA and other bodies about weaknesses in internal control point to a potential lack of capacity.

Recommendations

See recommendation under 12(b)(a)

Assessment criterion 12(b)(c):

There is evidence that internal or external audits are carried out at least annually and that other established written standards are complied with.

Conclusion: Substantive gap

¹⁵⁵ IRBA, AGSA, (2015) GUIDANCE ON PERFORMING AUDITS ON BEHALF OF THE AGSA

¹⁵⁶ IRBA, Code of Professional Conduct for Registered Auditors (Revised April 2023), including Independence Standards [https://www.irba.co.za/upload/IRBA%20Code%20\(Revised%20April%202023\).pdf](https://www.irba.co.za/upload/IRBA%20Code%20(Revised%20April%202023).pdf)

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Red flag: Yes

Qualitative analysis

There is ample evidence of external audits conducted at regular intervals by the AGSA, which cover the following:

- Audit reports (not accessible to the public)
- General reports covering audit outcomes of the PFMA
- General reports covering audit outcomes of the MFMA
- Special reports including those on Material Irregularities

Reports by AGSA are easily available through the website of the Auditor General and are downloadable free of charge.

In addition to the above, internal audit reports are produced by organs of state. Internal audit documents are not publicly available.

Quantitative analysis

** Recommended quantitative indicator to substantiate assessment of sub-indicator 12(b) Assessment criterion (c):*

No data

- *number of specialised procurement audits carried out compared to total number of audits (in %).*
- *share of procurement performance audits carried out (in % of total number of procurement audits).*

Source: Ministry of Finance/Supreme Audit Institution.

Gap analysis

Under certain circumstances audits (external and internal) can be “outsourced” to private sector firms. While there is guidance by AGSA on how these audits should be conducted, the quality of these audits may be compromised in certain instances. This is a particular finding of the Zondo Commission Report when reviewing the SAA case. The appointed private sector external auditor missed critical ‘red flags’, which were identified by AGSA in subsequent examinations. It is not clear to assessors which reasons prompt organs of state or AGSA to choose external providers for audits.

While audits are being carried out, there are significant limitation in the completeness of these audits due to lack of records or missing information. AGSA reports that it was not able to audit contracts worth R2,53 billion because of missing or incomplete information. Similar occurrences are also reported in internal audit findings.

This gap is assigned a red flag since the lack of data undermines the proper functioning of the audit function, hence impeding a vital goal of public procurement and audit, i.e. assurance of lawful implementation.

Recommendations

Ensure all records are available for audit purposes

It is vitally important that auditors have all records available to carry out their work. There should be significant and enforceable consequences for the lack of such records.

Investigate potential shortcomings in the practice of outsourcing of audits

While conditions for outsourcing audits are well-defined, there should be clarity about when this is the case and why. Audits by the private sector should be equivalent in quality and scope, addressing not only financial reporting but compliance with PFMA measures. South African authorities could get increased visibility about how widespread this practices is, how the audit quality compares to AGSA, and whether any regulatory changes are necessary to address potential shortcomings.

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

<p>Assessment criterion 12(b)(d): Clear and reliable reporting lines to relevant oversight bodies exist.</p>
<p>Conclusion: Substantive gap</p>
<p>Red flag: No</p>
<p>Qualitative analysis The Auditor General of South Africa has a constitutional mandate to report to the Standing committee on the Auditor-General as established in terms of section 10 (3) of the Public Audit Act. Furthermore, the Auditor-General has established several MoU to facilitate the exchanges with other public bodies, such as the Special Investigations Unit (SIU), Competition Commission, Department of Public Service and Administration, Public Service Commission. The MoU are not a pre-condition for sharing findings and referring matters to competent bodies but facilitate the process and ensure that findings are treated more effectively.</p> <p>Under section 45 of the Auditing Professions Act 26 of 2005, the concept of reportable irregularity is defined. It refers an unlawful act or omission that has been committed by someone in a management position which has caused or is likely to cause material financial loss to the entity or which is fraudulent, or which involves a material breach of a fiduciary duty. In such a case, the auditor has a legal obligation to immediately notify the Independent Regulatory Board for Auditors (IRBA) with details of the reportable irregularity and then, three days thereafter, to report to management and give them an opportunity to explain what happened. The auditor is then required to report back to IRBA and specify their opinion on whether there was such an irregularity.</p>
<p>Gap analysis The assessors were not able to gather a clear picture about clarity of reporting lines, in particular given the multitude of oversight bodies that may have a mandate for follow-up.</p> <p>Further, it should be noted that surveys conducted by the Institute of Internal Audit in 2018 highlight a culture of fear, in which internal auditors do not feel protected to bring up issues at the time of inquiry by judicial and presidential commissions. The IIA reports “internal auditors claiming they were victimised, intimidated and coerced into sweeping findings under the carpet”.¹⁵⁷ This applies both to internal auditors in the private and public sector.</p>
<p>Recommendations Clarify the reporting structure, criteria and standards for different oversight authorities.</p>
<p style="text-align: center;">Sub-indicator 12(c)</p>
<p>Enforcement and follow-up on findings and Recommendations</p>
<p>Assessment criterion 12(c)(a): Recommendations are responded to and implemented within the time frames established in the law.*.</p>
<p>Conclusion: Substantive gap</p>
<p>Red flag: Yes</p>
<p>Qualitative analysis The Public Audit Act 2005 does not seem to define clear time frames for the implementation of recommendations. Instead, the 2018 amendment of the PPA calls for the Auditor General to follow up with AA/AO on the implementation of recommendations relating to any material irregularity “within reasonable time after the issuing of an audit report”. AGSA’s stringent mandate for follow up applies only for material irregularities. Failure to take action by the part of AA/AO on addressing material irregularities gives AGSA power</p>

¹⁵⁷ IIA (2018), Internal Audit Must Help Rebuild SA as Country Presses Reset Button https://cdn.ymaws.com/www.iiasa.org.za/resource/collection/6F759FA7-2F04-4A2D-8F69-C94A6F4044D9/Internal_Audit_Must_Help_Rebuild_SA__24_May_2.pdf

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

to take remedial action (section 5A). In case of failure to comply with remedial action, AGSA must issue a certificate of debt requiring the AA/AO to repay the amount specified in the certificate of debt to the State (section 5B).

Quantitative analysis

* *Recommended quantitative indicator to substantiate assessment of sub-indicator 12(c) Assessment criterion (a):*
- *Share of internal and external audit Recommendations implemented within the time frames established in the law (in %).*

Data not provided/available

Source: Ministry of Finance/Supreme Audit Institution.

Gap analysis

AGSA documents many instances of lack of implementation of recommendations and highlights poor consequence management as an issue: “However, 44% of auditees did not comply with legislation on implementing consequences. At 35% of auditees, this non-compliance was material. As a result, the year-end balances of these types of unwanted expenditure continue to grow. A culture of consequence management has not materialised because the right tone has not been set to encourage a behavioural change at the highest levels.”¹⁵⁸

Resorting to the material irregularities process is necessary to introduce some action; the lack thereof seems insufficient to lead to any kind of action: in 2021-2022, AGSA reports that “until we issued notifications, no actions were being taken to address 82% of these matters”¹⁵⁹.

Overall, the language in the PAA is not specific regarding time frames. Furthermore, AGSA appears to only be mandated to follow up on material irregularities, and not on other types of recommendations.

This gap is assigned a red flag because the disregard of audit recommendations undermines the functioning of public procurement control, i.e. ensuring lawful implementation of public procurement. Furthermore, addressing this gap lies outside the direct sphere of public procurement.

Recommendations

Combined recommendation for indicator 12(c):

Monitor the impact of AG reform on enforcement and accountability

Recent reforms of AGSA’s mandate have shown improvements in enhancing accountability of AA/AO for not addressing audit recommendations. South African authorities could monitor the evolution of the implementation of ‘material irregularities’ and take additional action if necessary.

Introduce specific time frames for implementation of recommendations.

Assessment criterion 12(c)(b):

There are systems in place to follow up on the implementation/enforcement of the audit Recommendations.

¹⁵⁸ AGSA, PFMA 2021-2022, CONSOLIDATED GENERAL REPORT ON NATIONAL AND PROVINCIAL AUDIT OUTCOMES <https://pfma-2021-2022.agsareports.co.za/wp-content/uploads/2022/12/22253B-2021-22-PFMA-General-Report-interactive-V3.pdf>

¹⁵⁹ Ibid.

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

As per Treasury Regulations 3.1, the Audit Committee must meet at least once a year with the AGSA to ensure that “there are no unresolved issues of concern”. However, the Audit Committee does not have formal powers for implementation of audit recommendations. It must report annually on the effectiveness of 1) internal control, 2) the quality of in year management and monthly/quarterly reports, and 3) evaluation of the annual financial statements.

Audit Committee may be advising management on an action plan in response to findings from the Auditor-General, as reported by the NGO Parliamentary Monitoring Group (PMG)¹⁶⁰. It is not clear to the assessors whether this is a standard practice or an isolated example.

AGSA’s mandate regarding material irregularities provides it with powers to take action in case accounting officers or authorities do not deal with these types of irregularities appropriately.

Gap analysis

There are system in place to follow up on implementation of audit recommendations, consisting of the Audit Committee within an organization, and the material irregularities process by AGSA in case of inaction. Despite these mechanisms, implementation and enforcement of audit recommendations remains poor.

Recommendations

Combined recommendation for indicator 12(c):

Monitor the impact of AG reform on enforcement and accountability

Recent reforms of AGSA’s mandate have shown improvements in enhancing accountability of AA/AO for not addressing audit recommendations. South African authorities could monitor the evolution of the implementation of ‘material irregularities’ and take additional action if necessary.

Introduce specific time frames for implementation of recommendations.

Sub-indicator 12(d)

Qualification and training to conduct procurement audits

Assessment criterion 12(d)(a):

There is an established programme to train internal and external auditors to ensure that they are qualified to conduct high-quality procurement audits, including performance audits.*

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The Independent Regulatory Board of Auditors’ Continuing Professional Development Policy is aimed at improving and developing audit professionals across the spheres of Government.¹⁶¹ The Independent Regulatory Board of Auditors is established in terms of section 3 of the Auditing Professions Act 26 of 2005. It is a statutory body established to protect the financial interests of the public by ensuring registered auditors and their firms deliver services of the highest quality.

¹⁶⁰ <https://pmg.org.za/committee-meeting/34499/>

¹⁶¹ IRBA (2020) CONTINUING PROFESSIONAL DEVELOPMENT POLICY, <https://www.irba.co.za/upload/CPD%20Policy%20Final.pdf>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Section 6(1)(a) of the Auditing Profession Act, 2005 (Act No. 26 of 2005(as amended)) (“the Act”), mandates the IRBA to prescribe minimum qualifications, competency standards and requirements for the registration of auditors. Flowing from this duty to ensure competence at entry point to the profession, the IRBA has a similar responsibility to ensure that those persons who are registered, continue to develop and maintain their professional competence throughout their professional lives¹⁶².

AGSA also implements its training programmes and conducts one of the largest CA training programmes in the world. It supports staff through Leader training and Executive and leadership development programmes (EDP and LDP) and young professional development (SAICA trainee programme). Furthermore, regular internal training is provided to audit teams. Further activities to professionalise AGSA’s workforce consist in:

- Product Champion training - Monthly training sessions for training officers in each business unit within AGSA
- Technical committee meetings - Monthly meetings involving all staff in each audit business unit.
- FAQs - Available to all AG staff
- Technical consultation - Accessible to the entire audit team.
- Technical Updates - Provided to all AG staff

Quantitative analysis

** Recommended quantitative indicator to substantiate assessment of sub-indicator 12(d) Assessment criterion (a):*
- number of training courses conducted to train internal and external auditors in public procurement audits.
- share of auditors trained in public procurement (as % of total number of auditors).

No data

Source for all: Ministry of Finance/Supreme Audit Institution.

Gap analysis

Important skills gaps related to internal audit in the public sector have been documented since the 2000s and identified repeatedly throughout the years (e.g. 2014, 2015)¹⁶³. Beyond the public sector, internal audit skills are considered among the top 5 scarce skill in the 2023 FASSET report¹⁶⁴. The skills gap appears to be consisted with other findings throughout this report about the limited effectiveness of the internal audit function.

It is not clear to assessors whether training programmes cover performance audits.

Recommendations

Combined recommendation 12 (d)(a), 12 (d)(b) and 12(d)(c):

Given the critical role of internal audit, NT could update work carried out a decade ago in gathering visibility of the qualification and reporting arrangements of internal audit, with a view of strengthening capacity and addressing any shortcomings.

Assessment criterion 12(d)(b):

The selection of auditors requires that they have adequate knowledge of the subject as a condition for carrying out procurement audits; if auditors lack procurement knowledge, they are routinely supported by procurement specialists or consultants.

¹⁶² Ibid.

¹⁶³ Kato Plant (2017), Improving skills development in the South African public sector: an internal audit perspective, Southern African Journal of Accountability and Auditing Research Vol 19: 2017 (35-48)

¹⁶⁴ FASSET (2023) Trends in Employment & Training in the FASSET Sector, https://www.fasset.org.za/downloads/FINAL%20REPORT_FASSET%20Sector%20Trends%202024.pdf

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Conclusion: Substantive gap
Red flag: No
Qualitative analysis <p>AGSA reports the following regarding the selection of auditors: AGSA's office is made of a diverse team of auditors with wide ranging skills, expertise and experience which include amongst other certified fraud examiners and accountants, engineers, specialist data and information system analysts and Chartered Accountants. Almost 60% of AGSA's audit professionals are Chartered Accountants and belong to the accounting professional body SAICA.</p> <p>Audit teams are allocated through a risk-based approach – Experienced auditors are allocated to high-risk audits with increased supervision. Audit teams are supported by our specialised data analytics teams, investigations business unit and our technical audit support business unit among others. All audit work undergoes strict quality reviews by the Quality Control Business unit and some audit files also include independent reviews (Pre-Issuance etc.)</p>
Gap analysis <p>According to a 2014 NT survey on internal audit, lack of competences often leads to outsourcing of the internal audit function to private sector providers. The survey highlights difficulties in filling vacant posts with the competences required. Furthermore, the Chief Audit Executive (CAE) often does not have the formal qualifications recommended by the Institute of Internal Audit. The level of internal audit experience (the number of years of first-hand experience) is too low for the demands of the job¹⁶⁵.</p> <p>The assessors did not find any more recent data about the competencies of internal auditors, but numerous findings about the weaknesses of the internal audit function point to the fact that there may not have been substantive changes over the past decades in the level of skills and competences of internal audit in the public sector.</p>
Recommendations <p>Combined recommendation 12 (d)(a), 12 (d)(b) and 12(d)(c):</p> <p><u>Gather visibility of current qualifications and reporting arrangements of internal audit</u></p> <p>Given the critical role of internal audit, NT could update work carried out a decade ago in gathering visibility of the qualification and reporting arrangements of internal audit, with a view of strengthening capacity and addressing any shortcomings.</p>
Assessment criterion 12(d)(c): <p>Auditors are selected in a fair and transparent way and are fully independent.</p>
Conclusion: Minor gap
Red flag: No
Qualitative analysis <p>The Constitution ensures that AGSA's independence as it is legally, financially and operationally independent.</p>

¹⁶⁵ THE STATUS OF AND DEMAND FOR INTERNAL AUDITING IN SOUTH AFRICAN NATIONAL GOVERNMENT DEPARTMENTS

<https://www.treasury.gov.za/publications/other/2014%20The%20Status%20of%20and%20Demand%20for%20Internal%20Auditing%20in%20SA%20National%20Government%20Departments.pdf>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

The Public Audit Act 25 of 2004 provides for the appointment of Auditor General of South Africa for the auditing of public sector institutions and ensuring their accountability. Sections 25(1)(b), (2), (3) and (4) of the Act, provides for audits of Public Entities and other institutions not performed by the AGSA. An auditee should proceed to appoint an audit firm registered with the IRBA as stipulated by section 25(1)(b), read with section 25(4) of the PAA, if not advised before the start of the financial year that the AGSA will perform the audit.

Gap analysis

A 2014 survey by NT regarding internal audit functions highlights limited concerns about reporting lines of internal audit function not in line with best practice and potentially limiting the independence of the internal audit¹⁶⁶. More recent information would be valuable to determine whether such concerns are still applicable.

Recommendations

Combined recommendation 12 (d)(a), 12 (d)(b) and 12(d)(c):

Gather visibility of current qualifications and reporting arrangements of internal audit

Given the critical role of internal audit, NT could update work carried out a decade ago in gathering visibility of the qualification and reporting arrangements of internal audit, with a view of strengthening capacity and addressing any shortcomings.

Indicator 13. Procurement appeals mechanisms are effective and efficient

Note: As explained in the analysis at 1(h), independent review of decisions of procuring entities in relation to public procurement is through the court system, with applications for judicial review being made to the relevant High Court. As is common in systems which use the courts to conduct independent review of public procurement, there is limited or no national level data/information available to assess the mechanisms for procurement appeals in the manner required by the MAPS Methodology. This means that Indicator 13 has been partially completed. Where insufficient or no information is available this is noted, and the assessment criterion is shown as “No applicable”.

Sub-indicator 13(a) Process for challenges and appeals
Assessment criterion 13(a)(a): Decisions are rendered on the basis of available evidence submitted by the parties.
Conclusion: No gap
Red flag: No
Qualitative analysis Court decisions are based on consideration of evidence submitted by the parties in accordance with relevant procedural rules.
Gap analysis
Recommendations
Assessment criterion 13(a)(b): The first review of the evidence is carried out by the entity specified in the law.

¹⁶⁶ Ibid.

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

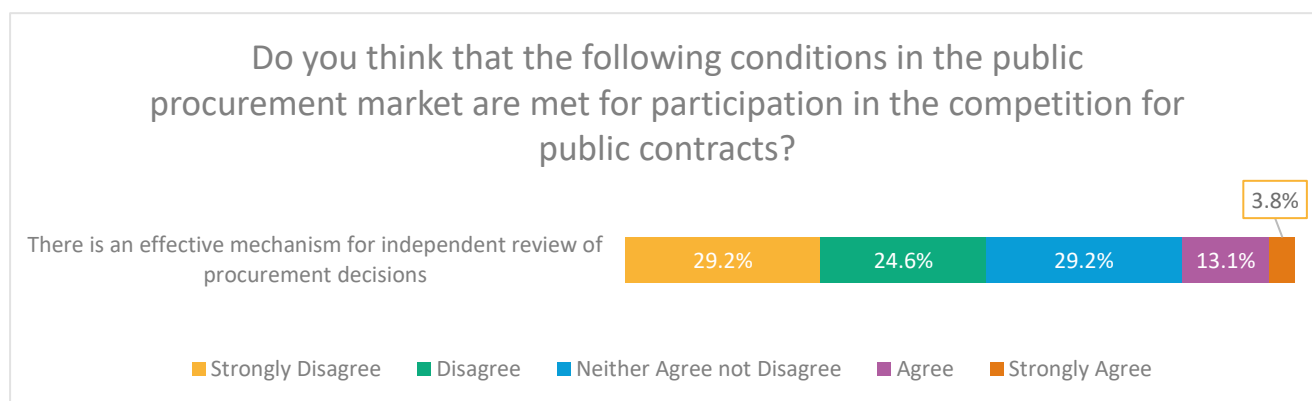
Conclusion: No gap
Red flag: No
Qualitative analysis Evidence is reviewed by the High Court which is the first-tier independent review body for the purposes of review of public procurement.
Gap analysis
Recommendations
Assessment criterion 13(a)(c): The body or authority (appeals body) in charge of reviewing decisions of the specified first review body issues final, enforceable decisions. *
Conclusion: No gap
Red flag: No
Qualitative analysis High Courts issue final enforceable decisions. Superior Courts Act No.10 of 2013 confirms the right of appeal to a superior court against a decision of a lower court. This covers a decision by a Division of the High Court which may be appealed to the Supreme Court of Appeal, also possibly Constitutional Court.
Quantitative analysis <i>// Minimum indicator // * Quantitative indicator to substantiate assessment of sub-indicator 13(a) Assessment criterion (c): - number of appeals. Source: Appeals body.</i> <i>* Recommended quantitative indicator to substantiate assessment of sub-indicator 13(a) Assessment criterion (c): number (and percentage) of enforced decisions. Source: Appeals body.</i> No data available but all court decisions are enforceable (see qualitative analysis)
Gap analysis
Recommendations
Assessment criterion 13(a)(d): The time frames specified for the submission and review of challenges and for appeals and issuing of decisions do not unduly delay the procurement process or make an appeal unrealistic.
Conclusion: Substantive gap
Red flag: Yes
Qualitative analysis

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Time frames for submission of applications for judicial review and for decisions by the court can extend for several months or longer (see analysis at 1(h)).

According to World Bank data (2017) the [average] time taken by the first-tier review body (Court) to render a decision is 228 days from filing of a complaint.¹⁶⁷ Filing of an application for judicial review does not automatically suspend the procurement process.

In response to the Private Sector survey, over half of respondents (53.8%) strongly disagreed or disagreed that there is an effective mechanism for independent review (see table below) and general lack of confidence in the appeal system was also expressed in direct engagement with stakeholders.



Gap analysis

The available procedures and related time scales do not guarantee an effective and efficient process meeting the practical and commercial imperatives of procurement related complaints.

The Gap is assigned a red flag because lack of an efficient review system can severely impede the objectives sought through public procurement by reducing confidence in the system which can have a negative impact on competition. In addition, necessary reforms will require a national mandate and actions going beyond those lying solely within the procurement sphere.

Recommendations

The same Recommendation as under 1(h)(d) is applied:

Consider undertaking a critical study of the data and information available and stakeholders' views on the operation of the system of judicial review to assess the fitness of purpose and efficiency of the current system for procurement complaints using the route of judicial review and to gauge confidence in and effectiveness of the operation of the system in practice. This should be undertaken with the aim of identifying whether the existing route may be adapted to meet the MAPS methodology requirements for an efficient review system or whether a new approach is required, such as the establishment of a specialist independent procurement review body.

Sub-indicator 13(b)

Independence and capacity of the appeals body

The appeals body:

Assessment criterion 13(b)(a):

is not involved in any capacity in procurement transactions or in the process leading to contract award decisions

¹⁶⁷ <https://pubdocs.worldbank.org/en/996201520270732530/South-Africa.xlsx>

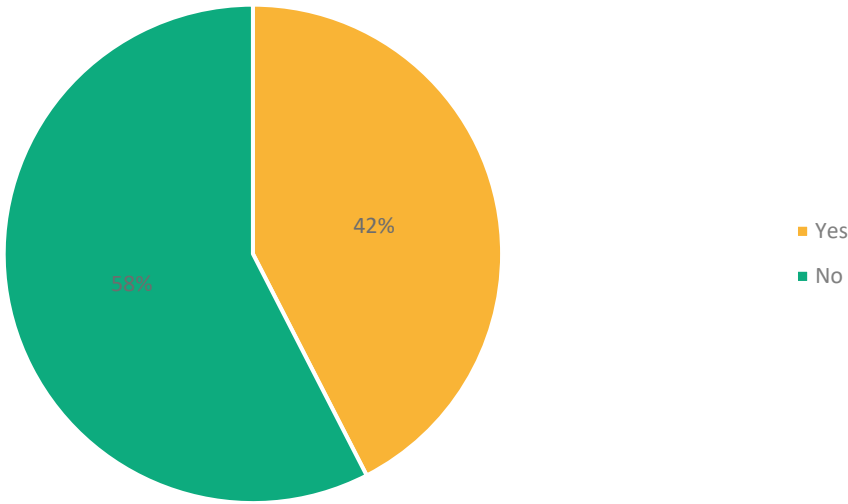
Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Conclusion: No gap
Red flag: No
Qualitative analysis The independent review body is a court, with judicial independence.
Gap analysis
Recommendations
Assessment criterion 13(b)(b): does not charge fees that inhibit access by concerned parties
Conclusion: No gap
Red flag: No
Qualitative analysis There is no fee payable to issue High Court proceedings.
Gap analysis
Recommendations
Assessment criterion 13(b)(c): follows procedures for submission and resolution of complaints that are clearly defined and publicly available
Conclusion: No gap
Red flag: No
Qualitative analysis Published court rules of procedure apply.
Gap analysis
Recommendations
Assessment criterion 13(b)(d): exercises its legal authority to suspend procurement proceedings and impose remedies
Conclusion: No gap
Red flag: No
Qualitative analysis See analysis at 1(h)(c) describing range of remedies available to the High Court and availability of interim applications which can include applications to suspend procurement proceedings. There is evidence, through publication of selected judgments, of active use of the High Court to pursue procurement related complaints but there is no comprehensive set of data to substantiate assessment.
Gap analysis
Recommendations

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

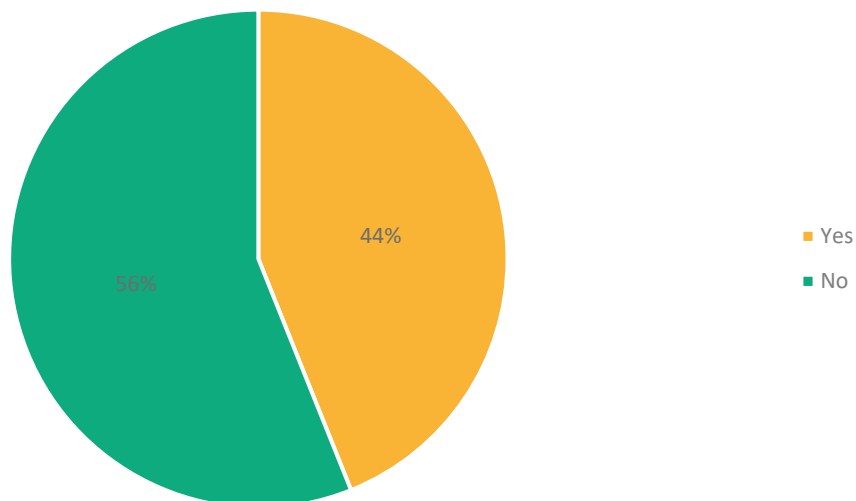
<p>Assessment criterion 13(b)(e): issues decisions within the time frame specified in the law/regulations*</p>
<p>Conclusion: Choose an item.</p>
<p>Red flag: Choose an item.</p>
<p>Qualitative analysis Not assessed See analysis at 1(h)(d). Time frames for decisions against which to assess this indicator are not specified in the public procurement legal framework.</p>
<p>Quantitative analysis</p> <p><i>Quantitative indicator to substantiate assessment of sub-indicator 13(b) assessment criterion (e):</i></p> <ul style="list-style-type: none"> • <i>appeals resolved within the time frame specified in the law/exceeding this time frame/unresolved (Total number and in %).</i> <p><i>Source: Appeals body.</i></p> <p>No data available</p>
<p>Gap analysis</p>
<p>Recommendations</p>
<p>Assessment criterion 13(b)(f): issues decisions that are binding on all parties</p>
<p>Conclusion: No gap</p>
<p>Red flag: No</p>
<p>Qualitative analysis Court decisions are binding on all parties.</p>
<p>Gap analysis</p>
<p>Recommendations</p>
<p>Assessment criterion 13(b)(g): is adequately resourced and staffed to fulfil its functions.</p>
<p>Conclusion: Choose an item.</p>
<p>Red flag: Choose an item.</p>
<p>Qualitative analysis Not assessed</p>
<p>Gap analysis</p>
<p>Recommendations</p>
<p align="center">Sub-indicator 13(c) Decisions of the appeals body Procedures governing the decision making process of the appeals body provide that decisions are:</p>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

<p>Assessment criterion 13(c)(a): based on information relevant to the case.</p>						
<p>Conclusion: No gap</p>						
<p>Red flag: No</p>						
<p>Qualitative analysis Published court rules of procedure and evidential rules and practices will apply.</p>						
<p>Gap analysis</p>						
<p>Recommendations</p>						
<p>Assessment criterion 13(c)(b): balanced and unbiased in consideration of the relevant information.*</p>						
<p>Conclusion: Substantive gap</p>						
<p>Red flag: Yes</p>						
<p>Qualitative analysis Whilst rules on conduct of court cases, and impartiality of the judiciary should ensure balanced and unbiased consideration of relevant information, the MAPS Assessment team notes, with concern, the responses to the Private Sector Survey in the quantitative analysis below.</p>						
<p>Quantitative analysis</p> <p><i>Recommended quantitative indicator to substantiate assessment of sub-indicator 13(c) Assessment criterion (b): - share of suppliers that perceive the challenge and appeals system as trustworthy (in % of responses). Source: Survey.</i></p> <div style="text-align: center;"> <p>Is the system for challenge of public procurement decisions and appeals to the courts trustworthy?</p>  <table border="1"> <thead> <tr> <th>Response</th> <th>Percentage</th> </tr> </thead> <tbody> <tr> <td>Yes</td> <td>42%</td> </tr> <tr> <td>No</td> <td>58%</td> </tr> </tbody> </table> </div> <p><i>- share of suppliers that perceive appeals decisions as consistent (in % of responses).</i></p>	Response	Percentage	Yes	42%	No	58%
Response	Percentage					
Yes	42%					
No	58%					

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

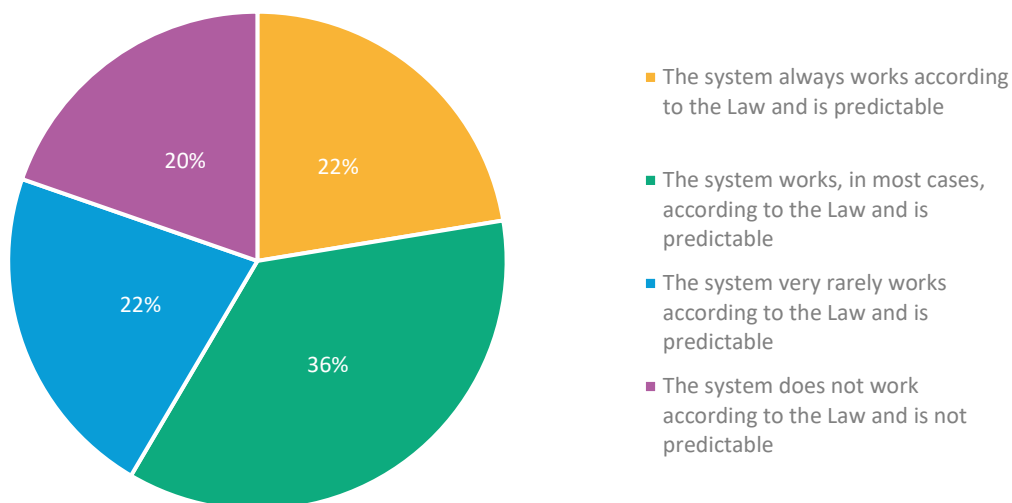
Are judgments made by the courts in public procurement cases consistent?



Source: Survey.

Additional questions raised in Private Sector survey – with responses

Overall, how do you rate the system for challenge of public procurement decisions and appeals to the courts?



Gap analysis

There is a perception that the challenge and appeals system is neither effective nor trustworthy and that appeals decisions are not consistent.

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

This Gap is assigned a red flag because lack of confidence in the review system can severely impede the objectives sought through public procurement.
<p>Recommendations</p> <p>The same Recommendation as under 1(h)(d) is applied:</p> <p>Consider undertaking a critical study of the data and information available and stakeholders' views on the operation of the system of judicial review to assess the fitness of purpose and efficiency of the current system for procurement complaints using the route of judicial review and to gauge confidence in and effectiveness of the operation of the system in practice. This should be undertaken with the aim of identifying whether the existing route may be adapted to meet the MAPS methodology requirements for an efficient review system or whether a new approach is required, such as the establishment of a specialist independent procurement review body.</p>
<p>Assessment criterion 13(c)(c):</p> <p>result in remedies, if required, that are necessary to correcting the implementation of the process or procedures.*</p>
<p>Conclusion: No gap</p>
<p>Red flag: No</p>
<p>Qualitative analysis</p> <p>See analysis at 1(h)(c) describing range of remedies available to High Court including to correct implementation of the process or procedures. There is evidence, through publication of selected judgments, of active use of the High Court to pursue procurement related complaints but there is no comprehensive set of data to substantiate assessment from a quantitative perspective.</p>
<p>Quantitative analysis</p> <p><i>* Recommended quantitative indicator to substantiate assessment of sub-indicator 13(c) Assessment criterion (c): - outcome of appeals (dismissed; decision in favour of procuring entity; decision in favour of applicant) (in %). Source: Appeals body.</i></p> <p>No data available</p>
<p>Gap analysis</p>
<p>Recommendations</p>
<p>Assessment criterion 13(c)(d):</p> <p>decisions are published on the centralised government online portal within specified timelines and as stipulated in the law.*</p>
<p>Conclusion: Substantive gap</p>
<p>Red flag: Yes</p>
<p>Qualitative analysis</p> <p>Analysis from 1(h)(e): There is no central source of all public procurement related decisions by the High Court/s. Individual judges may decide to publish a judgment if it is in the public interest to do so or if it concerns an important point of law. As a general rule, all hearings are in public and any judgment or order of the court is a public document.</p>
<p>Quantitative analysis</p> <p>// Minimum indicator // *Quantitative indicator to substantiate assessment of sub-indicator 13(c) Assessment criterion (d):</p>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

- share of appeals decisions posted on a central online platform within timelines specified in the law (in %).
Source: Centralised online portal.*

No data available

Gap analysis from 1(h)(e):

Publication of decisions in procurement cases allows interested parties to be better informed as to the consistency and fairness of the process. Court judgments are, as a general rule, public documents but High Court judgments are not all published as a matter of course and there is no official central government source of all public procurement related decisions made by the High Court.

The Gap is assigned a red flag because lack of comprehensive and reliable information on review can severely impede the objectives sought through public procurement by reducing confidence in the system.

Recommendations from 1(h)(e):

Pending review and decision on the fitness for purpose of the current system and proposals for improvement or changes, consider ways to gather more information on High Court judgments in procurement matters to start to collate relevant information. One possibility may be to require organs of state to report to NT when an application for judicial review is issued in the High Court and to notify NT of the outcome, with relevant case references.

Indicator 14. The country has ethics and anticorruption measures in place

Sub-indicator 14(a)

Legal definition of prohibited practices, conflict of interest, and associated responsibilities, accountabilities, and penalties

The legal/regulatory framework provides for the following:

Assessment criterion 14(a)(a):

definitions of fraud, corruption and other prohibited practices in procurement, consistent with obligations deriving from legally binding international anti-corruption agreements.

Conclusion: Minor gap

Red flag: No

Qualitative analysis

South Africa signed the United Nations Convention against Corruption on 9 December 2003 and ratified it on 22 November 2004. As per the South African Constitution (section 231 (4)), international law in South Africa only becomes law when enacted through national legislation. Relevant implementing legislation includes the following: Prevention and Combating of Corrupt Activities Act, Protected Disclosures Act, Promotion of Access to Information Act, Promotion of Administrative Justice Act, Public Service Act, Public Administration Management Act, Public Finance Management Act, Prevention of Organized Crime Act, Financial Intelligence Centre Act and International Cooperation in Criminal Matters Act.

South Africa is also a signatory of the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

FRAUD

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Fraud is a common law offence and defined as the “the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.” The definition is part of Common Law Offences-Definitions provided on the South African Police Service’s website¹⁶⁸.

CORRUPTION

The Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA) is South Africa’s key implementing legislation for addressing corruption. PRECCA defines a general offence of corruption (chapter 2, part 1, art. 3) defined as:

“Any person who, directly or indirectly,

- (a) accepts or agrees or offers to accept a gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person: or
 - (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner—
 - (i) that amounts to the-
 - (aa) illegal. dishonest. unauthorised. incomplete. or biased: or
 - (bb) misuse or selling of information or material acquired in the course the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation:
 - (ii) that amounts to-
 - (aa) the abuse of a position of authority:
 - (bb) a breach of trust; or
 - (cc) the violation of a legal duty or a set of rules:
 - (iii) designed to achieve an unjustified result: or
 - (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,
- is guilty of the offence of corruption.”

Further specific corruption offences are defined:

- Offences in respect of corrupt activities relating to public officers (chapter 2, part 3, art. 4)
- Offences in respect of corrupt activities relating to foreign public officials (chapter 2, part 3, art. 5)
- Offences in respect of corrupt activities relating to agents (chapter 2, part 3, art. 6)
- Offences in respect of corrupt activities relating to members of legislative authority (chapter 2, part 3, art. 7)
- Offences in respect of corrupt activities relating to judicial officers (chapter 2, part 3, art. 8)
- Offences in respect of corrupt activities relating to members of prosecuting authority (chapter 2, part 3, art. 9)
- Offences of receiving or offering of unauthorised gratification by or to party to an employment relationship (chapter 2, part 3, art. 10)
- Offences in respect of corrupt activities relating to witnesses and evidential material during certain proceedings (chapter 2, part 4, art. 11)
- Offences in respect of corrupt activities relating to contracts (chapter 2, part 4, art. 12)
- Offences in respect of corrupt activities relating to procuring and withdrawal of tenders (chapter 2, part 4, art. 13)
- Offences in respect of corrupt activities relating to auctions (chapter 2, part 4, art. 14)
- Offences in respect of corrupt activities relating to sporting events (chapter 2, part 4, art. 15)
- Offences in respect of corrupt activities relating to gambling games or game of chance (chapter 2, part 4, art. 16)
- Offence relating to acquisition of private interest in contract. agreement or investment of a public body (chapter 2, part 5, art. 17)

¹⁶⁸ <https://www.saps.gov.za/faqdetail.php?fid=9>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

- Offences of unacceptable conduct relating to witnesses (chapter 2, part 5, art. 18)
- Intentional interference with, hindering or obstructing of investigation of offence (chapter 2, part 5, art. 19)
- Accessory to or after an offence (chapter 2, part 6, art. 20)
- Attempt. conspiracy and inducing another person to commit offence (chapter 2, part 6, art. 21)

Specifically, PRECCA provides for: the offence of corruption and offences relating to corrupt activities, investigative measures in respect of corruption and related corrupt activities, the establishment and endorsement of a Register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts, and extraterritorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities. PRECCA also places a duty on certain persons holding a position of authority to report certain corrupt transactions¹⁶⁹.

SCM Guide for Accounting Officers/Authorities [20042.8] s. 2.8 Fraud and corruption

2.8.1 Government's policy is to require that contractors, including consultants, observe the highest standard of ethics during the selection and execution of contracts. In pursuance of this policy, Government defines, for the purposes of this provision, the terms set forth below:

- "corrupt practice" means the offering, giving, receiving, or soliciting of anything of value to influence the action of a public official in the selection process or in contract execution; and
- "fraudulent practice" means a misrepresentation of facts in order to influence a selection process or the execution of a contract to the detriment of the accounting officer/authority, and includes collusive practices among bidders/contractors (prior to or after submission of proposals) designed to establish prices at artificial, non-competitive levels and to deprive the accounting officer/authority of the benefits of free and open competition.

2.8.2 The accounting officer/authority:

- must reject a proposal for award if he/she determines that the supplier/service provider recommended for award, has engaged in corrupt or fraudulent activities in competing for the contract in question.
- may insist that a provision is included in the contract agreement with the contractor, requiring contractors to permit the accounting officer/authority and/or relevant treasury to inspect their accounts and records relating to the performance of the contract and to have them audited by auditors appointed by the accounting officer/authority/relevant treasury.

OTHER PROHIBITED PRACTICES

PRECCA defines a series of corruption-related offences, as listed above.

Gap analysis

Stakeholders did not report issues with legal definitions. No consolidated list of prohibited practices pertaining to public procurement appears to exist beyond "corrupt practice" and "fraudulent practice".

Recommendations

Assessment criterion 14(a)(b):

¹⁶⁹ UNODC Country Profile South Africa, <https://www.unodc.org/unodc/en/corruption/country-profile/countryprofile.html#?CountryProfileDetails=%2Funodc%2Fcorruption%2Fcountry-profile%2Fprofiles%2Fzaf.html>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

definitions of the individual responsibilities, accountability and penalties for government employees and private firms or individuals found guilty of fraud, corruption or other prohibited practices in procurement, without prejudice of other provisions in the criminal law.

Conclusion: No gap

Red flag: No

Qualitative analysis

Under PRECCA, the penalties apply for any person convicted to corruption offence defined in the Act (Part 1, 2, 3 or 4, or section 18 of Chapter 2). The penalties foresee: fines and imprisonment up to a lifetime if the sentence is imposed by a High Court; fine and imprisonment up to 18 years if a sentence to be imposed by a regional court; and

Fine or to imprisonment up to five years if the sentence to be imposed by a magistrate's court (Chapter 5, 26).

The PFMA also specifies offences and penalties, as follows: —

(1) An accounting officer is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting officer willfully or in a grossly negligent way fails to comply with a provision of section 38, 39 or 40.

(2) An accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority willfully or in a grossly negligent way fails to comply with a provision of section 50, 51 or 55.

(3) Any person, other than a person mentioned in section 66 (2) or (3), who purports to borrow money or to issue a guarantee, indemnity or security for or on behalf of a department, public entity or constitutional institution, or who enters into any other contract which purports to bind a department, public entity or constitutional institution to any future financial commitment, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years.

According to the amendments of the Competition Act 1998, as of 01 May 2016, directors and managers will face jail time for participation in a cartel, introducing personal criminal liability for cartel conduct¹⁷⁰.

Gap analysis

No gap.

Recommendations

Assessment criterion 14(a)(c):

definitions and provisions concerning conflict of interest, including a cooling-off period for former public officials.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

General provisions about potential conflicts are contained in "Part 5: Miscellaneous offences relating to possible conflict of interest and other unacceptable conduct" of PRECCA. Section 17 "Offence relating to acquisition of private interest in contract, agreement or investment of public body" specifies:

17. (1) Any public officer who, subject to subsection (2), acquires or holds a private interest in any contract, agreement or investment emanating from or connected with the public body in which he or she is employed or which is made on account of that public body, is guilty of an offence.

(2) Subsection (1) does not apply to:

(a) a public officer who acquires or holds such interest as a shareholder of a listed company;

¹⁷⁰ UNODC (2020) Country Profile South Africa

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

(b) a public officer, whose conditions of employment do not prohibit him or her from acquiring or holding such interest; or

(c) in the case of a tender process, a public officer who acquires a contract, agreement or investment through a tender process and whose conditions of employment do not prohibit him or her from acquiring holding such interest and who acquires or holds such interest through an independent tender process.

The Directive on other remunerative work outside the employee's employment in the relevant department as contemplated in section 30 of the Public Service Act, 1994 defines conflict of interest as "a conflict between the public duties and private interests of an employee, in which the employee has private interests which could improperly influence him / her, and / or negatively impact on his / her official obligations or official duties, and / or negatively impact on the public interest."¹⁷¹

Provisions

According to NT Treasury Regulation (16A8.3), supply chain management official or other role player –

(a) must recognise and disclose any conflict of interest that may arise;

(d) must ensure that they do not compromise the credibility or integrity of the supply chain management system through the acceptance of gifts or hospitality or any other act;

Also Treasury Regulation 16A8.4 provides that: If a supply chain management official or other role player, or any close family member, partner or associate of such official or other role player, has any private or business interest in any contract to be awarded, that official or other role player must –

(a) disclose that interest; and

(b) withdraw from participating in any manner whatsoever in the process relating to that contract.

As part of SCM No.3 of 2021/2022 s.7 Treatment of Disclosures and Declarations, "institutions must, as part of their SCM processes, identify and manage potential conflicts of interest and other disclosures made by a person participating in procurement processes to enable the AO/AA to make informed decisions about the person participating in the SCM process."

In particular, conflict of interests within the South African Public Procurement is regulated and monitored through the mandatory use of the Standard Bidding Document (SBD 4) to verify if bidders and their directors doing business with the state are not in the employment of the state and or whether not related to any person working within the state.

Gap analysis

There are no specific provisions for cooling-off periods for former public officials who are involved in future award processes representing an economic operator.

According to stakeholders, the definition of conflict of interest while not specific to public procurement – is sufficiently clear. The assessors note that conflict of interest is not defined in PRECCA, while it appears to be only defined in secondary legislation.

Recommendations

Introduce cooling off period for public sector employees

Provisions about integrating the private sector workforce after employment in the public sector should be introduced to limit the integrity risks associated with previous public sector activities.

¹⁷¹ Directive on other remunerative work outside the employee's employment in the relevant department as contemplated in section 30 of the Public Service Act, 1994

http://www.dpsa.gov.za/dpsa2g/documents/iem/2016/directive_rwops_30_09_2016.pdf

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Consider streamlining the definition of conflict of interest

While no issue has been expressed by stakeholders with the lack of a unified definition, South African authorities could consider introducing a streamlined definition for easy access and understanding, including expanding it to include actual, perceived and potential conflict of interest (as discussed in Indicator 5(d)).

Sub-indicator 14(b)

Provisions on prohibited practices in procurement documents

Assessment criterion 14(b)(a):

The legal/regulatory framework specifies this mandatory requirement and gives precise instructions on how to incorporate the matter in procurement and contract documents.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

TR 16A6.3(a) requires the AO/AA to ensure that bid documentation and general conditions of contract are in accordance with instructions of National Treasury, or prescripts of the CIDB in the case of a bid relating to the construction industry.

Section 23 of the General Conditions of a Contract 2010 (GCC) as issued by the National Treasury defines conditions for termination for default: The purchaser may terminate the contract in whole or in part if the supplier, in the judgment of the purchaser, has engaged in corrupt or fraudulent practices in competing for or in executing the contract (23.1 (c))

Section 34 of the General Conditions of a Contract 2010 (GCC) as issued by the National Treasury; Office of the Chief Procurement officer, outlines prohibition of Restrictive Practices by bidders/suppliers and provides for penalties to be imposed by the organs of state on transgressing suppliers/bidders:¹⁷²

NT Instruction NO NUMBER_2010/11 Prohibition of Restrictive Practices provides preventative measures to counter bid rigging:¹⁷³

3.1.1 Accounting officers and accounting authorities are required to utilize the attached Standard Bidding Document (SBD 9) "Certificate of Independent Bid Determination" when inviting price quotations, advertised competitive bids, limited bids or proposals. The SBD 9 form should be used with minimum changes that are necessary to address contract and project specific issues.

For construction procurement, the CIDB provides Standard Conditions for Tender, which includes reference to conflict of interest, 'corrupt practice', 'fraudulent practice'. Collusive practices are included as fraudulent practice.¹⁷⁴

Gap analysis

As assessed under Pillar I, there is substantive lack of clarity with respect to detailed provisions about eligibility and exclusion of suppliers (see sub-indicator 1(d)). Hence, the assessors conclude that there are no sufficiently precise instructions on how to deal with prohibited practices that would exclude bidders.

For instance, the list of grounds for exclusion does not cover terrorist related offences, money laundering or terrorist financing, child labour, human trafficking as prescribed by the MAPS Methodology. Again, as highlighted under sub-indicator 1(d), there is a high level of discretion afforded to AO/AA in deciding upon debarment of a

¹⁷² National Treasury General Conditions of Contract, July 2010

¹⁷³ Instruction NO NUMBER_2010/11 Prohibition of Restrictive Practices: Certificate of Independent Bid Determination http://ocpo.treasury.gov.za/Resource_Centre/Legislation/20100721%20NT%20Practice%20Note.pdf

¹⁷⁴ CIDB, CIDB Standard Conditions of Tender 2009, <https://www.cidb.org.za/download/100/procurement-documents-templates-and-guidelines/6128/cidb-standard-conditions-of-tender.pdf>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

supplier from doing business with government, by inclusion in the Restricted Supplier List. Also, the wording of grounds upon an AO/AA may disregard a bid in TR16A9.2, is vague and not well aligned with the anti-corruption regime.

Furthermore, General Conditions of Contract give substantive discretion to contracting authorities regarding the consequences of identified corrupt or fraudulent practices during bidding or contract execution. Termination of a contract may occur in part or in full but is not an obligation.

Similarly, as per GCC, referral to the Competition Commission in case of suspected bid rigging is not mandatory for the contracting authority. Termination of a contract, restriction of the bidder to do business with government, or claiming for damages may occur if the bidder has been found guilty by the Competition Commission but there is no obligation to take any of these actions.

Recommendations

Combined recommendation 14(a)(b) and 14(b)(b):

Support SCM practitioners with addressing prohibited practices

The legal framework should make it very clear which practices are prohibited in public procurement, and this information must be included in tender documents. SCM practitioners could be supported in this regard with comprehensive standardised tender document that included clauses about prohibited practices, including exclusion grounds.

More specifically, GCC could be more precise in mandating procuring entities to refer any identified corrupt or fraudulent practices to responsible agencies. Discretion in the consequences (e.g. termination of contract) could also be reviewed.

Assessment criterion 14(b)(b):

Procurement and contract documents include provisions on fraud, corruption and other prohibited practices, as specified in the legal/regulatory framework.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The General Conditions of Contract developed by NT form part of all bid documents and may not be amended. In the GCC, 'fraudulent practice' and 'corrupt practice' are defined. The GCC also specify that a person convicted under offences PRECCA (section 12 and 13) may be endorsed on the Register for Tender Defaulters (if the court rules so). If a person is endorsed on the Register, they will be prohibited from doing business with the public sector for a period not less than five years and not more than 10 years. In condition 34 ('Prohibition of restrictive practice') collusive bidding or bid rigging is cited as a prohibited practice.

For construction procurement, the CIDB provides Standard Conditions for Tender, which includes reference to conflict of interest, 'corrupt practice', 'fraudulent practice'. Collusive practices are included as fraudulent practice.¹⁷⁵

Gap analysis

NT's GCC do not refer other criminal practices specifically, such as terrorist related offences, money laundering or terrorist financing, child labour, human trafficking.

It should be noted that GCC should be used with minimum changes but still allow for potential changes.

¹⁷⁵ CIDB, CIDB Standard Conditions of Tender 2009, <https://www.cidb.org.za/download/100/procurement-documents-templates-and-guidelines/6128/cidb-standard-conditions-of-tender.pdf>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Recommendations

Combined recommendation 14(a)(b) and 14(b)(b):

Support SCM practitioners with addressing prohibited practices

The legal framework should make it very clear which practices are prohibited in public procurement, and this information must be included in tender documents. SCM practitioners could be supported in this regard with comprehensive standardised tender document that included clauses about prohibited practices, including exclusion grounds.

More specifically, GCC could be more precise in mandating procuring entities to refer any identified corrupt or fraudulent practices to responsible agencies. Discretion in the consequences (e.g. termination of contract) could also be reviewed.

Sub-indicator 14(c)

Effective sanctions and enforcement systems

Assessment criterion 14(c)(a):

Procuring entities are required to report allegations of fraud, corruption and other prohibited practices to law enforcement authorities, and there is a clear procedure in place for doing this.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

PFMA ss6 & 18 obligations to ensure that proper norms and standards are set to prevent abuse of the SCM and enforce the prescribed measures.

As per NT TR 16A9.1 the accounting officer or accounting authority must:

- (a) take all reasonable steps to prevent abuse of the supply chain management system;
- (b) investigate any allegations against an official or other role player of corruption, improper conduct or failure to comply with the supply chain management system, and when justified –
 - (i) take steps against such official or other role player and inform the relevant treasury of such steps; and
 - (ii) report any conduct that may constitute an offence to the South African Police Service

TR s.16A9.3 requires the National Treasury and each provincial treasury to establish and mechanism “(a) to receive complaints regarding alleged non-compliance with the prescribed minimum norms and standards; and (b) to make recommendations for remedial actions to be taken if non-compliance of any norms and standards is established, including any recommendations of criminal steps to be taken in case of corruption, fraud or other criminal offences.”

According to TR 16A8.5 an official in the supply chain management unit who becomes aware of a breach of or failure to comply with any aspect of the supply chain management system must immediately report the breach or failure to the accounting officer or accounting authority, in writing.

SCM Instruction No.3 of 2021/22 details measures for preventing and combating abuse in the SCM system.

Section 34.2 and 34.3 of the General Conditions of a Contract provides Procuring Entities with procedures to follow to report and deal with prohibited practices by suppliers.

Gap analysis

AA/AO have an obligation to refer offences to the South African Police Service, though this may not be the only law enforcement agency relevant for follow-up of certain matters. No other channels or procedures are described.

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Also, AA/AO are tasked with first-hand investigation of matters related to alleged corruption, improper conduct and failure to comply with the SCM system. This opens the question of whether AA/AO have the skills and capacity to actually investigate such matters, or whether a direct referral of allegations to relevant law enforcement would be more effective.

Compliance breaches identified by SCM officers must only be reported to the AA/AO but not to law enforcement directly.

According to the General Conditions of Contract, procuring entities may refer Competition Commission for suspected bid rigging, but have no obligations to do so.

Recommendations

Clarify procedures to refer offences to relevant oversight authorities.

Assessment criterion 14(c)(b):

There is evidence that this system is systematically applied and reports are consistently followed up by law enforcement authorities.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

Several institutions are involved in the follow up investigations related to corrupt practices. This includes the Special Investigative Unit (SIU), the South African Police Service with its Directorate for Priority Crime Investigation (DPCI –referred to as “The Hawks”), NT’s investigate unit, the Investigative Directorate (ID) within the NPA.

It is not clear to the assessors which entity has specific responsibilities for follow up and how the process for follow-up on allegation is set in motion (i.e. which institution is in charge under which circumstances). In fact, Treasury Regulations only mandate referrals to the South African Police Service. Stakeholders within law enforcement report follow up on all allegations received, but this has not been independently verified by the assessors.

There is evidence that National Treasury database of Restricted Suppliers and Tender Defaulters is used, even though the entries are exclusively ‘restricted suppliers’ and no ‘tender defaulter’ has been identified (see assessment criterion 14(c)(c) for detailed analysis.

Gap analysis

A gap is assigned due to the scarce evidence available to assess this criterion. Lack of clarity revolves, among other issues, about which institution is mandated for follow-up under which circumstances.

Gaps are also recorded for the use of the Register of Tender Defaulters (see 14(c)(c)).

Recommendations

Clarify reporting lines for follow-up on allegations in Treasury Regulations or other SCM guidance.

Introducing a single anticorruption body would also provide clarity on reporting of allegations (see assessment 14(d)).

Assessment criterion 14(c)(c):

There is a system for suspension/debarment that ensures due process and is consistently applied.

Conclusion: Substantive gap

Red flag: No

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Qualitative analysis

South Africa has a system for debarment of bidders, which consists of three separate systems, 1) the Register of Tender Defaulters (where convicted of corruption related offences under PRECCA); 2) the Restricted Supplier List and 3) the CIDB sanctions regime.

Debarment on conviction for corruption related offences is subject to due process of the courts which make an order to endorse and offender's particulars on the Register of Tender Defaulters. The CIDB operates as well-defined system to investigate complaints which may result in a sanction being applied to a registered contractor of restriction or prohibition from participating in public sector construction works procurement for a period of up to 10 years.

Debarment - Register of Tender Defaulters: Prevention and Combating of Corrupt Activities Act 2004 Chapters 6 (ss.29 to 33) provides for the established and operation by the Minister of Finance of the Register for Tender Defaulters. The Minister of Finance issued Regulations regarding the Register of Tender Defaulters (R.194, 11 March 2005). PRECCA s.28 give power to a court convicting a person of an offence in respect of corrupt activities relating to contracts (PRECCA s.12) or procuring and withdrawal of tenders (PRECCA s.13) to issue an order that the particulars of the convicted person, conviction, sentenced and any other related order be endorsed on the Register for Tender Defaulters. The endorsement may be widened by order of the court to cover any other enterprise owned or controlled by a convicted person, and to any partner, manager, director or other person who wholly or partly exercises, or may exercise, control where they were involved in the offence or knew, or ought to reasonably have known or suspected the offence. The endorsement may also apply to future establishment of an enterprise.

Debarment – Restricted Supplier List: There is a system of debarment, with a process to be followed prior to listing of a supplier on the Restricted Supplier List. SCM Instruction No.3 of 2021/22 sets out the process leading to debarment of suppliers from doing business with government by inclusion in the restricted supplier list which is published by National Treasury. The process is led by the AO/AA of an institution who is required to notify in writing the relevant supplier of (a) the intention to restrict, (b) grounds for restriction, (c) intended period of restriction, not exceeding 10 years, (d) right of supplier to make representations within 14 days as to why should not be restricted. The AO/AA is required to: consider any representations made; consult National Treasury and consider any views provided by the National Treasury prior to making a final decision. If the AO/AA makes a decision to restrict a supplier, they must inform National Treasury which adds the supplier to the published list and the AO/AA must inform the restricted supplier as soon as the restriction is recorded. The level of discretion available to the AO/AA is high and this raises risks of inconsistency of application of grounds for restrictions on participation, unless robust control and review measures are in place.

The Restricted Supplier List and Tender Defaulter report is available (in a consolidated document) from the NT/OCPO website.¹⁷⁶ However, it should be noted that no supplier is currently listed in the Register of Tender Defaulters¹⁷⁷. As reported by Corruption Watch, this Register appears to be empty as far back as 2004, or at least 2009¹⁷⁸.

CIDB sanctions regime: CIDB Regulations, Part V provides for a process for investigation of a complaint or suspicion of an act or omission in respect of the CIDB Code of Conduct. If the complaint or suspicion implicates a person employed by an organ of state the CIDB must refer it to the relevant AO/AA for investigation, or Audit Committee in the case of the CIDB. If the complaint or suspicion concerns a registered contractor the matter is investigated according to a due process, including a formal inquiry with a right for the contractor to attend and be represented, which is set out in detail in the CIDB Regulations. Sanction can include "restricting or prohibiting the respondent from participating in public sector construction works procurement for a period of time, which period may not

¹⁷⁶ <http://ocpo.treasury.gov.za/RestrictedSupplier/RestrictedSuppliersReport.pdf>

¹⁷⁷ <https://www.treasury.gov.za/publications/other/register%20for%20tender%20defaulters.pdf>

¹⁷⁸ <https://www.corruptionwatch.org.za/criminal-justice-partly-responsible-for-empty-tender-defaulters-register/>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

exceed 10 years.” Decisions are published in the Gazette and on the CIDB’s register of contractors. They do not appear to be included in the Restricted Supplier List and Tender Defaulter report published on the NT/OCPO website. There is a right of appeal for judicial review of a finding or sanctions.

Restrictions on participation: PRECCA s28(3) provides for the National Treasury to impose “restrictions” when the Register of Tender Defaulters is endorsed. In summary, the National Treasury:

(1) may Terminate any agreement with the convicted person or enterprise taking into account listed factors and subject to consultation with the purchasing authority or Government Department concerned. Where the National Treasury terminates an agreement, it may in addition recover damages, as defined.

and;

(2) must determine the period of prohibition, to be between 5 and 10 years.

The National Treasury must notify the concerned party of the restriction and also has power to vary or rescind a restriction.

During the prohibition period the National Treasury, purchasing authority or any Government Department must ignore an offer tendered by the relevant person or enterprise; or disqualify then from making an offer in relation to a specific supply or service.

Gap analysis

As assessed in sub-indicator 1(d), this analysis identifies three distinct gaps, as follows:

(1) There is no list of grounds for exclusion covering terrorist related offences, money laundering or terrorist financing, child labour, human trafficking as prescribed by the MAPS Methodology.

(2) There is a high level of discretion afforded to AO/AA in deciding upon debarment of a supplier from doing business with government, by inclusion in the Restricted Supplier List. This raises risks of inconsistency and/or bias in the application of grounds for restrictions on participation.

(3) The wording of grounds upon an AO/AA may disregard a bid in TR16A9.2, is vague and not well aligned with the anti-corruption regime. This raises concerns as to the efficacy of the process where significant discretion is exercised at a local level.

(4) The list of CIDB restricted/prohibited suppliers and the Restricted Supplier List and Tender Defaulter Report published by NT/OCPO are not linked, creating complexity and reducing clarity.

Analysis by Corruption Watch shows that both Register of Tender Defaulters and the Restricted Suppliers List are heavily underused, especially compared to the amount of abuse of the procurement system. In fact, the Register of Tender Suppliers appears to be empty since a decade already. Reasons for such low use may lie in the fact that prosecution of criminal conduct may not be brought under PRECCA’s general corruption or fraud definitions, while entry in the Register is only possible if the crime of procurement corruption is being prosecuted. Furthermore, AA/AO must instruct NT to enter supplier names into the Register after a decision by the court¹⁷⁹. It is not clear whether there is an issue with the flow of such information.

It is also important to consider the comparatively low entries of restricted suppliers list, including the fact that in an analysis of 2022 by Corruption Watch 138 submissions to the list came from a small subset of procuring entities (34) while a total of 584 entities could have potentially provided entries to the list. All in all, CSO stakeholders consider that debarment is not effective¹⁸⁰.

Finally, having two mechanisms with different modalities of functioning but ultimately the same goal creates unnecessary duplication and the potential for inconsistency. At a minimum, these systems should be linked to provide a single interface for procuring entities to identified excluded suppliers.

¹⁷⁹ <https://www.corruptionwatch.org.za/criminal-justice-partly-responsible-for-empty-tender-defaulters-register/>

¹⁸⁰ <https://www.corruptionwatch.org.za/criminal-justice-partly-responsible-for-empty-tender-defaulters-register/>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Recommendations

As identified in Indicator 1(d), increase the list of grounds for exclusion to cover terrorist related offences, money laundering or terrorist financing, child labour, human trafficking. Review or limit the discretionary powers offered to AA/AO in restricting suppliers. This could be implemented after a thorough review of current practices. Ensure that provisions in this matter are worded clearly.

Investigate barriers to low use (or lack thereof) of Register for Tender Defaulters and Restricted Supplier List.

Connect the list CIDB of restricted/prohibited suppliers and the Restricted Supplier List and Tender Defaulter Report for a unified view and consider merging these instruments for a single, clear, coherent mechanism for debarment of suppliers.

Assessment criterion 14(c)(d):

There is evidence that the laws on fraud, corruption and other prohibited practices are being enforced in the country by application of stated penalties.*

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

The National Prosecuting Authority (NPA) is South Africa's prosecuting authority in terms of the constitution and legislation. It has a mandate to institute criminal proceedings and carry out incidental functions. Other than the Investigative Directorate, the NPA is not responsible for investigating crime, that responsibility lies with law enforcement authorities (e.g. South African Police Service or Directorate for Priority Crime Investigation). Criminal matters are referred to the NPA once investigations are completed.

The NPA presented data to the assessors regarding the ongoing activities it is conducting, in particular those of the Investigative Directorate, which was instituted in the wake of the state capture to investigate and prosecute high profile corruption. The activities of the NPA are also documented in its annual report. No data about convictions was shared with the assessors.

Quantitative analysis

** Recommended quantitative indicator to substantiate assessment of sub-indicator 14(c) Assessment criterion (d):*
- *Firms/individuals found guilty of fraud and corruption in procurement: number of firms/individuals prosecuted/convicted; prohibited from participation in future procurements (suspended/debarred).*

175 companies included in the Restricted Supplier List. None in the Tender Defaulter Report.

Source: Restricted Supplier and Tender Defaulter Report

- Government officials found guilty of fraud and corruption in public procurement: number of officials prosecuted/convicted.

The National Prosecuting Authority (NPA)

Source: Normative/regulatory function/anti-corruption body.

- Gifts to secure public contracts: number of firms admitting to unethical practices, including making gifts in (in %).

190 survey respondents from the private sector (52%) claim that is expected to offer bonuses or rewards to secure procurement contracts:

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

41. Based on your experience, do you think it is expected that organisations offer some kind of bonuses/reward to secure a contract with Organs of State?

[More Details](#)

[Insights](#)

Yes	190
No	176



Source: Private sector survey.

Gap analysis

In the wake of state capture, media and CSO report about serious flaws in the ability of the prosecution to effectively bring to court. Notably, the first state capture trial ended in acquittal by the defendants and severe criticism of the police and prosecution considered “woefully inept”.¹⁸¹ In fact, the NPA has been deliberately targeted and weakened during the state capture years. It lost the so-called Directorate of Special Operations (Skorpions) since 2008 / 09, which was dealing with corruption cases. Since that, the NPA loss of investigative capacity for high level of complex fraud. The weakness of the National Prosecuting Authority (NPA) in credibly prosecuting state capture has been highlighted by NGOs¹⁸².

A particular weakness of the NPA’s current set up lies in the fact that the Investigative Directorate (ID) tasked with prosecuting state capture related crimes is not a permanent entity (it exists further to the President Proclamation No.20 of 2019) and hence does not guarantee tenure to the fullest extent to its employees. These issues are meant to be addressed with the establishment of a permanent investigative authority for dealing with high crime and complex corruption known as Investigating Directorate against Corruption (IDAC). The primary focus of the IDAC will therefore be on the investigation and prosecution of State Capture-related crime. It should also be bestowed with full criminal investigatory powers. At the time of this assessment, the National Prosecuting Authority Amendment Bill, 2023, which includes the proposal for IDAC has been adopted by Parliament and waiting to be signed into Law¹⁸³.

The severe weaknesses of the criminal justice system are also acknowledged in the South Africa’s National Anti-Corruption Strategy¹⁸⁴. Stakeholders confirm lack of capacity as a critical issue.

The private sector survey indicates that over half of surveyed suppliers consider corruption necessary to acquire public contracts, undermining the perception of enforcement related to corrupt and criminal activities.

This gap is assigned a red flag because it severely undermines accountability in the public procurement system but lies entirely outside the sphere of public procurement.

Recommendations

South African authorities need to ensure sufficient capacity is available to effectively prosecute those involved in criminal activities, most notably the high-level corruption of the state capture years. The lack thereof provides a

¹⁸¹ See for instance: <https://mg.co.za/news/2023-04-21-state-capture-nulane-trial-ends-in-acquittal/>

¹⁸² Open Secrets (2022), Bad Cops, bad Lawyers: The officials at the NPA and the Hawks delaying justice for State Capture, <https://www.opensecrets.org.za/investigation-bad-cops-bad-lawyers/>

¹⁸³ <https://pmg.org.za/bill/1174/>

¹⁸⁴ National Anti-Corruption Strategy 2020-2030

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

sense of impunity and lack of accountability, severely tampering the credibility of South African anticorruption efforts.

Sub-indicator 14(d) Anti-corruption framework and integrity training

Assessment criterion 14(d)(a):

The country has in place a comprehensive anti-corruption framework to prevent, detect and penalise corruption in government that involves the appropriate agencies of government with a level of responsibility and capacity to enable its responsibilities to be carried out.*.

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

South Africa signed the United Nations Convention against Corruption on 9 December 2003 and ratified it on 22 November 2004. Entities with mandates relevant to the prevention and countering of corruption include: Department of Public Service and Administration (DPSA), Public Service Commission (PSC), National Treasury, Office of the Chief Procurement Officer (OCPO), Special Investigating Unit (SIU), Financial Intelligence Centre (FIC) and other agencies. Coordination is exercised through the Anti-Corruption Task Team (ACTT)¹⁸⁵.

In addition to UNCAC, South Africa has ratified several international conventions and treaties and participates in forums that require the country to implement measures to prevent and combat corrupt activities. These include:

- The Organisation for Economic Cooperation and Development Convention (OECD) on Combating Bribery of Foreign Public Officials in International Business Transactions.
- The African Union's Convention on Preventing and Combating Corruption.
- The SADC Protocol Against Corruption.
- The Financial Action Task Force (FATF).
- The Group of 20 (G20) Anti-Corruption Working Group, where South Africa participates and regularly provides its accountability report.¹⁸⁶

Prosecution of crime is the primary role of the National Prosecuting Authority (NPA) in the anti-corruption framework, which is derived from section 179(2) of the Constitution of the Republic of South Africa, 1996 (Constitution), read with section 20(1) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (NPA Act), which legislation gives effect to section 179 of the Constitution. Section 179(2) of the Constitution provides that: "The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings." This then is the core function of the NPA, as the single national prosecuting authority in the Republic, in combatting corruption and other commercial or financial crime.

The South African National Anti-corruption strategy 2020-2030 provides a framework and action plan for the country as a whole and seeks to create a society in which government's administrative and procurement processes are reinforced to allow for greater monitoring, accountability and transparency¹⁸⁷.

Quantitative analysis

**Recommended quantitative indicator to substantiate assessment of sub-indicator 14(d) Assessment criterion (a): - percentage of favourable opinions by the public on the effectiveness of anti-corruption measures (in % of responses).*

¹⁸⁵ UNODC (2020) Final Country Report

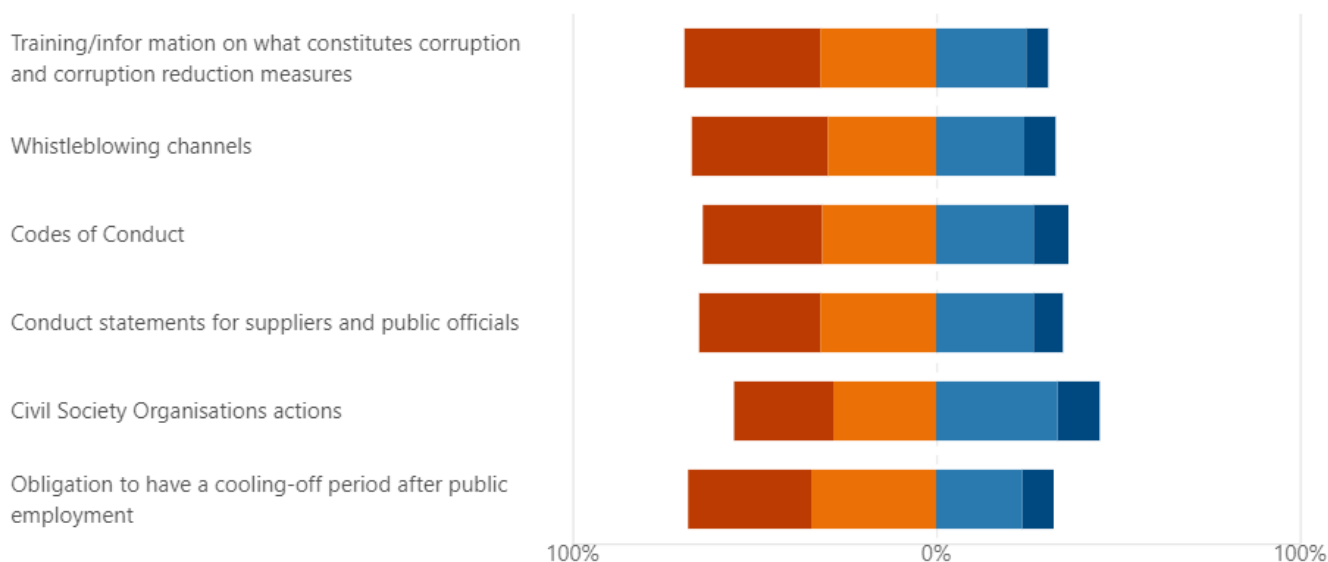
¹⁸⁶ National Anti-Corruption Strategy 2020-2030

¹⁸⁷ National Anti-Corruption Strategy 2020-2030

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

42. Considering the anti-corruption measures and related offences listed below, please rate them on the basis of what you consider to be their likely effectiveness:

■ Not effective ■ Not very effective ■ Effective ■ Very Effective



Source: Survey.

Gap analysis

As noted by the UNODC analysis of South Africa's compliance with UN Convention Against Corruption (UNCAC), there is no have a single body with prime responsibility for preventing corruption, despite a multitude of actors involved in anticorruption¹⁸⁸.

South Africa's anticorruption system proved ineffective in deterring a period of systemic political corruption referred to "state capture" as expressed in the Public Protector's "State of Capture Report", No 6 of 2016/17. This refers to "to alleged improper and unethical conduct by senior state functionaries relating to alleged improper relationships and involvement of private individuals in the removal and appointment of ministers and directors of state-owned entities (SOEs) resulting in the improper and possibly corrupt awarding of state contracts and benefits to private businesses."¹⁸⁹ As part of the state capture scheme, undue influence was exercised on SOEs and other government entities through the replacement of leadership or board positions. Law enforcement was also 'captured' by replacing key personnel and significantly weakened.

As noted in the National Anti-Corruption Strategy, South Africa is facing particular challenges in the wake of state capture, which entailed the hollowing out of the state's law enforcement agencies, requiring to build up lost capacity and skills¹⁹⁰. Similar concerns about limited capacity were expressed by stakeholders. The effects of loss of skills is tangible when looking at recent prosecution efforts of high-profile corruption cases related to state capture. According to commentators in the news and judicial system, police and prosecution have been "woefully inept" in presenting their case¹⁹¹.

¹⁸⁸ UNODC Country Profile South Africa, <https://www.unodc.org/unodc/en/corruption/country-profile/countryprofile.html#?CountryProfileDetails=%2Funodc%2Fcorruption%2Fcountry-profile%2Fprofiles%2Fzaf.html>

¹⁸⁹ National Anti-Corruption Strategy 2020-2030

¹⁹⁰ National Anti-Corruption Strategy 2020-2030

¹⁹¹ <https://mg.co.za/news/2023-04-21-state-capture-nulane-trial-ends-in-acquittal/>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

The National Anti-Corruption Strategy also points to structural flaws in the current institutional set up of anticorruption bodies: “numerous challenges [...] experienced with the current multi-agency approach and some of these were deliberately created or exacerbated by individuals seeking to weaken these entities.” Furthermore, coordination within the ‘multi-agency system’ has also suffered due to undue influence ¹⁹²

The survey results further underscore perception of limited effectiveness of anticorruption measures. Above 50% of respondents rate anticorruption measures as either “not effective” or “not very effective”.

This gap is assigned a red flag because it shows systemic weaknesses in the anticorruption system but lies outside the sphere of public procurement.

Recommendations

Introduce a single body tasked with anticorruption

South Africa would benefit from a strong, independent, capable anticorruption body, as opposed to the current system that relies on a multitude of agencies. An anticorruption body increases clarity in the roles of responsibilities around corruption prevention and detection.

Assessment criterion 14(d)(b):

As part of the anti-corruption framework, a mechanism is in place and is used for systematically identifying corruption risks and for mitigating these risks in the public procurement cycle.

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

The PFMA provides for the establishment of AO/AA with responsibilities for financial, risk management and internal control as well as internal audit. Treasury Regulations (TR 27.2.1) stipulate that accounting authorities must conduct regular risk assessment to identify risks to the public entity. This entails the set-up of risk management strategy and must include a fraud prevention plan. Treasury Regulations further mandate that these tools “must be used to direct internal audit effort and priority and to determine the skills required of managers and staff to improve controls and to manage these risks. The strategy must be clearly communicated to all employees to ensure that the risk management strategy is incorporated into the language and culture of the public entity.”

More specifically, the SCM Guide for Accounting Officers / Accounting Authorities provides a brief example of what risk management entails in the SCM (1.2.3). The Guide further details that award and management of contracts where fraud and corruption has been found in the past should be reflected in the institution’s Fraud Prevention Plan, and through cost-effective use of control measures and procedures and an ethical culture (1.2.4)¹⁹³.

Strategic Pillar Four of the National Anti-corruption Strategy defines actions to “Improve the integrity and credibility of the public procurement system”. It aims to create credible, transparent procurement system, and to ensure that Public Procurement Bill is supported, and its enactment expedited, transparency and accessibility of the public procurement system’s data is improved. Measures to enable enforcement and oversight are supported, Professionalization of the procurement and supply chain management functions is prioritized. Implementation is

¹⁹² National Anti-Corruption Strategy 2020-2030

¹⁹³ SCM Guide for Accounting Officers / Accounting Authorities (2004)

http://ocpo.treasury.gov.za/Resource_Centre/Legislation/SCM%20Jan900-Guidelines.pdf

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

based around a) enhancing oversight and enforcement in public procurement b) improve transparency and data management c) support professionalism in SCM¹⁹⁴.

Strategic Pillar Six of the National Anti-corruption Strategy (“Protect vulnerable sectors that are most prone to corruption and unethical practices with effective risk management”) identifies the following sectors as most vulnerable to corruption: health; local government; state-owned entities; construction; transport; the financial sector; energy; mining; water; real estate; education; information and communication technology (ICT); small, medium and micro enterprises (SMMEs); border management and defense/armaments. Several factors are listed as to why these sectors are particularly vulnerable, however no specific interventions related to procurement practices are foreseen in the Strategy¹⁹⁵.

Gap analysis

The effectiveness of actions by AA/AO (i.e. risk management strategy and fraud prevention plans) appear limited given findings throughout this report on lack of compliance, wasteful and irregular expenditure. The state capture experience shows that it is possible to entirely neutralize the actions of AA/AO and internal audit structures regarding corruption prevention by inserting complicit personnel in these positions of responsibility. No actions limiting the risks of such ‘capture’ of internal accountability function seem to have been taken.

Guidance on risk management specific in the SCM Guide for AA/AO is quite limited regarding public procurement risks. The National Anti-Corruption strategy does not tackle the identification of risks in public procurement, although it addresses corruption risks in vulnerable sectors.

This gap is assigned a red flag because the lack of effective mechanisms to identify and deal with corruption risks in public procurement severely undermines the goal of ensuring integrity in public procurement – in particular, in a context where corruption is rampant.

Recommendations

Combined recommendation with 14(d)(b) and 14(d)(d):

Support AA/AO in identification of corruption related risks, including in vulnerable sectors

Greater support, tools and guidance could be provided to AA/AO in their risk management processes. If needed, additional reporting should be required. Risk management activities should focus on sectors that are particularly vulnerable to corruption, as identified in the National Anti-Corruption Strategy.

Assessment criterion 14(d)(c):

As part of the anti-corruption framework, statistics on corruption-related legal proceedings and convictions are compiled and reports are published annually.

Conclusion: No gap

Red flag: No

Qualitative analysis

The NPA’s Investigative Directorate provided the assessors with statistics about its activities (as already listed under 14(c)(d)):

Total number of matters authorised (2019 – 30 September 2023)	100
Number of new matters authorised (1 April 2023 – 30 September 2023)	02
Total number of matters under investigation	63
Total number of matters enrolled (2019 – 30 September 2023)	36
Total number of accused persons (2019 – 30 September 2023)	207

¹⁹⁴ National Anti-Corruption Strategy 2020-2030

¹⁹⁵ National Anti-Corruption Strategy 2020-2030

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Number of accused entities (2019 – 30 September 2023)	66
Number Tax matters enrolled (2019 – 30 September 2023)	09
Number of accused persons in relation to tax offences	13
No of accused entities in relation to tax offences	13

Indicator	No of Recommendations	No of Cases
Recommendations under intake process or application for authorization in-progress in the ID.	15	7
Recommendations under investigation.	85	18
Recommendations enrolled – Criminal.	22	7
Recommendations that required further consideration.	0	0
Recommendations with no prospects of Prosecution.	0	0
Recommendation finalised.	0	0
State Capture Matters with No Specific Recommendations	-	13
Total Number of SCC with specific recommendations:	122	32
Total Number State Capture Matters with no Specific Recommendations	-	13

Additional statistics about NPA ongoing investigations and convictions are published in NPA's annual report.¹⁹⁶

Gap analysis

No gap.

Recommendations

Assessment criterion 14(d)(d):

Special measures are in place for the detection and prevention of corruption associated with procurement.

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

The Prevention and Combating of Corrupt Activities Act 12 of 2004 provides for measures to prevent and combat corruption and corrupt activities related to procurement tenders and contracts. Sections 38 and 51 (respectively) of the Public Finance Management Act 1 of 1999, outlines the general responsibilities of Accounting Officers and Accounting Authorities of Public Entities, Trading Entities, Departments and or Constitutional Institutions to ensure an effective, efficient and transparent systems of financial and risk management and internal control.

The National Anti-Corruption Strategy supports reinforcement of detection and prevention of corruption related to public procurement through strengthening oversight functions; improved enforcement; greater transparency through improved data management; and professionalisation of the procurement and supply chain management functions¹⁹⁷.

Gap analysis

It is evident that the current system is inadequate to detect and prevent corruption associated with public procurement. Fundamental shortcomings lie in the weakened capacity of law enforcement agencies, reducing the

¹⁹⁶ NPA Annual Report 2022-2023

<https://www.npa.gov.za/sites/default/files/uploads/NPA%20Annual%20Report%202022-23.pdf>

¹⁹⁷ National Anti-Corruption Strategy 2020-2030

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

ability to investigate and prosecute corruption linked to procurement. As laid out in the analysis of Indicator 12, major shortcomings are also linked to weak internal control and internal audit capacity, and overall limited accountability in case of irregularities (lack of consequence management), while at the same time substantive discretion of AA/AO for “procurement by other means”. Limited transparency of procurement data and difficulties in using procurement data for data analytics and identification of ‘red flags’ also contributes to a weak system of corruption prevention and detection.

More broadly, detection and prevention of corruption is undermined by lack of clarity of the system of reporting allegations, severe risks to one’s life in case of whistleblowing. Not least, the lack of a specialized mandate for a single anti-corruption authority and challenges related to coordination of the so-called ‘multi-agency system’ fundamentally undermines strong and credible action to implementing anticorruption measures.

The Judicial Commission of Inquiry into State Capture introduces several recommendations specifically targeted at public procurement, highlighting the need for further measures to detect and prevent corruption. A recommendation calls for the introduction of a National Charter Against Corruption in public procurement, including defining a Code of Conduct and ethical standards applicable for procurement. A second recommendation calls for the establishment of an independent Agency against corruption in public procurement¹⁹⁸.

This gap is assigned a red flag because the lack of effective mechanisms to detect and prevent corruption in public procurement severely undermines the goal of ensuring integrity in public procurement – in particular, in a context where corruption is rampant.

Recommendations

Combined recommendation with 14(d)(b) and 14(d)(d):

Support AA/AO in identification of corruption related risks, including in vulnerable sectors

Greater support, tools and guidance could be provided to AA/AO in their risk management processes. If needed, additional reporting should be required. Risk management activities should focus on sectors that are particularly vulnerable to corruption, as identified in the National Anti-Corruption Strategy.

Assessment criterion 14(d)(e):

Special integrity training programmes are offered, and the procurement workforce regularly participates in this training.

Conclusion: Minor gap

Red flag: No

Qualitative analysis

The National School of Government has a mandate to offer compulsory Ethics and Integrity Management Trainings and Workshop for all public servants. The e-learning course “Ethics in the Public Service” is compulsory.

The National Treasury Regulations 16A8, outlines the obligation for SCM Practitioners to adhere to the National Treasury’s Code of Conduct for Supply Chain Management practitioners.

The National Prosecuting Authority (NPA) presently conducts awareness on ethics matters which mainly includes the Public Service Code of Conduct, Code of Conduct for Prosecutors, NPA Code of Ethics and Public Service Regulations. Within the NPA this role has been entrusted to the Integrity Management Unit which is based in head office. The Integrity Management Unit conducts awareness sessions mainly onsite at the various offices of the NPA throughout the country, whilst some sessions are conducted virtually via Microsoft Team.

¹⁹⁸ Judicial Commission of Inquiry into State Capture Report Part VI, Vol 4: All the Recommendations

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Currently there is no integrity training provided for NPA's Investigative Directorate (ID). However, the NPA-ID amendment bill provides for integrity testing of investigators. Once it becomes law integrity training will be provided. The ID currently uses the general public service code of conduct and the code of conduct applicable to the NPA.

Gap analysis

It is not clear to the assessors what kind of integrity and ethics-related courses are available to SCM practitioners, and how regularly they are being attended.

Recommendations

Consider increased integrity and ethics-related training as part of a broader anticorruption strategy and framework.

Sub-indicator 14(e)

Stakeholder support to strengthen integrity in procurement

Assessment criterion 14(e)(a):

There are strong and credible civil society organizations that exercise social audit and control.

Conclusion: Minor gap

Red flag: No

Qualitative analysis

Section 16(1) of the South African Constitution guarantees freedom of expression for individuals, the media and academic thought. Access to information rights are founded in the constitution and supported by the Promotion of Access to Information Act 2 of 2000. According to Transparency International, freedom of information requests are generally respected despite certain administrative challenges. Refusal to grant access to information required by the relevant laws can prompt intervention by the courts¹⁹⁹.

South Africa's media and civil society is considered vibrant. The media is capable of robustly engaging with society, as well as with powerful stakeholders in both government and the private sector. Specialist investigative journalists, such as amaBhungane and Scorpio, play a vital role in exposing political and private sector corruption²⁰⁰.

Non-profit civil action organizations such as the Organization Undoing Tax Abuse (OUTA), AFRIFORUM and Afri-business focus on exposing Government corruption and the abuse of taxes and public funds.

Gap analysis

There is evidence for active civil society participation in exercising a control function regarding public procurement. However, a small gap is assigned because suppliers show little awareness about CSOs performing social scrutiny in public procurement, as demonstrated by the supplier survey conducted for this assessment. Namely, 73% of respondents declare not to know any CSO performing such role, while only 27% confirm their knowledge of active CSOs.

Recommendations

Combined recommendation for 14(e)(a), 14(e)(b) and 14(e)(c):

Empower CSO in conducting their functions through capacity building, if necessary, and introduction of practices that enhances CSO oversight role through direct participation (see Indicator 11).

See additional recommendations under Indicator 11.

¹⁹⁹ Transparency International (2020) Implementing and Enforcing the African Union Convention on Preventing and Combating Crime: A Comparative Review https://images.transparencycdn.org/images/2020_Report_African-Union-Convention-Review_English.pdf

²⁰⁰ Ibid.

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Assessment criterion 14(e)(b):

There is an enabling environment for civil society organizations to have a meaningful role as third-party monitors, including clear channels for engagement and feedback that are promoted by the government.

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

As indicated in the analysis of assessment criterion 14(e)(a), an enabling environment for civil society is provided by constitutional rights to freedom of speech and access to information rights.

Gap analysis

Gaps in the engagement between civil society and governments have come to the fore with respect to the consultation process around the procurement bill (see Indicator 11). As a general principle, CSO stakeholders do not perceive engagement with government authorities to be sufficiently institutionalized. Furthermore, data from the supplier survey also confirms the notion that there are obstacles in realising the role of social control by CSOs, as indicated by 58% of respondents.

Recommendations

Combined recommendation for 14(e)(a), 14(e)(b) and 14(e)(c):

Empower CSO in conducting their functions through capacity building, if necessary, and introduction of practices that enhances CSO oversight role through direct participation (see Indicator 11).

See additional recommendations under Indicator 11.

Assessment criterion 14(e)(c):

There is evidence that civil society contributes to shape and improve integrity of public procurement.*

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

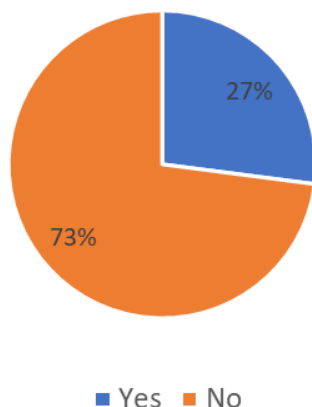
As discussed under Indicator 11, civil society has participated actively in the consultation process of the preparation of the new Public Procurement Bill, evidencing their role in contributing to shape integrity of public procurement. That said, CSO stakeholders denounced several aspects of the process, and voiced specific concerns in new Public Procurement Bill, i.e. that the new bill may limit access to civil society to procurement information, instead of increasing it.

Quantitative analysis

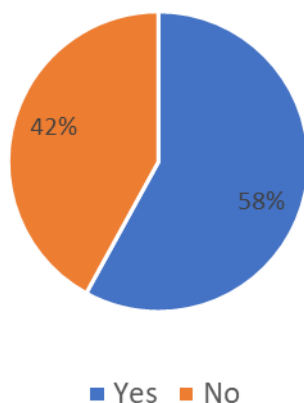
** Recommended quantitative indicator to substantiate assessment of sub-indicator 14(e) Assessment criterion (c):
- number of domestic civil society organisations (CSOs), including national offices of international CSOs) actively providing oversight and social control in public procurement.*

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Do you know of any Civil Society Organisation in South Africa that actively performs a social scrutiny and control function in public procurement?



In your opinion, are there obstacles to the realisation of the role of social control by Civil Society Organisations?



Source: Supplier survey

Gap analysis

The business sector appears to have limited confidence in the civil society's ability to exercise social control, as reported by the survey of suppliers conducted for this MAPS assessment. Namely, 58% of respondents believe that there are obstacles to CSO ability to exercise social control. Furthermore, awareness of CSOs performing watchdog functions in public procurement is very limited: only 27% declare knowing any such civil society organization.

Concerns by CSOs revolve around access to information for civil society in the new Bill, which introduce the possibility of restricting access to procurement information under certain circumstances. Another area of concern expressed by CSO (and already highlighted in other parts of this assessment) is the lack of transparency of procurement data for more advanced monitoring and analytics.

Recommendations

Combined recommendation for 14(e)(a), 14(e)(b) and 14(e)(c):

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Empower CSO in conducting their functions through capacity building, if necessary, and introduction of practices that enhances CSO oversight role through direct participation (see Indicator 11).

Assessment criterion 14(e)(d):

Suppliers and business associations actively support integrity and ethical behaviour in public procurement, e.g. through internal compliance measures.*

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The Companies Act, 2008, is South Africa's overarching regulation for businesses providing for incorporation, registration, organisation and management of companies. With respect to corruption and integrity, the Companies Act, mandates basic requirements for state-owned, listed and public companies, as well as companies of a certain size to take certain enhance accountability and transparency and internal monitoring through social and ethics committees²⁰¹.

Audit of private companies is only mandatory for companies above certain thresholds regarding scope of activities, number of employees and turnover. This is determined by 'public interest scores' and prescribed in the Companies Regulations, 2011.

Several sections of the Companies Act are relevant in the context of corruption prevention and detection. Namely, Section 22 of the Act prohibits reckless trading and fraudulent activities by companies. Section 28 requires companies to keep and maintain accurate accounting records, even when companies are not subjected to audit requirements. Contraventions are punishable by sanction of an administrative fine or imprisonment.

In line with the Companies Act, companies can either be audited or independently reviewed. All public and state-owned companies above a certain size must be audited while all private companies falling below the 350 public interest score threshold may be independently reviewed. The Companies Act does not require for internal auditing controls to assist in preventing and detecting acts of corruption.

The Companies Act prescribes for companies to maintain security registers reflecting shareholders, holders of beneficial interests and the extent of the interests in the securities (section 50). Prior to 2023, this information was not shared with the regulator. The establishment of Beneficial Ownership Register in 2023 mandates sharing information with Companies and Intellectual Property Commission (CIPC) on an annual basis. Non-compliance constitutes an offence under the Companies Act.

In addition to complying with the Companies Act, companies listed on the Johannesburg Stock Exchange are mandated to implement the King IV Code on Corporate Governance. The King Code provides guidance for improving transparency and stability of financial management of listed companies, including guidelines on risk management, the composition of boards of directors and the performance of board members.

Quantitative analysis

* Recommended quantitative indicator to substantiate assessment of sub-indicator 14(e) Assessment criterion (d):
- number of suppliers that have internal compliance measures in place (in %).

No data available / provided
Source: Supplier database.

²⁰¹ UNODC South Africa

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Gap analysis

Important gaps consist in the lack of requirements for internal audit control to support prevention and detection of corruption as well as the lack of provisions about post-employment of public sector employees. These findings have been also highlighted in the UNODC's Review of South Africa's compliance with the UNCAC Convention²⁰².

Furthermore, as highlighted under the UNCAC review SOEs have not been a primary focus of anticorruption mechanisms, despite the sector being primarily vulnerable to fraud and corruption, as identified in the National Anti-Corruption Strategy²⁰³.

Beneficial ownership Register has only been introduced recently and it is not clear to the assessors whether the information contained in the register is being used by SCM officials and oversight bodies for corruption prevention and detection purposes.

Recommendations

Address gaps with integrity practices in the private sector, including SOEs

Introduce provisions to ensure that private sector rules make use of internal control and audit for the purposes of preventing and detecting corruption.

See recommendation under 14(a)(c) for cooling off periods after public sector employment.

Sub-indicator 14(f)

Secure mechanism for reporting prohibited practices or unethical behaviour

Assessment criterion 14(f)(a):

There are secure, accessible and confidential channels for reporting cases of fraud, corruption or other prohibited practices or unethical behaviour.

Conclusion: No gap

Red flag: No

Qualitative analysis

The Protected Disclosures Act 2000 (Act No. 26 of 2000) provides protection for both public and private sector whistleblowers. The Act makes provisions for procedures whereby which public and private sector employees may disclose information concerning unlawful or irregular conduct by an employer or an employee of that employer. The Act protects whistleblowers from occupational detriment²⁰⁴.

As per UNODC review, South Africa was found to be in compliance with article 32 (Protection of witnesses, experts and victims) and 33 (Protection of reporting persons) of the UNCAC during the first cycle of implementation review.

Several hotlines are available to the public to report information that is linked to any fraud or corruption (non-exhaustive list):²⁰⁵

- South African Anti-corruption hotline
- Special Investigating Unit Whistle-blower Hotline (anonymous)
- Presidential hotline
- Public Protector hotline
- Directorate of Priority Crime Investigation (Hawks)
- Independent Police Investigative Directorate

²⁰² UNODC South Africa Country Profile

²⁰³ Ibid.

²⁰⁴ UNODC

²⁰⁵ <https://www.gov.za/anti-corruption/hotlines>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

- Anti-Corruption Hotline

The National AntiCorruption Hotline (NACH) is a national system for reporting any form of corruption by members of the public or public sector employees. It is managed by the Public Service Commission (the PSC), which is responsible for investigating, monitoring and evaluating the organisation and administration, and personnel practices of the public service.

The National Anti-Corruption Strategy includes a dedicated Strategic Pillar One (“Citizen Participation”), which focuses on Promote and encourage active citizenry, whistleblowing, integrity and transparency in all spheres of society. The implementation programme entails measures protect and support whistleblowers and resource the whistleblowing mechanisms. As part of the outcomes of the Strategic Pillar Four (“Credible, Transparent Procurement System”) Whistleblowing relevant to corruption in procurement is incentivised and supported²⁰⁶.

Gap analysis

No gap identified.

Recommendations

Assessment criterion 14(f)(b):

There are legal provisions to protect whistle-blowers, and these are considered effective.

Conclusion: Substantive gap

Red flag: Yes

Qualitative analysis

The provisions of the Protected Disclosure Act 26 of 2000 are focused on protecting whistle-blowers from ‘occupational detriment’. The SIU and the NACH hotlines offer anonymous reporting.

Gap analysis

As reported by stakeholders, civil servants that are ethical are very scared to expose unlawful actions and come forward as whistleblowers– the risks including very real threats to their lives. The UNODC Country Report of South Africa provides background as to why whistleblowing is included in the National Anti-Corruption Strategy: “The current whistleblowing legislation provides limited protection and is perceived to be inadequate.”²⁰⁷

The Judicial Commission of Inquiry into State Capture further underscored limitation in the current system of whistleblowing. Namely, it included recommendations around the protection of whistleblowers according to Article 32(2), as part of its recommendations to related to public procurement. This would mean granting whistleblowers the same protection as offered to witnesses²⁰⁸.

The assessors conclude that the anonymity of whistleblowers may not be sufficiently protected in practice, since whistleblowers appear to be threatened personally. Once the identity of a whistleblower has been identified, further mechanisms to grant protection by law enforcement authorities should be in place.

This gap is assigned a red flag because the lack of effective whistleblower protection robs the procurement system of an important safeguard against corruption. This gap lies outside the sphere of public procurement.

²⁰⁶ National Anti-Corruption Strategy 2020-2030

²⁰⁷ UNODC Country Report South Africa (2020)

²⁰⁸ Judicial Commission of Inquiry into State Capture Report Part VI, Vol 4: All the Recommendations

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

<p>Recommendations Introduce legal protections for whistleblowers similar to those afforded for witnesses, as prescribed by UNCAC. Ensure the anonymity of disclosures.</p>
<p>Assessment criterion 14(f)(c): There is a functioning system that serves to follow up on disclosures.</p>
<p>Conclusion: Substantive gap</p>
<p>Red flag: No</p>
<p>Qualitative analysis Stakeholders in law enforcement confirm to conduct follow up on all disclosures received. The assessors have not been able to independently verify this claim.</p>
<p>Gap analysis See assessment under criterion 14(c)(b). Gaps appear in the lack of clarity regarding responsibilities for follow-up. No consolidated reporting system appears to exist.</p>
<p>Recommendations See recommendations under 14(c)(b).</p>
<p style="text-align: center;">Sub-indicator 14(g) Codes of conduct/codes of ethics and financial disclosure rules</p>
<p>Assessment criterion 14(g)(a): There is a code of conduct or ethics for government officials, with particular provisions for those involved in public financial management, including procurement.*</p>
<p>Conclusion: Substantive gap</p>
<p>Red flag: No</p>
<p>Qualitative analysis The Code of Conduct for Public Servants is included Chapter 2, Part 1, of the Public Service Regulations 2016 (amended by Public Service Amendment Regulations 2023) issued pursuant to the Public Service Act 1994. It requires public servants to adhere to the Constitution of the Republic of South Africa and other laws of the Country while performing their duties;</p> <p>The Code sets out standards of conduct for employees when they:</p> <ul style="list-style-type: none"> (a) provide services to the public; (b) perform their duties; and (c) relate to each other. <p>The Code further sets out ethical standards for employees, including rules regarding:</p> <ul style="list-style-type: none"> (i) receipt and acceptance of gifts; (ii) conducting business with an organ of state (prohibition); (iii) conflict of interest management; and (iv) performance of other remunerative work. <p>Furthermore, the Code of Conduct for Supply Chain Management Practitioners (SCM Code of Conduct), issued in PN SCM Instruction No.4 of 2003 applies to all SCM officers. It includes provision on conflict of interest,</p>

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

accountability, openness, confidentiality, and 'combative practices', i.e. unethical and illegal practices in public procurement. Provisions for bid evaluation and adjudication teams are also specified in the Code of Conduct²⁰⁹.

Quantitative analysis

** Recommended quantitative indicator to substantiate assessment of sub-indicator 14(g) Assessment criterion (a): - share of procurement entities that have a mandatory code of conduct or ethics, with particular provisions for those involved in public financial management, including procurement (in % of total number of procuring entities).*

No data

Source: Normative/regulatory function.

Gap analysis

The assessors could not locate a consolidated version of the Code of Conduct for Public Servants that takes into account the amendments of 2023. Considering that employees must be aware of the Code of Conduct and act according to its provisions, it is important to ensure easy and user-friendly access to it.

Recommendations

Facilitate access to a streamlined up-to-date Code of Conduct version of the code of conduct. Introduce regular trainings to ensure that civil servants are well acquainted with it.

Assessment criterion 14(g)(b):

The code defines accountability for decision making, and subjects decision makers to specific financial disclosure requirements.*

Conclusion: Substantive gap

Red flag: No

Qualitative analysis

The SCM Code of Conduct includes general provisions around accountability (3.1 and 3.2), but also specific accountability for AA/AO (3.3):

3.1 Practitioners are accountable for their decisions and actions to the public.

3.1 Practitioners should use public property scrupulously.

3.3 Only AA/AO or their delegates have the authority to commit the government to any transaction for the procurement of goods and services.

3.4 All transactions conducted by a practitioner in should be recorded and accounted for in an appropriate accounting system. Practitioners should not make any false or misleading entries into such a system for reason whatsoever.

Regarding financial disclosure requirements, the SCM Code of Conduct specifies that "SCM practitioners, to the extent required by their position, should declare any business, commercial and financial interests and activities undertaken for financial gain that may raise a possible conflict of interest (2.1)".

The Code of Conduct for Public Servants includes provisions for annual financial disclosure by Senior Management Service (SMS). Disclosure by other public sector employees has to be specified by the Minister (Section 17). The system for financial disclosure belongs to Department of Public Service and Administration (DPSA). Accounting officers are notified of the disclosure and can act on it, if necessary.

²⁰⁹ Code of Conduct for Supply Chain Management Practitioners, PN SCM Instruction No.4 of 2003 http://ocpo.treasury.gov.za/Resource_Centre/Legislation/SCM-PracNote%2003%204.pdf

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

In March 2017, the Minister for the Public Service and Administration issued a Determination and Directive on other categories of employees to disclose their financial interests. In terms of Regulation 18(5) which came into effect on 01 August 2016, designated employees must use the electronic (eDisclosure) system to disclose their financial interests.

Quantitative analysis

** Recommended quantitative indicator to substantiate assessment of sub-indicator 14(g) Assessment criterion (b):
- officials involved in public procurement that have filed financial disclosure forms (in % of total required by law).*

No data

Source: Normative/regulatory function.

Gap analysis

Financial disclosure requirements as per Code of Conduct for Public Servants cover only the employee in question, but not interest related to family members. It is not clear to what extent non-SMS are covered by requirements to disclose financial interests. The SCM Code of Conduct does not provide more detailed provisions in this regard.

Recommendations

Provisions for routine financial disclosure should be broader in scope, i.e. cover family members and apply to all SCM officers, not only senior management.

Assessment criterion 14(g)(c):

The code is of mandatory, and the consequences of any failure to comply are administrative or criminal.

Conclusion: No gap

Red flag: No

Qualitative analysis

The analysis by UNODC reports the following: "Failure to disclose financial interest is a misconduct. The Executive Authorities and Heads of Departments have to take disciplinary action against such employees. Depending on the severity of the transgression, sanctions include:

- A final written warning;
- Suspension without pay;
- Demotion as an alternative to dismissal; and
- Dismissal."²¹⁰

Heads of departments are, in terms of section 7(3)(b) of the Public Service Act, inter alia responsible for the efficient management and administration of their departments and the maintenance of discipline. They may therefore, after the matter has been consulted in the appropriate Chamber of the Public Service Bargaining Council, and without derogating from it, supplement the Code of Conduct provided for in this Chapter in order to provide for their unique circumstances. Heads of department should also ensure that their staff are acquainted with these measures, and that they accept and abide by them.

Non-compliance and or violation of the codes of Conduct (Code of Conduct for Public Servants and SCM Code of Conduct) are punishable by law.

Gap analysis

²¹⁰ UNODC Country Report South Africa (2020)

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

Recommendations
Assessment criterion 14(g)(d): Regular training programmes are offered to ensure sustained awareness and implementation of measures.
Conclusion: Substantive gap
Red flag: No
Qualitative analysis Training and guidelines related to financial disclosure have been provided ²¹¹ . The Public Service Commission publishes a list of resources on its website, although it is not clear which of these are still up to date. For instance, the available information about the Code of Conduct does not take into account the most recent amendments ²¹² . No information about training is available on the website of the Public Service Commission.
Gap analysis Training and available guidelines about financial disclosure have not been issued for members of the executive (cabinet members, deputy ministers, premiers and members of executive councils) ²¹³ . The assessors lack details about the kind of training, its frequency and quality. No information is available on specific training related to any code of conduct. Information available on the website of the Public Service Commission appears outdated and is not presented in a user-friendly format.
Recommendations Provide regular training on the code of conduct. Furthermore, introduce user-friendly and up-to-date guidance material. Currently users are not able to understand which guidance is in force and which one isn't.
Assessment criterion 14(g)(e): Conflict of interest statements, financial disclosure forms and information on beneficial ownership are systematically filed, accessible and utilised by decision makers to prevent corruption risks throughout the public procurement cycle.
Conclusion: Substantive gap
Red flag: No
Qualitative analysis Section 16A8.3 (a) of the Treasury Regulations of 2005 as amended states that a Supply Chain Management official or other role player must recognize and disclose any conflict of interest that may arise. Also, Treasury Regulation 16A8.4 provides that: If a supply chain management official or other role player, or any close family member, partner or associate of such official or other role player, has any private or business interest in any contract to be awarded, that official or other role player must – (a) disclose that interest; and (b) withdraw from participating in any manner whatsoever in the process relating to that contract. Furthermore, conflict of interests is monitored through the mandatory use of the Standard Bidding Document (SBD 4) to verify if bidders and their directors doing business with the state are not in the employ of the state and or whether not related to any person working within the state. These declarations are kept by the institution in

²¹¹ Ibid.

²¹² <https://www.psc.gov.za/documents/guidelines.asp>

²¹³ UNODC Country Report South Africa (2020)

Pillar IV. Accountability, Integrity and Transparency of the Public Procurement System

charge of the procurement. Internal control and internal audit are responsible for verification, while the AGSA would conduct external audit.

As of 2023, South Africa amended the Companies Regulation (Companies Amendment Regulations 2023) to require “affected companies” to establish and maintain a beneficial interest register (“BI Register”) containing information about natural persons holding a beneficial interest of 5% or more of the total number of securities issued by a company. Companies are also responsible for keeping this register up to date.

Gap analysis

Financial disclosure declarations are not sufficiently comprehensive (only senior civil servants, no family coverage). It is not clear in practice how accessible the information is, and how it used to prevent conflict of interest ex ante (internal control) or ex post (internal and external audit).

Conflict of interest declarations rely on the civil servants’ willingness to disclose.

Recommendations

Provisions for routine financial disclosure should be broader in scope, i.e. cover family members and apply to all SCM officers, not only senior management.