Position Papers on State Reform

Thematic Area 3:

Position Paper on Reforming the Public Procurement System in South Africa

DRAFT FOR COMMENT

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Prologue: Position Papers on State Reform

The position paper that follows forms part of a set of three that argue for crucial reforms of the South African state. The goals of these reforms are to realise a rigorous reduction in corruption and in the influence of patronage in South African politics, while improving the political responsiveness, efficiency, and the developmental effectiveness of its public administration.

- The present paper deals with reforms to the public procurement system in South Africa
- A second position paper argues for reforms in the appointment and removal in the Public Service and Municipalities in South Africa.
- A third paper deals with reforms to the process of appointment and removal of senior leaders to key criminal justice institutions with an investigative and prosecutorial mandate.

In his 2019 State of the Nation Address, the President recognised that "our greatest efforts to end poverty, unemployment and inequality will achieve little unless we tackle state capture and corruption in all its manifestations and in all areas of public life."[i] The President further committed government to working with South African society in the fight against these threats and in strengthening the state's ability to promote its democratic mandate and address the needs of the people. These are significant commitments. They are indicative of a widely evidenced momentum in government, and in society in general, in favour of reversing the erosion of state institutions and reaffirming the values and aspirations of the anti-apartheid project. These position papers are aligned with that momentum. They aim to contribute to the development of an overarching strategy for state reform. They do so by underlining a set of concrete institutional adjustments that aim to achieve values of integrity, democratic control, and administrative effectiveness. By identifying these specific interventions, these proposals aim to support and coordinate reform-minded politicians, public servants, and civil society actors around a targeted reform movement.

South Africa's approach to anti-corruption has emphasised the need to select more ethical leaders and to mobilise the citizenry for accountability. While these are important concerns, no country has transcended an episode of expansive corruption and patronage politics through such efforts alone. Rather, modern governance is about designing institutions in a way that minimizes reliance on the good character of leaders and citizens. It recognises that well-designed institutions ensure good people, that it is the institutions as they are that corrupts them.

Some South Africans focus on economic growth and equality, as self-standing values and as a means to reduce corruption and patronage. Undoubtedly this is necessary, but these arguments elide the extent to which corruption and patronage act as a constraint on economic advance. In contemporary conditions of globally competitive capitalism, a professional and appropriately insulated public administration has been a necessary condition for rapid development and effective redistribution.[ii] In fact, state-building and

economic development are entangled. Insulated public administrations, an important boon to economic development, can only be sustainably founded on a reliable commitment to distributing the benefits of growth to everyone. South Africa has never closed this circle.

Radically reducing corruption and patronage, establishing the official professionalism and flexibility required by the developmental state, these goals necessitate constructing a public administration that is insulated in the right sorts of ways from political interference and factionalism. In this respect South Africa should emulate all countries that have successfully overcome political crises induced by corruption and patronage. As long as politicians retain effectively unrestrained powers over appointment and promotion, opportunities and incentives will favour pressures to violate the rules in service to narrow political and private interests. Powers of appointment and promotion must therefore be checked and balanced, through the assignment of significant duties in the process to institutionally independent administrative commissions. In the same movement rules must be loosened, to enable professional public managers to perform the policy-directed, but technical function of improving South Africa.

The **first position paper, on reforming the processes for appointments and removals in South Africa's public service and municipalities** aims to ensure political control over appointment and removal processes, but simultaneously to make it difficult to manipulate appointment and removal in such a way as to build illicit or inappropriate political and personal networks in public administrations.

The **second paper on appointments and removals of senior leaders in the criminal justice sector** argues that the legal framework that governs the appointment to and removal of senior personnel from key institutions of the criminal justice system has contributed to a blurring of the political-administrative divide and has severely constrained efforts to contain corrupt practices. The paper proposes a series of reforms to the appointment and removal processes for senior leaders in the National Prosecuting Authority (NPA), the South African Police Service (SAPS), the Directorate for Priority Crime Investigation (DPCI), and the Independent Police Investigative Directorate (IPID) which aim to improve the transparency and rigour of these processes, to better guarantee their independence from partisan politics, while ensuring that the President as head of state, and the executive, retain their Constitutional powers to appoint without these powers becoming merely administrative or ceremonial in character.

The **third paper focuses on reforming the public procurement system in South Africa**: The state procurement system is a major site of corruption in the state (and in the business sector). Reforms to the public procurement system are needed, but they should, we suggest, focus on enabling the state to play its intended role in supporting economic and social development. This is a vital ingredient in reducing pressure to use state resources illicitly to build economic wherewithal. Here we propose a focus on loosening the rules to facilitate good purchasing practice and black economic empowerment, but strengthening mechanisms of contract management, including through an innovative mechanism incentivising private enforcement of contracts, to ensure that goods and services purchases are delivered and private sector capacities are built.

Reforms in the three proposed areas above are overlapping and they are mutually reinforcing. There are further areas of government that require concerted attention, such as the state-owned enterprises and other public entities. We do not deal with this subject. The reform principles developed here are relevant to public entities, but these are established under particular laws outside of the public service and will require reform measures tailored to their particular establishment. There are also problems specific to sectors, such as in education and health. Our view is that the sorts of problems that the reforms developed here intend to fix apply across sectors and are to some extent necessary to resolving their specific issues.

Further, the themes covered by these three position papers do not cover all of the reforms required in such a project – they are a start. We hope to expand from these initial papers to cover further potential areas under a state reform project, including, for example, reforms to improve the oversight role of Parliament.

The papers are informed by ongoing conversations with knowledgeable and supportive political office-bearers and public managers. They are a collective product of partnership between civil society organisations, research institutes, and individuals committed to a politics oriented around the achievement of a free and equal society, devoid of racism, sexism, and other forms of oppression and marginalisation as set out in our Constitution's founding provisions. These papers recognise the importance to this goal of a democratic, lawful, and developmental public administration. They are dedicated to supporting the construction of such an administration through activism around specific reforms with widely evidenced efficacy.

While the three position papers include concrete proposals for reform, our suggestions in this regard are likely to be refined in ongoing conversation with government, experts in the field, and wider civil society. We welcome discussion and debate on the way to an effective reform coalition.

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POSITION PAPER ON REFORMING PUBLIC PROCUREMENT IN SOUTH AFRICA

Alliance for State Reform #FixTheState

Second Draft

15 October 2019

Executive Summary

Public procurement in South Africa is significant in terms of the scope of the state functions that it operationalises and the scale of its contribution to public expenditure. The government spends almost R1 trillion annually through the public procurement system, around 1.3 times what it pays in employee compensation and 19.5 per cent of South Africa's gross domestic product. Public procurement has, as such, powerful effects on the tone and substance of South African politics and in the structure and distributions of its economy.

There is a general consensus, widely evidenced, that South Africa's public procurement system is in crisis. It exhibits high levels of non-compliance and corruption. It too often incurs fruitless and wasteful expenditure and fails to provide the right goods and services, at the right price, at the right place and time. The causal dynamics that have produced this crisis are complicated, but they can without great distortion be distilled into just five.

1. Public procurement is subject to extensive political interference which, among a range of other ramifications, has served to facilitate corruption and undermine oversight and enforcement.

2. There are major deficits in the capacity of public procurement functions, at both regulatory and operational levels. The system does not have sufficiently skilled public procurement personnel, in sufficient numbers, employed within appropriately designed organisational structures.

3. Public procurement is subject to an excessively complicated, fragmented, and often inconsistent regulatory regime, which often creates operational inefficiency, gridlock, and confusion even where there is integrity and professionalism.

4. And related to the third point, **public procurement involves stark trade-offs between the procedural integrity necessary for fairness and to protect public funds, and the flexibility associated with the operational substance of purchasing.** South African public procurement has struck a non-optimal balance between these competing imperatives. Focused primarily on the dictates of public financial management and in ad hoc attempts to ensure compliance in the absence of robust enforcement actions, public procurement regulators have tightened the construction and interpretation of rules and procedures. The result has been only limited, if any, gains in integrity, while creating impediments for smooth procurement operations.

5. There is a mismatch between this general approach to regulation and government's commitment to using public procurement to achieve social and developmental objectives. Central here is the prevalence of annual competitive methods, for small contracts, when building private sector

capacities tends to require longer-term relational methods, with contracts that facilitate the attainment of economies of scale.

The position paper develops its proposals with regards for these causes and the contingencies of supporting reform from outside of government. There are seven proposals.

In relation to data and transparency, currently poorly provided for and a problem for assessing deterioration and improvement in procurement performance:

Proposal 1: National Treasury should update the public on progress and time frames for the implementation of its Integrated Financial Management System. It should report on investigations being conducted into the procurement of the new system and on processes for consequence management.
Proposal 2: The Office of the Chief Procurement Officer (O-CPO) should develop, with relevant stakeholders, then publish and commit to a schedule of data that will be collected and kept on a longitudinal basis.
Proposal 3: The O-CPO should commit to an open data and open contracting standard, publishing procurement information in accordance with a schedule developed with relevant stakeholders.

Considering that insulation of the public procurement function is currently addressed in other position papers, proposals in relation to capacitation and professionalisation are:

Proposal 4: The National Treasury and the O-CPO should conduct a scientific study of work in relation to the task of reforming and directing, monitoring, supporting, and enforcing the development of the procurement system. It should present a business case for bringing the O-CPO up to a staff complement and skills mix appropriate to these efforts.
Proposal 5: The Supply Chain Management (SCM) Interim Council should commit to keeping [the association; Alliance for State Reform] informed as to its vision and road map for professionalisation. The [Alliance] should commit to assisting the SCM Interim Council in realising this vision, leveraging its contacts in broader society.

In relation to cohering the legal landscape and providing the legal underpinnings for public procurement reform, a new Public Procurement Bill should provide for the following:

Proposal 6: A single statute for public procurement should be legislated, incorporating and providing for the repeal of all other statutes dealing with public procurement. It should, in addition, provide for the following:
(1) A single public procurement regulatory authority with jurisdiction over the whole public procurement system, including all organs of state currently under the Public Finance Management Act and the Municipal Finance Management Act.
(2) The insulation of this single authority from political interference, either by retaining it within the National Treasury or providing special protections against political interference over and above those of an ordinary, independent public entity.
(3) A flexible set of procurement principles and methods, i.e. just, open, limited and direct methods, which can be defined and combined into a broader set of methods, which can be incrementally differentiated along lines of product, sector and so on, in the course of evolving a principles-based, strategic and developmental procurement system.

(4) The statute should open the door to the inclusion of a wider set of goals in procurement processes, including in adjudication to go beyond simply price and preference to include functionality, life-cycle costs, industrial development, employment, green procurement, and so on.
(5) The public procurement regulator should have stronger powers to compel organs of state into transversal contracts.
(6) It should be able to set price-bands within which purchases must fit, e.g. between R50 and R80 for a ream of 500 pages of A4 white paper.
(7) The statute should, as per Proposal 5 above, establish the Supply Chain Management Council, as a professional body with the relevant powers and functions.
(8) The statute should, as per Proposal 3, include a justiciable open contracting and open data provision for public procurement.
(9) The statute should establish the basis for modern *qui tam* actions, granting private persons a general right to enforce public procurement law, and incentivising private action through guaranteed minima for civil recoveries.

Sub-clauses **(3)**, **(4)**, **(5)**, and **(6)** create opportunities for striking a better balance between concerns with procedural integrity and the need for operational flexibility in public procurement. They open out into a vision of what is defined here as a principles-based, strategic and developmental procurement system, which the position paper gestures towards incrementally creating.

In relation to enforcement, to cover gaps in governmental will and capacity, the position paper argues for the inclusion in statute of a general private right to enforce public procurement law. This should be by civil actions for recovery of damages that result from procurement fraud, incentivised by a guaranteed minimum share of recoveries. The mechanism is tried and tested in other countries and is known as *qui tam*:

Proposal 7: Government must include a qui tam provision in the upcoming Public Procurement Bill. The [Alliance for State Reform] will commit to drawing on local and international expertise to draft this provision. Beyond this, the O-CPO should conduct a business case defining the institutional parameters and capacity-requirements for the operationalisation of a qui tam provision, with which the [Alliance for State Reform] will also assist.

1. Introduction

The position paper that follows forms part of a broader set that argues for specific, crucial reforms of the South African state. The goals of these reforms are to realise a rigorous reduction in corruption and in the influence of patronage in South African politics, while improving the democratic responsiveness, efficiency and the developmental effectiveness of its public administration. The present paper deals with public procurement. It should be read in conjunction with the position papers on personnel practices in the public service, municipalities and other organs of state.

In 2012, in his budget speech, then Minister of Finance Pravin Gordhan announced the formation in the National Treasury of an Office of the Chief Procurement Officer (O-CPO).[1] In his 2013 budget speech, Gordhan declared that through this vehicle there would be a wider reform push. He followed up with an unprecedented acknowledgement of the political challenges involved:

[1] *2012 Budget Speech By Minister of Finance Pravin Gordhan* [Web log post]. (2012, February 22). Accessed 10 October 2019 at https://www.gov.za/2012-budget-speech-minister-finance-pravin-gordhan

> Let me be frank. This is a difficult task with too many points of resistance!... While our ablest civil servants have had great difficulty in optimising procurement, it has yielded rich pickings for those who seek to exploit it. There are also too many people who have a stake in keeping the system the way it is. Our solutions, hitherto, have not matched the size and complexity of the challenge… This is going to take a special effort from all of us in Government, assisted by people in business and broader society.[2]

Six years later, important advances have been made in capacitating the O-CPO, in reviewing existing high-value and long-term contracts for the recovery of monies fraudulently obtained and for renegotiating the terms of contracts, in intelligently optimising supplier registration, tendering, and transversal contracting through the *gcommerce* platform, central supplier database, and the e-tender portal. These advances, however, have not been sufficient. The O-CPO and its supporters have operated under the constraint of periodic and intense political pressure. Progress has been too slow.

In response, a political push is necessary. The present position paper picks up the call for mobilising people in broader society behind public procurement reform. It intends to be a collective product, informed by and giving rise to ongoing conversations and actions. Reform-minded civil society, unionists and business people, while they cannot feasibly co-direct all the technicalities of public procurement reform, can and must develop a strategy for applying pressure to push it in the right general direction. Reform-minded politicians and public administrators, in contemporary conditions, need a bulwark in broader society in order to do their work, they need to be pushed beyond what they otherwise might believe to be impossible. It is for this role, as internal and external pressure group, that the following concrete proposals for public procurement reform are drafted.

2. Background on Public Procurement in South Africa

2.1. The historical evolution of the South African procurement system

South Africa under apartheid operated a classically centralised procurement regime, with national functions vested in a State Tender Board, able to delegate to departments and other entities, together with alternative arrangements for security-related purchasing and state-owned enterprises. Provincial and local governments, as well as the plethora of segregated administrations, operated similar systems. Tender boards were generally, but not always, composed of political representatives, state officials, and corporatised interests such as business, industry, professional and other associations. These interests engaged directly in the allocation of tenders, the idea being that each could balance the others to produce relatively impartial distributions. They favoured open competitive tenders, but operated relatively loosely and delegated widely, with departures from the lowest-priced rule being common. The procurement system veered strongly towards larger, better established businesses, appointed – on relatively long-term contracts – features institutionalised in item specifications, in norms, standards, rules and procedures. Public procurement, in even more direct ways, was exclusively for white businesses, with access for black business expanding only gradually from the 1960s in segregated administrations, then in some cases in historically white administrations in the years immediately preceding 1994 (Brunette et al. 2019).

The system was widely and justly condemned for its racial bias. It was generally and correctly understood that the central tender boards acted as a bottleneck on service delivery and matched the

[2] *2012 Budget Speech By Minister of Finance Pravin Gordhan* [Web log post]. (2013, February 27). Accessed 10 October 2019 at http://www.treasury.gov.za/documents/national%20budget/2013/speech/speech.pdf

specific needs of user departments, often poorly. Public procurement reform, therefore, moved on to the post-apartheid government's agenda quickly. The Department of Public Works and the National Treasury, supported by a jointly-establish Procurement Forum, led the endeavour. By 1997, these produced the Green Paper on Public Sector Procurement Reform. It advocated for, and successfully pointed the way toward breaking up the tender boards, with public procurement managerial powers devolved, under the Public Finance Management Act and the Municipal Finance Management Act, to the accounting officers and authorities of the departments and other organs of state. Simultaneously, the Green Paper argued for – and this was also widely implemented – simplifying procurement procedures and documentation, reducing or eliminating upfront costs such as performance guarantees and the price of purchase of bid packs, and unbundling large contracts – all intended to facilitate the participation of smaller, emerging suppliers. Preferential procurement, written into the 1996 Constitution as s217(2), would be mobilised to address the inequalities generated by colonialism and apartheid. The Preferential Procurement Policy Framework Act (PPPFA) of 2000 would formalise this in a rigid, 80-20, 90-10, price and preference points system. The PPPFA would be aligned with and become a keystone of broad-based black economic empowerment legislation.

The Green Paper also emphasised the need for a more sophisticated, regulatory approach. It argued for the creation of a National Procurement Compliance Office able to steer the process of reform and the evolution of the procurement system through robust powers and functions of standard-setting, monitoring, and enforcement.[3] The Office was never created. The Green Paper, even then, left its institutional location undecided. Instead, dedicated public procurement regulatory authority was demoted to National Treasury's residual, multi-purpose Specialist Functions division. Relevant regulatory powers were also dispersed across a number of National Treasury divisions and beyond, into such entities as the Construction Industry Development Board under the Department of Public Works, responsible for regulating construction procurement.

The creation in 2013 of the O-CPO heralded a process of elevation and integration of earlier submerged and disaggregated public procurement regulatory powers and functions. The major reform effort announced in the budget speech of that year was a continuation of a reform process begun almost two decades earlier.[4]

2.2. The importance and scale of public procurement

Over the last few decades, especially from the 1980s, states around the globe have made fundamental changes to the ways in which they administer their public functions. An important feature of those changes has been a shift from direct provision of services by the state's own personnel, in-house, toward indirect provision through the contracting of private providers, which is to say, out-sourcing. South Africa has been no exception to this trend.[5]

Public servants widely report a massive expansion of the scope of public functions that are now contracted out. Often this has extended into what are ordinarily considered the core public functions. Policy design and analysis processes are often outsourced. It is common for consultants to finalise

[3] *Notice 691 of 1997: Green Paper on Public Sector Procurement Reform in South Africa*. [Web log post]. (1997, April). Accesssed on 10 October 2019 at https://www.gov.za/sites/default/files/gcis_document/201409/17928gen6910.pdf

[4] Brunette, R., J. Klaaren and P. Nqaba (2019) 'Reform in the Contract State: Embedded Directions in Public Procurement Regulation in South Africa'. *Development Southern Africa*; see https://pdfs.semanticscholar.org/86b5/f274722ec8afeb18d389a3725630504fcfce.pdf

[5] Brunette, R. (2014) 'The Contract State: Outsourcing & Decentralisation in Contemporary South Africa'. A PARI report. Johannesburg: Public Affairs Research Institute; see http://www.pari.org.za/wp-content/uploads/PARI-The-Contract-State-01082014.pdf.

basic documents such as Integrated Development Plans and financial statements. They are generally central to the formulation and implementation of major administrative reform initiatives. Officials in administrative and technical operations report that they spend more and more time in the specification and management of contracts and that even the capacity to perform these functions has been hollowed out by excessive recourse to contracting, which excludes personnel from implementation work, thereby undermines learning and broader career prospects, and so makes state employment a less attractive prospect for young professionals. Actually, the contracting function itself is often contracted out, to so-called and often infamous 'purchasing management units'.

The scale of South African public procurement can also be measured quantitatively. In 2017, using South African Reserve Bank statistics, R967 billion went through public procurement. In the preceding two decades, public sector procurement expenditure rose in relation to total employee compensation, from a ratio of 0.97 to 1.3. In the same time, public procurement as a proportion of gross domestic product increased almost five percentage points, from 14.79 per cent to 19.5 per cent. In 2017 almost one-fifth of the South African economy passed through public contracts.[6]

The significance of the public procurement system to South Africa goes beyond its broad scope and huge size. Public procurement has been an increasingly important feature of public administration, but it has also been an increasingly important factor in politics. Political competition for public office – it is by now universally recognised – is often about access to public procurement opportunities. Preferential procurement operates in accordance with a company's B-BBEE score, which includes the extent to which companies themselves contract to suppliers with high scores. Public procurement, therefore, cascades across the South African economy, constituting a massive lever for its demographic and structural transformation.[7] A second important extension of public procurement into economic policy occurs by way of the Department of Trade and Industry's local content programme, where a percentage of the price of public tenders must go to local producers.

3. The Problems of Public Procurement in South Africa

There has been a lamentable paucity of large-scale and quantitative data – published and indeed within the public service – on the general performance of South Africa's public procurement system. The O-CPO has itself alluded to some of the reasons why. It notes that there has been a proliferation of information and communication infrastructures and procedures dealing with public procurement, but also with related areas like public finance, personnel, logistics, taxation, company registration and so on. It argues that the failure to ensure uniformity and integration between these infrastructures has created problems for data quality, comprehensiveness and measurement, undermining comparability between organs of state and across time.[8] This has not hindered, and it should not be allowed to hinder, the development of a thoroughgoing reform effort. Certainly, more precise and comprehensive evidence can aid reform. Its systematic and continuous development ought to be an object of reform. Information, however, has costs in terms of time and money. Knowledge is never complete. There is an irreducible element of uncertainty in all reform decisions. Calls for more

[6] Brunette, R., J. Klaaren and P. Nqaba (2019) 'Reform in the Contract State: Embedded Directions in Public Procurement Regulation in South Africa'. *Development Southern Africa*; see https://pdfs.semanticscholar.org/86b5/f274722ec8afeb18d389a3725630504fcfce.pdf

[7] Bolton, P. (2006) 'Government Procurement as a Policy Tool in South Africa'. *Journal of Public Procurement* 6(3): pp. 193–217.

[8] National Treasury (2015) *Public Sector Supply Chain Management Review.* Accessed on 10 October 2019 at http://www.treasury.gov.za/publications/other/SCMR%20REPORT%202015.pdf

evidence, therefore, can amount to a counsel of perfection against pragmatism, a recipe for conservatism rather than progressive advance.[9]

The extent and variety of the available evidence – from Auditor General reports, from existing and too often confidentially-held government studies and investigations, from the public statements of governmental actors, from wide-ranging academic interview and news media exposé – is such as to render public procurement reform a matter of urgency. On the basis of such evidence, there has emerged a general consensus that public procurement has descended into a veritable crisis of non-compliance, corruption and operational inability to secure the right goods and services, at the right price, in the right place, at the right time. Public procurement is producing large, deleterious effects in the tone and substance of South African politics. While there is ample reason to believe that it has facilitated a significant redistribution of market share, managerial responsibility and employment in the economy, there are grounds for arguing that it has not done enough and that it too often fails to produce foster suppliers that are sustainable and productive.

It can be argued, furthermore, again from those sources of evidence, as well as international experience, that positive changes to this system can be developed based on what we already know about the causal underpinnings of the crisis in public procurement. More than that, in all actually existing policy processes, evidence-gathering doesn't simply precede implementation, rather they are interwoven, in the sense that *implementation also precedes evidence*. Put another way, one sees how something 'works' by making incremental adjustments to it. The sorts of institutional adjustments advocated here are, like experiments in physics, ways of rearranging variables in order to illuminate causality. They are, again, ways of doing so that are by available evidence more than likely to improve the public procurement system, chosen and designed so as to produce minimal expense and disruption.

4. Causes of the Problem

The South African public procurement system – operated by over a thousand organs of state, that delegate to tens of thousands of divisions, field offices, schools, hospitals, and so on, with hundreds of thousands of registered suppliers entering over two million transactions annually – is complicated. The causes of its problems, however, can without great violence to this complexity be reduced to just five.

4.1. Political interference and a lack of enforcement

The first cause of problems in public procurement is **political interference in procurement operations**, which is enabled by the system of political control over appointments, promotions, and dismissals across South Africa's public administration.

Integrity in public procurement relies on a system of checks and balances. In South Africa, the division of responsibilities across the stages of the procurement process between end-user departments, supply chain management units, bid specification committees, bid evaluation committees and bid adjudication committees – not to mention a range of oversight authorities – aims to achieve this. The idea is that no single person or group can control outcomes across stages and, thereby, direct

[9] See Simon, H.A. (1947) *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organization*. New York, N.Y.: Macmillan Inc.; March J.G. and H.A. Simon (1958) *Organizations*. Hoboken, N.J.: John Wiley and Sons Inc.

contracts illicitly to themselves or their connections. Where small groups of politicians, however, can appoint their allies at the key points across this process, and otherwise bend public servants into submission by threats of curtailment of their career prospects and more, then the system of checks and balances wholly ceases to function. The stages of the process are bridged by political appointments.

It is evident that this sort of politicisation of essentially administrative procurement operations is a pervasive feature of South Africa's system. It is, being additionally extended into the criminal justice system, a fundamental cause of the lack of enforcement to compliance in the public procurement system and the consequent erosion of rules, procedures, and discipline associated with corruption. In turn, the result is a loss of control that has become a major impediment to operational efficacy and to incentivising the formation of sustainable and high-level capacities in suppliers. Political interference and how to address it is the subject matter of the position papers on personnel practices in the public service and municipalities and in the criminal justice institutions. Being dealt with there, this position paper focuses on causes and solutions more specific to public procurement.

4.2. A lack of capacity

A second cause, in part interlinked with the first, is **a lack of capacity within regulatory authorities and procuring entities**, which is to say a lack of sufficiently skilled public procurement personnel, in sufficient numbers, employed within appropriately designed organisational structures. Public procurement has grown in scope and scale. Non-compliance, corruption and poor performance have attained epidemic proportions. Efforts to adequately staff and train public procurement regulation and operations are not commensurate with the enormity of the problem.

The O-CPO is charged with modernising and regulating a procurement system that churns out as many as a million contracts annually. In 2016, it had just 68 employees. The provincial treasuries operate supply chain management support units that complement the O-CPO in provinces and so-called 'delegated' municipalities, which include all except 17 of South Africa's largest municipalities. These units had 204 employees, bringing the combined total to 272 employees. Funded posts amounted to 374, with vacancies therefore at 27 per cent. A large number of these employees are directly involved in procurement processes, transversal contracting, the establishment and maintenance of information and communication technology systems, etc. Just 157 employees were involved in classically regulatory functions of policy, norms and standards, monitoring, supporting and enforcing. Employees tend to have reasonable levels of educational attainment, most have postgraduate qualifications, but very few have extensive formal education in procurement or closely related fields such as supply chain management and logistics. Very few are members of public procurement professional bodies, specifically the Chartered Institute of Procurement and Supply (CIPS).

A number of other state employees, in divisions like the Office of the Accountant General in the National Treasury, in other entities like the Auditor General and the Construction Industry Development Board, deal with public procurement regulation, as part of more general responsibilities and focusing on particular aspects. There are strong arguments, however, based on subject matter specificity and specialisation, for dedicated public procurement regulation, and this has seemingly been woefully under-capacitated. The O-CPO reports, for instance, that in the ten months preceding February 2018, 2704 state employees were doing business with the state, obtaining R8 billion in payments. Due to gaps in the data this understates the actual figures for employees doing business

with the state.[10] In fact, regulations prohibiting state employees from doing business with the state only cover the tip of a vast and unquantifiable iceberg – the ordinary practice being to instead register family members, friends and other personal and political relations as directors of businesses. In 2016, in the O-CPO and provincial treasuries, in relation to that sort of workload, only 55 personnel dealt specifically with public procurement monitoring and compliance.

Public procurement practitioners involved in operations in broader organs of state display a similar profile of skills and professionalisation. They are, that is, relatively well-educated, but not widely in procurement and related fields. They are generally not enrolled in public procurement professional bodies. Anecdotally, personnel numbers in relation to workload are more closely aligned here, but people involved in procurement processes do often report in interview that due diligence is attenuated by overburdening. Earlier and later stages in supply chain processes are often neglected in organisational design and staffing. In other words, organs of state focus attention on purchasing and logistics, while not adequately addressing demand management, procurement planning, contract management and performance evaluation.

There is, furthermore, the issue of over-outsourcing, where professionals such as engineers and architects report being reduced to glorified contract managers, with associated loss of skill and numbers and a consequent hollowing out of even public procurement capacity. These concerns require more dedicated study, which will be dealt with in the proposals below.

4.3. An excessively complicated, fragmented, and inconsistent legal regime

A third cause is the current state of the legal regime for public procurement. **South Africa's public procurement laws constitute a regulatory framework that is unnecessarily complicated, fragmented and inconsistent.** While the four most important statutes are the Public Finance Management Act, the Municipal Finance Management Act, the Preferential Procurement Policy Framework Act and the Construction Industry Development Board Act, many of the significant and decisive rules are contained in diverse sector statutes. There exists something like 22 pieces of primary legislation dealing with public procurement in a significant way. Regulatory authority, including to set legal rules, is dispersed across multiple national organs of state, most importantly the National Treasury and the Construction Industry Development Board. An unsystematic and uncoordinated approach to legal elaboration, often the result of ad hoc responses to emerging problems of corruption and poor performance, has produced subordinate legislation that brings the total of distinct pieces of law to around 85. There is uncertainty as to the legal status of instruments at the lower end of this regulatory architecture. The binding character of National Treasury practice notes and guidance documents is sometimes asserted but open to question.[11]

There is real difficulty, even for those experienced and expert in public procurement, to determine which laws are applicable to which intended procurements. Procurement practitioners, forced to cobble procedure together from this welter of regulation, often come out with incoherent processes that are open to court challenge. The complexity of the regulatory framework – combined with a general lack of consequence management – further disincentivises compliance, disrupts routine, and

[10] National Treasury (2018) *State Employees Conducting Business With Government.* Accessed on 11 October 2019 at http://ocpo.treasury.gov.za/Resource_Centre/Publications/Report%20Employees%20of%20State%20doing%20business%20with%20government.pdf

[11] Quinot, G. (2014) 'An Institutional Legal Structure for Regulating Public Procurement in South Africa'. A DFC S.A.U. report. See http://africanprocurementlaw.org/wp-content/uploads/2016/01/OCPO-Final-Report-APPRRU-Web-Secure.pdf

so undermines control. Unnecessary differentiation of procurement procedure across different organs of state makes it more costly to train procurement practitioners and therefore to capacitate functions.

4.4. A poorly optimised relationship between integrity and flexibility in the construction and application of rules

The regime doesn't only exhibit an excessively complex, fragmented and inconsistent legislative framework. **Public procurement involves stark trade-offs** between the procedural integrity necessary for fairness and to protect public funds, and the flexibility associated with the operational substance of purchasing. A fourth cause of problems in public procurement in South Africa is that the balance that has been struck between procedural integrity and operational flexibility has not been optimal.

The provenance of this reality is comprehensible. In South Africa, as a result of its British administrative inheritance, public procurement has traditionally been understood as a public financial competency. It was noted above that in terms of the Constitution and subsequent legislation and practice, public procurement regulation was not only placed within the National Treasury, it was also effectively demoted from an agency, the State Tender Board, responsible to the Minister of Finance, to a series of sub-divisions, known as the SCM Office, within the Specialist Functions branch of National Treasury. When procurement operations were themselves decentralised to procuring organs of state, these were guided toward placing their SCM units under these organisations' chief financial officers. Procurement practitioners would therefore struggle to express themselves in public procurement policy processes. Public financial management, more concerned with integrity – increasingly inordinately so, given the growing crisis of non-compliance and corruption – would subordinate public procurement to its own logic. National Treasury, the Auditor General, and related agents of regulation would increasingly tighten interpretations of rules and procedures. Public procurement's operational substance tended in this process to be displaced.

The legal framework public procurement provides, for instance, for some necessary flexibility in choice of purchasing method and for deviations. A rigid compliance orientation, however, has tended increasingly to constrain these possibilities and fix procurement processes in austerely defined procedures and timeframes. The PPPFA, as interpreted by the courts, excludes functionality as an adjudication criterion, confining purchasing decisions to price and preference, which makes it exceedingly difficult to secure the right goods and services where products are complex and highly differentiated. Justifications for deviations are often too strictly construed, especially given capacity constraints in drawing them up. To the extent that this tightening is the only mechanism available to public financial regulators for improving compliance, it is understandable.

Stricter rules, however, are a problematic substitute for enforcement. The reality is, inevitably, that the resulting rigidity has simply constrained practitioners with integrity, who already intend to follow the rules and procedures. Politicians and public administrators who have bridged checks and balances with their political connections are still able to break the rules with impunity. In fact, they have often used them to pull power away from practitioners with more operational concerns. So, corruption and anti-corruption have eaten at public procurement from both ends. The inefficiencies associated with corruption have been augmented by the inefficiencies associated with anti-corruption.[12]

[12] Brunette, R., J. Klaaren and P. Nqaba (2019) 'Reform in the Contract State: Embedded Directions in Public Procurement Regulation in South Africa'. *Development Southern Africa*; see https://pdfs.semanticscholar.org/86b5/f274722ec8afeb18d389a3725630504fcfce.pdf

4.5. The failure to match procurement procedure to developmental objectives

The fourth cause is related to a fifth, involving a mismatch between procurement operations and the development objectives to which public procurement in South Africa is being put. South Africa is committed to using public procurement to foster the formation and viability of firms that are owned, operated, and staffed at all levels by categories of previously disadvantaged people, and that assist in developing the capacities of disadvantaged people through skills development, supplier and enterprise development, and broader socio-economic development efforts. The Department of Trade and Industry has developed the local content programme to leverage public procurement for purposes of industrial development.

The government has not maintained a comprehensive time-series of the extent to which these objects have been achieved, but the data available suggests significant gains, even if these can be improved on. In 2018, the O-CPO reported that 66% of registered supplier were B-BBEE Level 1, the highest level of contribution to black economic empowerment. 57% of suppliers were majority owned by black people, 22% were majority owned by black women, 23% were majority owned by youth, and 18% were majority owned by black people living in rural areas or townships.[13] It is reasonable to suppose that many suppliers were still in the process of updating their credentials on the Central Supplier Database from which these figures were drawn. O-CPO statistics, admittedly incomplete, drawn from government's payment system indicate that in the last eight months of 2017, 36% of national and provincial procurement budgets went to level 1 contributors, a further 17% went to level 2 contributors, and that the total up to level 4 contributors was 75%.[14] Gaps in the data notwithstanding, it seems clear that the country has not achieved demographic parity in public contracting, but it is equally apparent that it is on the way to doing so. Between March 2015 and July 2017, it reports that R59.95 million was "locked into the country" by the local content programme.[15] So, although it can be assumed that a much larger proportion of the procurement budget is spent domestically, the local content programme itself doesn't breach 5% of it.

There are, beyond these absolute figures, serious questions to ask about the viability of the firms being fostered on public procurement. Government contracting is, again, highly politicised. Where suppliers are politically or personally connected, political and personal considerations will tend to attenuate good procurement planning, specification, contracting and performance management. Deficits in administrative capacity can result in a similar looseness. Where procurement plans are unpublished and unreliable, and where suppliers are subject to political caprice, then they won't have the certainty necessary to invest in productive capacities. Where suppliers aren't reliably and rigorously compelled to perform on contract and at an appropriate level, they are unlikely to build the productive capacities necessary for doing so. Middle-man suppliers – which function simply by purchasing supplies and services in the market and then selling these to government at a mark-up – are common. Many suppliers that win contracts amount to little more than shelf-companies. Cutting corners in contracting processes is in fact rife.

The issue, however, is not just one of a failure to construct compliant and capacitated procurement functions. There is a broader mismatch between the basics of the public procurement regulatory regime and its expressed developmental objectives. Centrally, the regulatory regime favours annual

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13 http://ocpo.treasury.gov.za/Resource_Centre/Publications/Report%20State%20of%20Gov%20Suppliers%20Report.pdf

14 http://ocpo.treasury.gov.za/Resource_Centre/Publications/2018%20State%20of%20procurement%20spent.pdf

15 https://www.gov.za/sites/default/files/gcis_document/201805/industrial-policy-action-plan.pdf

contracting, through competitive processes, where contracts are small and competition is on the basis of price and preference as defined in B-BBEE scores. In most areas a year is too short a time frame to foster a supplier's productive capacities. Indeed, short time horizons encourage suppliers to seek quick profits by depressing production costs. The level of competition in South Africa is often so intense as to be destructive. It is not uncommon for hundreds of suppliers to vie for a single tender, often pushing prices below the costs of production in the hope that this can be made up later with contract deviations and the cutting of corners. Contracts are unbundled to smaller suppliers with little regard for attaining the economies of scale needed by competitive enterprises. The focus on price marginalises functionality and broader value-for-money. Preferences are rigidly fixed in statute and B-BBEE scoring applies to the whole firm instead of to its offer on a specific tender, which means that the system doesn't fully explore opportunities for maximising black economic empowerment on contracts where associated costs can be minimised.

5. Reform Proposals for a Reform Movement

The O-CPO and the National Treasury are involved in an ongoing reform drive, which should be supported and, where appropriate, built upon. The following proposals, responsive to the causes of problems in public procurement described above, are crafted with an eye to performing this external, pressure and facilitation role.

5.1. Data and transparency

The O-CPO has begun to publish reports on the state of the public procurement system. The construction of a the gcommerce platform, central supplier database, and the e-tender portal offer welcome opportunities for generating rich, longitudinal data about this system. Maximising opportunities here is made difficult by the archaic, unintegrated, and deteriorating character of government's broader information technology systems, most prominently BAS (the accounting system), PERSAL (personnel), and LOGIS (logistics). The State Information Technology Agency, National Treasury, and the Department of Public Service and Administration have been working on modernising its information technology with an Integrated Financial Management System. Progress has been slow and the procurement process for this new system has itself been mired in allegations of corruption. The O-CPO has not given any indication as to what data it is collecting and whether it plans to do so over a sufficiently long period to begin to discern trends in public procurement. The first two proposals follow from these considerations.

Proposal 1: National Treasury should update the public on progress and time frames for the implementation of its Integrated Financial Management System. It should report on investigations being conducted into the procurement of the new system and on processes for consequence management.

Proposal 2: The O-CPO should develop, with relevant stakeholders, then publish and commit to a schedule of data that will be collected and kept on a longitudinal basis.

The new information technology dealing with public procurement also offers opportunities for publishing data and other information on the procurement system and, in fact, on procurement processes in real time. Currently, too much valuable information is not in the public domain. Much more can be done to promote transparency in South Africa's public procurement, along the lines of such international initiatives as the Open Contracting Partnership and the Construction Industry Transparency Initiative.

Proposal 3: The O-CPO should commit to an open data and open contracting standard, publishing procurement information in accordance with a schedule developed with relevant stakeholders.

5.2. Insulating, capacitating, and professionalising public procurement

Politicians, who have the power to set overarching laws and policies and to direct their impartial implementation, should not be directly involved in decision-making in procurement operations. Procurement is a quintessentially administrative function. Public procurement reformers must be centrally concerned, then, with insulating public procurement processes from political interference. What this entails is supporting the proposals contained in the position papers on personnel practices.

Public procurement policy is more directly related to issues of capacitation and professionalisation. In regard to capacitation, it seems clear that the O-CPO needs to build more internal capacity, necessary to design and drive the modernisation process and to monitor, investigate and ensure compliance and anti-corruption. A number of the proposals offered here require further, although not prohibitive, outlays for staff. Generating data and monitoring trends and emerging issues in public procurement requires work hours, as does, for instance, maintaining transparency of the system. Budget formulators may balk at extra expenditure, but it cannot be that austerity becomes a justification for not spending money that will have the effect of saving money.

Proposal 4: The National Treasury and the O-CPO should conduct a scientific study of work in relation to the task of reforming and directing, monitoring, supporting, and enforcing the development of the procurement system. It should present a business case for bringing the O-CPO up to a staff complement and skills mix appropriate to these efforts.

It is likely that a similar initiative is necessary for provincial treasuries and for procuring organs of state themselves. The same can be said for discerning the appropriate balance between in-sourcing and out-sourcing in organs of state. These will necessarily require a longer-term, more decentralised and difficult process, which the O-CPO can begin to address by generating and publishing data on capacity as per proposals 2 and 3. A movement for state reform would need to generate a dedicated plan of action if it wishes to support this kind of work.

In the area of professionalisation, the National Treasury has recently established a Supply Chain Management Interim Council responsible for developing a roadmap for the achievement of public sector supply chain professionalisation and coordinating stakeholders into the effort. The Interim Council has a bearing on political interference, inasmuch as membership in professional bodies and the induction of procurement practitioners into the norms and standards of professionalism will create resources for and inclinations toward resistance to unwarranted political interference. Professional requirements for training and continuous education has obvious, important consequences for capacitation. There is considerable scope for a broader set of actors to assist the Council in its work, especially by lobbying professional organisations and universities to develop appropriate supply chain management programmes.

Proposal 5: The SCM Interim Council should commit to keeping [the association; Alliance for State Reform] informed as to its vision and road map for professionalisation. The [Alliance] should commit to assisting the SCM Interim Council in realising this vision, leveraging its contacts in broader society.

5.3. The legislation of a single public procurement statute cohering and providing for the reform of the public procurement legal landscape and system

Since 2016, government has been committed to the introduction into Parliament of a Public Procurement Bill. The Minister of Finance has promised to table it in Parliament in the course of the current financial year. The Bill is responsive to the problems of fragmentation and inconsistency in the present public procurement legal framework. It will play a significant role in enabling and constraining the process of wider reform, including for the proposals contained in this position paper. It will have a number of moving parts, some quite technical and probably beyond the scope of a broader societal movement for public procurement reform.

The key statutory proposals of such a movement should be as follows. Some of the sub-clauses of this proposal will be elaborated on in sub-sections below.

Proposal 6: A single statute for public procurement should be legislated, incorporating and providing for the repeal of all other statutes dealing with public procurement. It should, in addition, provide for the following:
(1) A single public procurement regulatory authority with jurisdiction over the whole public procurement system, including all organs of state currently under the Public Finance Management Act and the Municipal Finance Management Act.
(2) The insulation of this single authority from political interference, either by retaining it within the National Treasury or providing special protections against political interference over and above those of an ordinary, independent public entity.
(3) A flexible set of procurement principles and methods, i.e. just open, limited, and direct methods, which can be defined and combined into a broader set of methods, which can be incrementally differentiated along lines of product, sector, and so on, in the course of evolving a principles-based, strategic, and developmental procurement system.
(4) The statute should open the door to the inclusion of a wider set of goals in procurement processes, including in adjudication to go beyond simply price and preference to include functionality, life-cycle costs, industrial development, employment, green procurement, and so on.
(5) The public procurement regulator should have stronger powers to compel organs of state into transversal contracts.
(6) It should be able to set price-bands within which purchases must fit, e.g. between R50 and R80 for a ream of 500 pages of A4 white paper.
(7) The statute should, as per Proposal 5 above, establish the Supply Chain Management Council, as a professional body with the relevant powers and functions.
(8) The statute should, as per Proposal 3, include a justiciable open contracting and open data provision for public procurement.
(9) The statute should establish the basis for modern qui tam actions, giving a private right to enforce public procurement law, and incentivising private action through guaranteed minima for civil recoveries.

5.4. The establishment of a single regulatory authority with jurisdiction over the whole public procurement system

The O-CPO needs to be empowered to drive the process of cohering and continuously adjusting the public procurement system. It must have the powers necessary to do so across the whole public procurement system, in provincial and local government and the public entities. What this may involve is subsuming all or certain of the powers of such regulators as the Construction Industry Development Board and the State Information Technology Agency. It might work with the provincial treasuries,

which have occasionally been important sources of experimentation and innovation in the public procurement system, but with a clear, if arms-length, line of authority running from the O-CPO down. These concerns cohere with Proposal 6.1 above.

A constant and recurring topic of debate amongst reformers of public procurement, going back to the Green Paper, is the appropriate location of this regulatory authority. Currently, the O-CPO is the main contender, but its position must be formalised in statute. The O-CPO, as presently instituted, has the advantages that it can ride on the powers of National Treasury under section 216 of the Constitution, it can draw on its capacity and prestige, and perhaps most importantly it can benefit from the relative autonomy of National Treasury from political interference. It has been argued, not implausibly, that although progress has already been made in liberating public procurement from a narrow concern with public financial management, retaining the O-CPO in National Treasury risks perpetuating procurement's subordination. There are also conflicts between National Treasury's role as a public procurement regulator, on the one hand, and as a procuring entity in its own right, on the other. On these grounds, it has been argued, for instance, that the regulatory functions of the O-CPO should be consolidated and carved out into a public entity responsible directly to Parliament.[16]

These and a range of other options bring into play a number of values that are difficult to adjudicate on any single scale. Whatever the ultimate decision, which will be announced in preliminary fashion in the Public Procurement Bill, reform-minded people should be agreed that the regulatory authority remain free of political interference. Proposal 6.2 above provides for that.

5.5. A principles-based, strategic, and developmental approach to procurement

Across the globe, jurisdictions are engaging with reform and improvement of their public procurement systems. The question is often posed as to how to optimise the relationship between procedural integrity – which in South Africa has involved the elaboration of more rigid rules – and the operational flexibility necessary especially in more complex processes to achieve goals of efficiency, effectiveness, and the promotion of social policy. The answer to this question is often posed in terms of principles-based regulation and strategic procurement.

The OECD in 2009 has proposed a set of integrity principles for a public procurement system to avoid corruption.[17] In its Benchmarking Public Procurement research initiative, the World Bank has also developed a number of indicators that are closely based on the principles they believe underpin a good public procurement system.[18] These and other sets of principles are part of a move in terms of regulatory strategy away from rules and towards the use of standards and results monitoring as routes to the improvement of a public procurement system.[19] South Africa, in developing such an approach, can work from the principles contained in section 217 of the Constitution, that public procurement proceed within a system that is fair, equitable, transparent, competitive and cost-effective.

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[16] Geo Quinot, "An Institutional Legal Structure for Regulating Public Procurement in South Africa," March 2014.

[17] OECD, *OECD Principles for Integrity in Public Procurement* (OECD, 2009), https://doi.org/10.1787/9789264056527-en.

[18] World Bank, "Benchmarking Public Procurement 2016: Assessing Public Procurement in 77 Economies," 2016, http://bpp.worldbank.org/~/media/WBG/BPP/Documents/Reports/Benchmarking-Public-Procurement-2016.pdf.

[19] Julia Black, "Forms and Paradoxes of Principles-Based Regulation," *Capital Markets Law Journal* 3, no. 4 (October 1, 2008): 425–57, https://doi.org/10.1093/cmlj/kmn026.

Strategic procurement, often in practice related to principles-based regulation, involves a more pragmatic, flexible, and differentiated approach to procurement methodology.[20] The O-CPO has adopted this approach in its own operations; it has a Chief Directorate: Strategic Procurement. The basic idea of strategic procurement is that it recognises the importance of ensuring value added across the stages of the procurement process, from demand management, market research and specification, through purchasing to contract and relationship management and review. It accepts that certain products, say those that are very price sensitive, where there are many suppliers and competitive markets, are best purchased through competitive bidding. It argues, however, that the range of products is such that significant differentiation in purchasing approach is needed along lines of product-type, sector, and purchasing entity. In many cases, for instance where products are complex, highly specific in their applications, and where few suppliers exist, a more relational, long-term and performance-based procurement methodology is necessary. This sort of differentiation is already advanced in the area of infrastructure procurement. The approach opens out into a recognition of the importance of a range of other adjudication criteria for public procurement, beyond price and preference to include functionality, total lifecycle costs, and so on.

Developmental procurement refers to the use of public procurement to achieve broader developmental policy objectives. There are good arguments for the proposition that the Preferential Procurement Policy Framework Act, along with the Broad-Based Black Economic Empowerment Act, have been too rigid in their establishment at statutory level of the 90 to 10, 80 to 20 points system, the latter preferences based on firm-level B-BBEE scores rather than contract-level scores. There are also a range of policy concerns that don't find expression in preferences, such as green procurement. There are, beyond the points system, strong complementarities between principles-based regulation, strategic procurement, and such developmental concerns. The former helps to create the flexibilities necessary to build new productive capacities in the private sector, by way of such mechanisms as longer-term, performance-based relationships around larger contracts that attain economies of scale.

South Africa should move towards this emerging vision of a principles-based, strategic, and developmental procurement system. The approach enables the public procurement system to better tailor its processes to its operational and social policy subject matter. It recognises that procurement law and procedure is a means toward governmental aims, and not an end in itself. The process, however, of moving towards a principles-based, strategic, and developmental public procurement system will be complicated. It may involve broader institutional reforms in organs of state, for instance the creation of chief procurement officers elevated to sit alongside chief financial officers and chief operations officers in strategic management. It will need to be rolled out in a manner that is tightly controlled, incremental, and that occurs alongside efforts to depoliticise and professionalise public procurement in South Africa. Reform-minded people should monitor this process and its vital interconnections. In the meantime, we propose to deal with this initially as a statutory matter, one where the statutory room must be created for the process to evolve. That room is provided for under proposals 6.3 and 6.4 above.

The public procurement regulator, as part of a principles-based, strategic, and developmental approach to public procurement, should also have stronger powers to compel organs of state into transversal contracts, for purposes of intelligently leveraging government purchasing power and fostering economies of scale in strategic sectors. It should be able to set price-bands within which purchases must fit, to avoid rampant over-expenditure in key areas such as housing. These concerns are addressed in proposals 6.5 and 6.6.

[20] See Peter Kraljic, 1983, Purchasing must become supply management, also http://www.treasury.gov.za/publications/other/SCMR%20REPORT%202015.pdf

5.6. Enhanced enforcement mechanisms

Capacity and political considerations have tended to undercut oversight and enforcement operations in South Africa's public procurement system. Due to capacity shortfalls, there has been a tendency toward rationing these functions, which has opened up regulatory shortfalls. In public procurement, addressing this requires capacitation of central regulatory authority, along the lines of Proposal 4. Political considerations have impinged upon regulatory decision-making both directly and indirectly. Most directly, this has been through politicisation of the personnel practices of broader criminal justice institutions, such as the South African Police Service and the National Prosecuting Authority. Within organs of state, oversight functions have pervasively suffered a similar fate. These issues are addressed in the position papers on personnel practices in the public service, the municipalities, and the criminal justice institutions. More indirectly, regulatory functions that have not been directly politicised have generally held back enforcement actions, especially where these would implicate more powerful politicians and political networks. In order, that is, to avert the ever-present threat of direct politicisation, they have been compelled to operate in political terms.

Civil recovery and criminal enforcement mechanisms available to regulators and the leadership of organs of state have all been undermined by these dynamics. The Public Audit Amendment Act, now law, gives to the Auditor General the power to take appropriate remedial action, to issue certificates of debt where accounting officers and authorities fail to comply with this action, and to refer matters for criminal investigation. The development is welcome. The Auditor General, however, is unlikely to fully escape the problems of limited capacity and politicisation that have attenuated the efforts of other independent public sector oversight and enforcement agencies. There is a long history of other countries developing creative and well-refined enforcement mechanisms for covering such gaps.

These hinge on what is known as *qui tam*, short for the Latin of "he who sues on behalf of the King as well as for himself. An element of any *qui tam* mechanism is that there is a law that defines an offence or an infringement of a right, together with a penalty or forfeiture which might be extracted from any person who does violate or infringe. In public procurement, for example, fraud committed against the state might give rise to a claim for damages by the state. What distinguishes a qui tam mechanism, however, is that it amounts to a statutory grant of a general private right to enforce a specific law *for* the state, with efforts in this direction incentivised by a share of the resulting penalty or forfeiture.

Qui tam has an ancient pedigree. It originated in late-Republican Roman law more than two thousand years ago. It was developed in English law especially from the fourteenth century. It is today, in the United States, quite arguably its most effective technique available to the federal government for rooting out corruption and fraud in public procurement. The United States Department of Justice reports qui tam settlements and judgements of over $3-billion in 2017, or 92% of all damages for "false claims", which American law defines as fraud or "reckless disregard for truth or falsity" in dealing with the state.[21]

A number of features of modern *qui tam* account for its success. While public investigators and prosecutors might defer to political interests, *qui tam* enables private actors to pick up the slack. Evidence gathering by public investigators and consultants is costly in terms of personnel time and money. Whistle-blowers save the state from these outlays by bringing inside information out into the open, but there are generally prohibitive disincentives for whistle-blowing, as whistle-blowers are commonly dismissed from their jobs, informally black-listed in the job market, socially ostracised, subjected to counter-investigations and -litigation, and worse. *Qui tam*, however, evens them up for their commitment to public integrity, giving them the prospect of a large reward with which they can

[21] https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery

establish themselves in another professional field, geographical location, and so on, with the costs being born not by the government, but by corrupt combinations themselves, as a part of the damages that they must pay to the state.[22] Further to these points, United States law provides for triple damages in *qui tam* actions, so as to enhance incentivisation and not prejudice the fiscus.

Qui tam actions are normally launched by whistle-blowers employed in the state or large private enterprises, who have linked up with law firms that specialise in these kinds of suits. It is a civil action, the burden of evidence being on a balance of probabilities. It is not a replacement for, but a complement to traditional public enforcement. Evidence gleaned from *qui tam* proceedings can be used subsequently in criminal actions.

A number of further features of modern *qui tam* constrain possibilities for its abuse. A *qui tam* litigant, known as a "relator", must be what is called an "original source" of information, which means that they voluntary brought forward information before there has been any public disclosure, or they provide additional information that is independent of and materially adds to publicly disclosed allegations.

Relators must file, with the relevant information under seal for a specific time period, in the United States 60 days, to give government, the Department of Justice, an opportunity to investigate and decide whether to intervene and take up the action, decline to intervene and allow the relator to act on behalf of the state, or move to have the action dismissed with the possibility of review by a court. If, in the United States, the government joins, then in the event of success the relator is entitled to a minimum of 15 and a maximum of 25% of the recovery. If the government declines to join, the relator is entitled to a minimum of 25 and a maximum of 30% to cover the costs of litigation. These arrangements amount to a sophisticated series of checks and balances between *qui tam* litigants, the government, and the courts. Specialist law firms in particular, as repeat players, rely on their trustworthiness to be effective, as a reputation for vexatious and frivolous suits may lead not only to penalties but also a failure to be taken seriously by both government and the courts in future proceedings.[23] Ordinary laws as to fraud, defamation, and so on also apply to *qui tam* litigants. Courts will adjust rewards between the minima and maxima according to such factors as the quality of the information provided, the expertise and legwork performed by supporting lawyers, and the litigant's complicity in giving rise to fraud against the state.

The available evidence suggests that arguments raised against qui tam, around the possibility of its abuse, are largely unfounded. In South Africa, a serious concern with corruption in public procurement should lead naturally to a serious consideration of *qui tam* as a remedy.

Proposal 7: Government must include a qui tam provision in the upcoming Public Procurement Bill. The [Alliance for State Reform] will commit to drawing on local and international expertise to draft this provision. Beyond this, the O-CPO should conduct a business case defining the institutional parameters and capacity-requirements for the operationalisation of a *qui tam* provision, with which the [Alliance for State Reform] will also assist.

[i] https://www.gov.za/speeches/president-cyril-ramaphosa-2019-state-nation-address-7-feb-2019-0000

[ii] E.g. Peter Evans and James Rauch. 1999. "Bureaucracy and growth: a cross-national analysis of the effects of 'Weberian' state structures on economic growth," American Sociological Review 64 (5), pp. 748-65; Atul Kohli. 2007. State-Directed Development: Political Power and Industrialization in the Global Periphery. New York: Cambridge University Press.

[22] Braithwaite, Regulatory Capitalism.

[23] Braithwaite, Regulatory Capitalism.