Public Procurement and Corruption in South Africa

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Abstract

Like many other countries, South Africa depends heavily on its public procurement system and faces persistent issues of corruption within that system. Its regulatory regimes for public procurement and for anti-corruption are nonetheless distinct. Despite knowledge of significant corruption in the final decades of apartheid, anti-corruption was treated as a secondary rather than a primary objective in the initial phase of post-apartheid reform and design of public procurement. Rules against corruption in public procurement have largely taken the form of criminal offences in the anti-corruption regime, and the form of administrative rules internal to government within the public procurement system, neither of which has been effective. The lack of attention to the overlap of these two regimes has created the potential for continued growth of corruption in public procurement. As a reaction to the COVID-19 pandemic as well as to the grand corruption termed 'state capture', the South African government has recently introduced several measures and strengthened institutions to address corruption linked to public procurement; these are more investigative and ad-hoc than systemic and preventative. Finally, we briefly describe and then examine the place of information technology in South African public procurement, particularly in advancing the anti-corruption goal.

Introduction

This paper aims to analyse the approach of post-apartheid South Africa to corruption in public procurement. Like many polities, South Africa depends heavily on its public procurement system, both as a policy lever and as a mode of delivering public services. As a policy problem, the issue of corruption in public procurement has steadily made its way onto South Africa's national agenda and rose to true prominence around 2010. By 2021 it has become clear that official measures responding to corruption in public procurement have been inadequate (Gray, 2021). This paper argues that this

inadequacy takes place in at least two dimensions. In the anti-corruption realm, such measures have largely consisted of general anti-corruption provisions and have usually built on a criminal law model. In the realm of public procurement, provisions aiming to stem corruption have consisted largely of tightened reporting requirements, generally applicable and arguably contributing to the current acknowledged crisis surrounding the South African system.

The focus in this paper is not on the dynamics or the scale and scope of the corruption in this sector itself. We are concerned here rather with understanding South Africa's response to such corruption. Our analysis proceeds in four steps.

In the section following this one, we locate the objective of anti-corruption within the post-apartheid public procurement system using historical institutional analysis. We show that, despite knowledge of significant corruption in the final decades of apartheid, anti-corruption was treated as a secondary rather than a primary objective in the initial phase of reform and design of public procurement, a period running from the advent of constitutional democracy to 2012. For instance, integrity or anti-corruption is not among the five principles enshrined in South Africa's constitution to govern public procurement.

In the next section, we outline two distinct policy frameworks — that of public procurement and that of anti-corruption – that are largely separate and have very few points of formal or substantive connection. Here, we focus on the rules (particularly at statutory level) rather than the institutions or the detailed guidance frameworks that are central to putting these policy frameworks into action. We show how the lack of attention to the overlap of these two regimes has created the potential for continued growth of corruption in public procurement through wrong-sized and misdirected enforcement tools in both the criminal and civil law.

In the following section, we return to an institutionalist perspective. After noting the primary institutions responsible for the anti-corruption objective, this section identifies and explores several recent and significant anti-corruption institutional initiatives which have been designed specifically to address integrity issues in public procurement.

In our final substantive section, we briefly describe and then examine the place of information technology in South African public procurement, particularly in advancing the anti-corruption goal. We then briefly conclude.

The Post-Apartheid Evolution of Public Procurement and Corruption

The transition from apartheid, especially after the African National Congress's (ANC) commanding victory in national elections of 1994, saw the coming into office of a powerful and confident anti-apartheid movement, committed to transforming South Africa's government institutions across a broad front. The country's public procurement regime was a central target of this project of transformation. In international policy debates, procurement was already understood to be a crucial site of good governance reform and an important lever for wider policy goals, including national economic development and redistribution. The ANC early conceived of public procurement as a vehicle for what became known as black economic empowerment (BEE), the formation of a black capitalist class. In 1993, party policy-thinkers had already approached the World Bank to help fund procurement reform. In 1995, the Ministry of Public Works and the Ministry of Finance constituted a

Procurement Forum, supported by a technical Public Sector Procurement Reform Task Team, to design this process.

In 1994, South Africa operated a centralised public procurement system. The Treasury, following an old and established British administrative tradition, held original procurement regulatory powers. In the national public service, operations were vested in the State Tender Board, which could delegate specific, often smaller and technically *sui generis* purchases to departments and other entities. The security establishment and state-owned enterprises operated their own procurement boards. In the country's provincial and local governments, its segregated 'own affairs' and 'Bantustan' administrations, these all inclined toward similar arrangements. The tender boards were generally composed of political representatives, public administrative officials, along with corporatist groups with an interest in public procurement, including business, industry, and professional associations. They favoured the method of open competitive tenders but were able to — and they regularly did — justify departure from the lowest-priced rule. The centralised system was biased toward bulk purchases, from large and established white-owned firms, a fact which was institutionalised in operational rules and procedures, standards, and product specifications. In those pre-democratic days in South Africa, practitioners often saw long-term relationships with systematically privileged providers as a way to develop shared understandings and norms, to produce certainty and reduce risk.

A new generation of officials, coming in through the ministries of Public Works and Finance, imbued with projects of black economic advancement or public financial discipline and often for social and political reasons distrusting old apartheid administrators, brought a new perspective. In this view, the presence of a pattern of repeated transactions with a select set of white-owned companies inspired concerns about unfair exclusion of black suppliers and often justified denunciations of corruption.

These issues defined the Procurement Forum's work and shaped the post-apartheid procurement regime. A 1995 'Ten Point Plan' introduced preferences for emerging suppliers and announced the work of breaking up tender boards, decentralising procurement powers to departments, unbundling contracts, classifying public works to open opportunities on smaller projects, together with a range of measures to make it easier for emerging suppliers to access information, make bids, and get paid. These objectives, pushed by the Ministry of Public Works at the time, seemed to dovetail with the National Treasury's new public management-inspired interest in introducing more flexibility, competition, and legibility into administrative systems. The tender boards were seen as bottle necks, too rigid to provide for the complex needs of end-user departments. Devolving powers onto departmental and agency heads would free up managers for the task of managing and thereby clarify accountability for results. South Africa's 1997 Green Paper on Public Sector Procurement Reform reiterated these goals and envisaged replacing the State Tender Board with a new National Procurement Compliance Office, tasked with steering the evolution of the procurement regime by developing norms and standards, receiving reports and complaints, auditing and investigating the performance of procuring entities, constructing information systems, providing support, and enforcing compliance.

In the event, the Compliance Office was never created. The functions of the State Tender Board were devolved into the National Treasury's residual Special Functions Division, within which the procurement concern was only clarified and elevated into the executive committee after the creation of an Office of the Chief Procurement in 2012. In the interim, the concerns with anti-corruption and

black capitalist advance elaborated in incongruent ways in procuring entities themselves. The procurement reforms of the early post-apartheid years, by dissolving the tender boards, formally removed politicians from direct engagement with procurement decision-making, which had been an especially prominent feature in local government. The Treasury commanded instead the establishment of dedicated, professional supply chain management units within procuring entities, which would regulate the work of bid committees made up of administrative officials. The ANC, however, compelled to assert control over public administrations which were historically implicated in the implementation of apartheid, implemented a policy of cadre deployment, which mandated the appointment of party operatives into administrative positions. The project of black economic empowerment, which after all was meant to create a black capitalist class aligned to the anti-apartheid movement and, therefore, to the ANC, would henceforth be directed by these operatives.

In this framework, Treasury could legislate the exclusion of political office-bearers from procurement decision-making, but political office-bearers would by-pass such legislation with political appointments of administrative officials. These could be positioned in such a way to circumvent and subvert political-administrative controls, checks and balances. Increasingly worried about corruption, Treasury and the Auditor General would collaborate in the construction of an increasingly rigid and detailed regulatory regime, but this would often be used to draw powers from technical delivery functions, from engineers and other delivery professionals, always more difficult to politicise, into the supply chain management units and bid committees which were repurposed to orchestrate political distributions. The process of unbundling produced a runaway dynamic, where expanding political demands were met by breaking contracts into smaller and smaller pieces, eroding regulatory visibility and control. These are the broad institutional parameters of public procurement and corruption in South Africa.

The Regulatory Framework Against Corruption in Public Procurement

This section of the paper outlines the regulatory framework aiming to reduce corruption in public procurement in South Africa. This objective sits at the intersection of two major state efforts: anti-corruption and effective public procurement. The regulatory frameworks for both initiatives are largely dominated by general rather than specific provisions and demonstrate two mostly uncoordinated approaches — a largely criminal approach to anticorruption and a largely administrative approach to public procurement.

We shall first survey the field of public procurement. As described in the previous section, the post-apartheid regulation of state contracting for goods, services, and infrastructure has been extensively decentralized, but only incompletely institutionalised, exhibiting a partial reform of the centralised and institutionally racist apartheid tendering system (Brunette, Klaaren, and Nqaba 2019). While opinions differ as to whether the degree of decentralisation is optimal or not, a consensus has emerged amongst policymakers in the executive and the legislature as well as the judiciary that the current legal framework is fragmented and in urgent need of consolidation (Quinot 2014; 2018). We agree. By one 2014 count, the regime consisted of 22 statutes and, with subordinate legislation included, 85 distinct legal instruments. What integration does exist is primarily achieved by subordinate legislation and is unstable. Housed in National Treasury, a legal drafting effort aimed at consolidation in this field is currently underway and may result in a new statutory framework for public procurement within several years, but at the time of writing does not demonstrate great momentum

or political will. The current fragmentation not only reduces efficacy, but also enables public procurement rent-seeking and corruption. Fragmentation creates opportunities for arbitrage between different legislative frameworks. It also contributes to a further distinctive feature of the South African public procurement framework (discussed further below) — the absence of effective anti-corruption provisions specifically focused on public procurement. Neither of the two regulatory bodies most closely monitoring and enforcing the public procurement regime — the Office of the Chief Procurement Officer in the National Treasury and the Auditor-General — have anti-corruption enforcement in public procurement as a central part of their mandate.

In this context of incomplete institutionalisation, the Minister of Finance has exercised discretion to create several instruments such as the debarment mechanism (which is parallel to a similar apparently non-functioning tool sourced in the anti-corruption framework (see below)) which are often considered as anti-corruption tools (Procurement Watch 2021, 12-13). While civil and administrative violations in terms of the Preferential Procurement Policy Framework Act (PPPFA), the Public Finance Management Act (PFMA) and other statutes should in theory lead to a contractor being excluded from further tender processes (e.g., debarment) under Treasury's Database of Restricted Suppliers, rates of reporting, detection and imposition of effective remedies are very low (Williams-Elegbe 2020; Klaaren and Brunette 2020). We thus agree with Williams-Elegbe that the debarment mechanism has considerable potential to combat corruption (as well as poor performance), but that potential has not yet been realised. In any event, the two other principal executive-driven mechanisms in this field — the e-tenders portal and the electronic Central Suppliers Database launched in 2015 — are best seen as constraining the opportunities for corruption in this field rather than actively combatting such. Improvements in transparency — one of the section 217 values in the Constitution — are often touted and politically packaged as anti-corruption initiatives, but in practice serve multiple objectives beyond integrity and should not be regarded primarily as anti-corruption tools.

There are few to no statutory provisions specifically addressing corruption in public procurement in the three significant substantive empowering statutes incorporated into the current public procurement framework. The law incorporated by regulations into the PPPFA's implementation (thus applicable generally), the Broad-Based Black Economic Empowerment Act 53 of 2003 only criminalises fronting in general (section 130). For infrastructure, the Construction Industry Development Board Act (section 18) only criminalises (and provides significant civil sanctions for) failure to register as a contractor in terms of the Act. Finally, the State Information Technology Agency Act 88 of 1998 contains no provisions at statutory level regarding corruption in information technology procurement.

To survey the field of anticorruption regulation, the South African regime is largely a post-apartheid construction and has become consolidated around a 2004 law, the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA). This statute forms part and parcel of the post-apartheid approach to anticorruption in South Africa, the strategy of which has been aptly characterised as 'a law enforcement/organisational control approach' (Naidoo 2013). The PRECCA was drafted at a time of increasing global attention to cross-border corruption and has the potential for transnational enforcement coordination (Davis 2019). Sections 12, 13, and 17 of PRECCA create specific procurement-related (criminal) offences and other sections provide remedies designed to address persons and firms violating these provisions (Williams and Quinot 2007). Offences here may overlap with some other criminal justice statutes as well (Procurement Watch 2021, 11 (Prevention of Organised Crime Act 121 of 1998)). While the anti-corruption regulatory framework is largely

consolidated, it is probably best seen as for instance including anti-corruption provisions sourced not in the PRECCA, but in the Public Service Act, 1994, the statute governing the organisation and functioning of South Africa's public service (Munzhedzi 2016, 4-5).

As we have seen, there is a very limited degree of formal intentional coordination between the two regulatory frameworks. In one instance, PRECCA convictions theoretically lead to debarment. Where regulatory frameworks either solely or operating in tandem do not work, the ultimate safety net protecting against corruption in public procurement is of course the judiciary. The South African judiciary has long played this regulatory and anti-corruption role and has thus both reaped the benefits and suffered the costs of such function (Bhorat et al. 2017; Fombad and Steytler 2020; Klaaren 2020).

Beyond these statutory, discretionary, and judicial mechanisms, there are of course other legal tools — too many to list here — that incidentally or indirectly address public procurement corruption in South Africa. Where well-resourced and competent regulatory agencies are active and/or where the disciplinary and human resources codes of private sector organisations are clear and effective, real results may be achieved.

One example is worth noting in closing this section. The competition authorities have been effective in addressing bid-rigging particularly in the construction industry, uncovering substantial prohibited practices in the building of public infrastructure (including football stadiums) for the 2010 football World Cup, hosted by South Africa (Lewis and Das Nair 2014). Many of these anticompetitive practices, addressed through the competition framework, undoubtedly also constituted corruption. More generally, as Lewis and das Nair observe: 'Corrupt conduct and anti-competitive conduct have much in common' (Lewis and Das Nair 2014; Williams and Quinot 2007, 341-42). As part of increased coordination, Lewis and das Nair argue explicitly that law enforcement agencies ought to use the competition goal in selecting their cases for prosecution — we are aware of no evidence that this has been prosecutorial practice (Burke 2018; Lewis and Das Nair 2014).

Anti-Corruption Institutions

The South African government has recently introduced several measures and strengthened institutions to address corruption linked to public procurement. Many of these measures were triggered by multiple reports of corruption linked to the public procurement of goods and services (including personal protective equipment (PPE)), sourced for the purpose of responding to the COVID-19 pandemic. Formal institutions like Parliament, particularly the Standing Committee on Public Accounts, and the Auditor General of South Africa are constitutionally mandated to exercise oversight over government expenditure. However, over and above these institutions, additional institutional arrangements have been strengthened to facilitate prompt investigations and enable quick remedial action to be taken on procurement-related matters, including the recovery of funds and assets.

The introduction of some of these measures was precipitated by a surge in cases of corruption in public procurement at a time when the country was already facing a difficult economic situation. Prior to the onset of the COVID-19 pandemic and the introduction of a strict lockdown to contain the spread of the virus on 26 March 2020, South Africa was facing a formal unemployment rate of 30%, with over a third of families relying on debt as part of their household income, while government wages and spending were the highest spending item, accounting for over 34% of consolidated expenditure in the 2019-2020 budget (Naidoo 2021).

This section provides a brief overview of some of the key entities either recently introduced or strengthened to address corruption in public procurement including the Zondo Commission, the Special Investigating Unit (SIU) and the Special Tribunal, two sector-specific forums, namely the Health Sector and the Infrastructure Built Anti-Corruption Forums, as well as the recent adoption of the National Anti-Corruption Strategy. At the time of writing, the Zondo Commission[1] had not yet published its recommendations, while the National Anti-Corruption Strategy and the Infrastructure Built Anti-Corruption Forum were just starting to be activated. It was therefore not possible to ascertain the impact of these initiatives. However, significant progress is being made by the SIU and its reliance on the Special Tribunal, as well as the National Health Sector Anti-Corruption Forum in combatting corruption and recovering state assets. Still, while there has been a flourishing of initiatives to detect, investigate and prosecute cases of procurement-related corruption (at great cost to the state) after-the-fact, there has been limited movement in the adoption of measures to pre-empt procurement-related corruption from occurring in the first place.

The Special Investigating Unit and the Special Tribunal

The SIU is a public entity in terms of Schedule 3A of the PFMA, which derives its mandate predominantly from the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996). The SIU is a dedicated anti-corruption agency with a mandate to investigate, on the basis of referrals by the President, serious malpractice or maladministration in connection with the administration of state institutions, state assets and public money as well as any conduct which may seriously harm the interests of the public; and to institute and conduct civil proceedings in any court of law or a special tribunal in its own name or on behalf of state institutions. Where evidence of criminal offences is uncovered, the SIU works closely with other law enforcement agencies and refers matters to the National Prosecuting Authority (NPA) for prosecution.

To facilitate the recovery of state funds arising from testimony presented before the Zondo Commission, and conscious of the effects of state capture on the hollowing out of key criminal justice system institutions, in February 2019, President Ramaphosa proclaimed the establishment of a special tribunal on corruption, fraud and illicit money flows in terms of the Specialised Investigating Unit and Tribunals Act, 74 of 1996 to expedite civil claims against corrupt public servants and to recover monies lost to the state from corruption or irregular spending, including those associated with public procurement. The fairly recent establishment of the Tribunal has given added impetus to the efficiency of the SIU since the Tribunal has sought to fast-track the process of asset recovery - including the freezing of assets - of high priority cases mandated to the SIU by avoiding protracted delays resulting from reliance on the country's backlogged high courts, by prosecuting cases without the need of a criminal conviction and by being required to meet the lower standard of proof applicable to civil cases.

In addition to being mandated by presidential proclamation to pursue civil claims linked to corruption, fraud and illicit money flows and recover state funds and assets, on 23 July 2020, President Ramaphosa also issued a proclamation for the SIU to investigate any unlawful or improper conduct in the

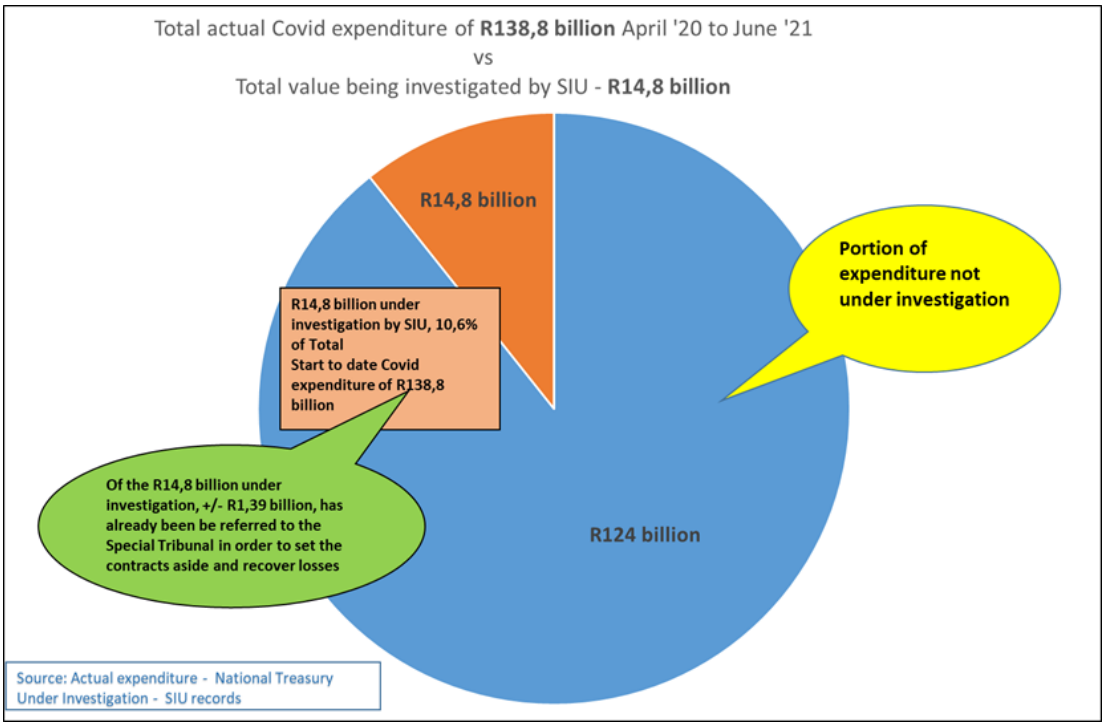
[1] Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State.

procurement of any goods, works and services during or related to the National State of Disaster declared on 15 March 2020, in any state institution and across all spheres of the state.

The extension of the SIU's mandate to include investigations into the misuse of COVID-19 related funds was accompanied by the President's establishment, following a decision by Cabinet on 5 August 2020, of an Inter-Ministerial Committee (IMC) of Ministers composed of six ministers tasked with looking into corruption in the procurement of goods and services sourced for the purpose of containing and responding to the COVID-19 pandemic, including PPE (Government of South Africa 2020). To assist the Committee, the President required all ministers and premiers to provide information on the names of companies and details of tenders and contracts that had been awarded in national departments, provincial governments, and public entities during the period of the National State of Disaster. In his briefing to Parliament approximately a month later, the President noted that 95% of provincial and national departments and state entities had submitted all information regarding Covid-19 procurement to the ministerial team (Parliament (RSA), 2). With this unprecedented move, the public gained access to valuable information regarding awarded public tenders and contracts through the National Treasury's website.

Government attempts to prevent, detect, investigate and prosecute COVID-19 procurement-related corruption was also given a boost with the establishment of a special coordination centre of law enforcement agencies in mid-August 2020, known as a 'Fusion Centre' bringing together the Financial Intelligence Centre (FIC), the Independent Police Investigative Directorate (IPID), the NPA, the Directorate for Priority Crime Investigation (DPCI or 'Hawks'), the SIU and the State Security Agency, as well as the South African Revenue Service. As of June 2021, this collaborative work had resulted in 39 accused persons who appeared in 23 criminal court cases across the country and at least R878 million in public funds recovered (South African Government News Agency 2021).

As of 1 September 2021, the SIU had investigated R14.8 billion, approximately 10% of the total actual state COVID expenditure between April 2020 and June 2021 (R138.8 billion).



As shown in the table above (Parliamentary Monitoring Group 2021), of the amount under investigation, the SIU referred cases worth R1.4 billion to the Special Tribunal to have contracts set aside and recover lost funds; referred 148 individuals and entities to the NPA for possible criminal action, 127 government officials for disciplinary action and 3 political office bearers for executive action (South African Government News Agency 2021). As much as the SIU has been successful in taking matters from allegations, through full investigation to litigation, it has no power to ensure that referrals of government officials who are implicated in acts of corruption culminate in the institution of disciplinary processes and their possible dismissal or that the NPA will prosecute the cases referred to it.

The Zondo Commission and the prosecution of civil and criminal cases related to public procurement

Since its establishment in 2018, the Zondo Commission has highlighted how, despite the myriad of regulations and directives, state procurement was consciously abused by national, provincial, and local government departments and state-owned enterprises such as Eskom, Passenger Rail Agency of South Africa, South African Airways, and others. Testimony led before the Commission has detailed allegations of corruption against high-ranking and politically connected individuals who used the state and procurement systems for their own benefit with devastating consequences for the country's development. The work of the Zondo Commission is expected not only to assist in the prosecution of persons involved in state capture, corruption, fraud but also to provide a set of recommendations to mitigate against the recurrence of state capture. To facilitate the former, on 28 July 2020, the regulations of the Zondo Commission were amended to allow the commission to share information, records or documents collected in the course of its investigations with law enforcement agencies to enable both civil and criminal prosecutions (Government Gazette 2020).

Sectoral Anti-Corruption Forums

Two main sectoral forums are described in this section, the Health Sector Anti-Corruption Forum (HSACF) which was established in 2018, and the recently established Infrastructure Built Anti-Corruption Forum (IBACF) which is a joint initiative by the SIU and the Department of Public Works.

Health Sector Anti-Corruption Forum

The HSACF was established following the Presidential Health Summit in 2018 with the aim of fighting against fraud and corruption in the health sector, both public and private. It was officially launched in October 2019, guided by terms of reference to formalise a relationship of collaboration, consultation, mutual support and co-operation between the parties to deal with key vulnerabilities in the health care sector, and address their consequences through criminal prosecution and civil litigation, amongst other activities (Government Communication Information Service 2019, 10). The HSACF represents a collaboration between public, private and civil society entities aimed at tackling procurement-related corruption, amounting to billions of rands (Reddy 2020), linked to fraudulent orders and tender irregularities associated with the high volume and varied nature of transactions on goods and services, as well as fiscal dumping by government departments through non-governmental organisations, bribery, over-pricing and poor governance in the health sector, amongst others (Presidency, Republic of South Africa 2019). The forum is composed of the following stakeholders: the SIU, the National Department of Health, the Council for Medical Schemes, the DPCI or Hawks, the Financial Intelligence Centre (FIC), the Health Funders Association, the Health Professions Council of South Africa (HPCSA), the NPA, the board of Healthcare Funders of Southern Africa, and two prominent civil society organisations working in the health and corruption sectors, namely Section 27 and Corruption Watch.

In the 21 August 2020 Inter-Ministerial Committee's briefing to Parliament, it was noted that the HSACF would report directly to the President about irregularities and maladministration in the health sector, thus enhancing the Forum's potential to enable quick remedial action to be taken (Parliamentary Monitoring Group 2020). In 2020 alone, the forum dealt with 20 allegations of serious maladministration, fraud, and corruption, 13 of which were converted into investigations, and four resulted in the submission of proclamation motivations for the President's approval to deal with these matters further (Sunday World 2020). Additionally, the forum has made criminal referrals in cases involving the HPCSA, the Office of the State Attorney and COVID-19 procurement by state institutions across all spheres of government and reported that lifestyle audits are being conducted on public servants implicated in impropriety. Through its participation in the Forum, Corruption Watch has consistently advocated for the adoption of open contracting principles and practices in public procurement in the health sector, as endorsed by the G20 and successfully implemented in at least 30 countries globally, to enhance transparency and accountability (Reddy 2020).

Infrastructure Built Anti-Corruption Forum (IBACF)

Only a few months ago, in May 2021, the Minister of Public Works and Infrastructure and the Head of the SIU launched the Infrastructure Built Anti-Corruption Forum to strengthen the work of the state in preventing, detecting, and acting against corruption in the implementation of the infrastructure investment plan, which is an integral part of the country's Economic Reconstruction and Recovery Plan

(Gilili 2021). Investigations by the SIU in the construction sector, totalling over R10 billion to date, have shown that the sector has been subject to price fixing, high construction board gradings issued to non-deserving contractors, issuing of illegal environmental permits to large developers, and fraud against the state through the use of substandard construction materials to increase profits, and solicitation of facilitation fees or kickbacks, amongst other practices (Government of South Africa 2021).

Like the HSACF, this forum recognises that fighting corruption requires a multi-sectoral approach and therefore includes representatives from the NPA, the DPCI or Hawks, FIC, Council for the Built Environment, Master Builders South Africa, South African Council for the Architectural Profession, Consulting Engineers South Africa, South African Black Technical and Allied Careers Organisation, South African Bureau of Standards, Business Unity South Africa, Corruption Watch and Human Sciences Research Council.

It is envisioned that the forum will have both a prevention and investigative mandate. By working with its various agency members, it will oversee investigations and enhance accountability by referring matters for criminal prosecution and civil litigation. It has called on members of the public to use the SIU's confidential whistleblowing line to report corruption and has also committed to exploring how whistle-blowers can be incentivised and rewarded for coming forward with information on corruption that leads to successful prosecution (Government of South Africa 2021).

National Anti-Corruption Strategy

Most of the measures and institutions set out above can be regarded as giving effect to the country's National Anti-Corruption Strategy (NACS). The NACS is the product of a multi-year and multi-sectoral consultative process that started in 2016 and culminated with its adoption by Cabinet on 19 November 2020. It aims to provide a national intervention framework to address corruption across all sectors of society and under which to establish an independent overarching statutory anti-corruption body that will report directly to Parliament. It recognises the need to coordinate anti-corruption activities and to create implementation structures and monitoring measures that can address the scourge of corruption holistically and at multiple levels through the implementation of six pillars, one of which focuses squarely on procurement, namely: 1) promoting and encouraging active citizenry, whistleblowing, integrity and transparency in all spheres of society; 2) advancing the professionalisation of employees to optimise their contribution to create corruption free workplaces; 3) enhancing governance, oversight and consequence management in organisations; 4) improving the integrity and credibility of the public procurement system; 5) strengthening the resourcing, coordination, transnational cooperation, performance, accountability and independence of dedicated anti-corruption agencies; and 6) protecting vulnerable sectors that are most prone to corruption and unethical practices with effective risk management.

To support its public procurement pillar, the strategy prioritises programmes to enhance oversight and enforcement in public procurement; improve transparency and data management; and support professionalism in supply chain management. Through the implementation of these programmes, the strategy aims to strengthen the procurement regulatory framework, processes and systems to monitor compliance and effectively address corrupt practices; increase the knowledge of different sectors of society about the public procurement system, reporting and available whistleblowing mechanisms; support and incentivise whistleblowing; and improve coordination with law

enforcement agencies to enable swift consequence management for procurement related corruption. In addition, the strategy aims to enhance transparency in public procurement by improving data systems, procurement information and databases through the adoption of open governance and open contracting principles and making procurement data available and accessible to facilitate public scrutiny. To build professionalism within supply chain management, the strategy stresses the implementation of appropriate training and professionalisation initiatives to enable such personnel to execute their tasks with both skill and integrity.

To give effect to the strategy and the programmes under each of its pillars, the strategy proposes a phased implementation approach. The first phase is regarded as a transitional strategy implementation phase, including research, conceptual development and drafting of a proposal to Cabinet for the establishment of the overarching body which will be executed by an interim multi-sectoral advisory body, called the National Anti-Corruption Advisory Council (NACAC) that will either operate for a maximum period of two years or be disbanded as soon as the permanent body is established.

During the second phase, the independent overarching statutory body will be established, premised on an integrated, multi-dimensional operational model with cross-sectoral collaboration, and drive the long-term roll-out of the strategy and all its related programmes. Until such time, however, the strategy recommends that one of its immediate focus areas should be COVID-19 related public procurement issues, by building on the work of the IMC on COVID-19 and operational interventions by the Fusion Centre. The other recommended focus area is to protect vulnerable groups by launching collective interventions, projects or investigations in sectors affected by grand-scale corruption or where such groups are most vulnerable to exploitation due to the pandemic. In this regard, the establishment and/or strengthening of sectoral anti-corruption forums, the establishment of the special tribunal and the fusion centre can be seen as initiatives that fall within these two focus areas to address public procurement corruption while protecting the welfare of vulnerable sectors.

Public Procurement, Corruption, and Information Technology

Procurement and information technology (IT) have often had a difficult relationship as functions within both public and private organisations. South Africa is no exception to this general proposition; this section will explore both the public procurement of IT and the IT of public procurement in South Africa.

Certain elements of IT procurement not easily lend themselves to a standard commodity review template of ‘quality, delivery and price’ as can be applied to more traditional products or even services. For this reason, IT category specialists need to understand the category’s peculiarities and adapt accordingly. In South Africa, this has often proven tricky, as the frameworks utilised for procurement systems were developed based on more traditional commodities, products, and services. Technology solutions may be considered the ‘gold standard’ of good governance, but many procurement professionals have backgrounds that stem from process-based purchasing functions and maintain a limited understanding of IT products and services. It is therefore important to consider both the use of technology within procurement, which has had mixed uptake, and the procurement of IT directly, which remains one of the most difficult categories to procure effectively.

Whereas physical products can be specified in terms of clearly defined parameters such as physical dimension or weight, this is often not as straightforward when considering technology. Rather than considering a product or service, technology procurement often involves a level of complexity more akin to infrastructure yet maintains its own distinct quirks which make it vulnerable to corruption. Developing and evaluating the specification requires an understanding of the role the technology needs to fulfil, ownership and licencing models, the provision of ongoing support and how the technology is expected to develop over time. IT procurement has itself become a specialised category precisely because it requires a different skillset to the procurement of more tangible or commoditised products and services, even when the technology itself is considered standard. The proprietary nature of software means that it can be easier for specifications to be written with specific suppliers in mind, thus limiting the marketplace from the outset. Specifications developed in line with certain suppliers' products or systems can be more difficult to spot within technology, so a procurement professional needs to have some understanding of the technology itself, how the marketplace is structured and work with a range of suppliers to try and ensure levels of competition can be maintained where possible.

Even with an understanding of the technology marketplace, pricing can be a major point which is difficult to break down when it comes to a technology product and US$ exchange rates can increase this pressure further. In reality, the opportunity to negotiate the terms of a contract may well be severely limited by the licence terms of the software. While physical products consist of known materials, software development has far fewer tangible elements and may have dependent factors not easily predicted which introduce defects (bugs), the rectification of which may themselves not be straightforward. Therefore, it is rarely just the product itself which needs to be understood but the way in which support will be provided and the environment within which the technology is designed to operate.

Technology is often one of the first considerations for organisations to consider when developing more robust anti-corruption systems, but while technology can speed up or automate many of the processes within the system, many such systems remain vulnerable to subversion. The design of these systems is often not within the organisation's control or influence. This places the onus on the buying organisation to understand how the system will operate, what it is required to do now and what it is likely to be required to do in future. Alongside these considerations is also how it might be required to interact with existing systems and whether it might restrict the introduction or amendment of other systems in future. Many organisations will implement relatively standardised resource management systems such as SAP and Oracle to reduce time and costs by speeding up and standardising purchasing processes within the organisation. However, while they tend to some basic best practice elements of checks and authorisations, these systems are not primarily designed to function as anti-corruption tools.

Within procurement itself, although various systems such as e-tendering and e-auctions have been developed to promote e-procurement, there is limited use of the technology to its fullest extent. This can be indicative of environments where the technology uptake is essentially superficial and 'workarounds' may be more prevalent as a result. For example, specification documents are often uploaded as is, with no attempt to break down the evaluation elements for scrutiny and scoring against pre-set criteria.

One example of how the SAP system at Eskom, the state-owned energy provider, was manipulated has been outlined at the Zondo commission (see above). Eskom operates as a monopoly utility and the number of contracts where even a slight amendment needs authorisation from National Treasury has become a major administrative burden. In such an environment, officials admit to trying to find ways to work around it and exploit loopholes. In and of itself, this may not directly be attributed to acts of corruption, yet the effect has been to undermine the integrity of governance structures more generally in place.

Eskom's SAP system was used to place orders and pay suppliers. For a payment to be made, several basic conditions had to be met. These included having an appropriate contract in place, ensuring that the payment did not exceed the limits of the contract and ensuring that departments with different accountabilities would be responsible for authorising payment and verifying the delivery of goods or services in line with the contract. Eskom's former Head of Finance, Snehal Nagar's testimony (Nagar 2019) to the Zondo Commission outlined one irregular situation involving a supplier third party, Tegeta (one of many companies linked to the Gupta brothers, whose actions and interests are specifically mentioned in the Zondo commission's terms of reference). Nagar's affidavit (29.11.2018) outlines how the standard procurement processes were circumvented. Unusually, he was contacted by phone and email requesting that he expedite an advance payment against a pro-forma invoice of more than R659 million to Tegeta in the absence of any other formal procurement process. Tegeta was an existing supplier but the amount in question would have breached the thresholds for further approval by Treasury had it been processed as a contract amendment. Nagar did not consider this amount exceptional, taking into consideration Eskom's total annual spend on coal (estimated at R50 to R70 billion), but he fails to compare the cost of the contract in relation to similar short- or medium-term contracts for coal.

Since no formal contract existed for this payment, the procurement department would have had to authorise the payment by arranging for it to be allocated against another contract already in the system. Eskom's SAP system required the confirmation of the satisfactory delivery of goods or services by at least one other department to allow payment as well as other interim approvals prior to placing a new contract. Nagar indicated that several teams were involved in the process across various functions, all of whose input were required to effectively 'fool' the SAP system into authorising the payment (Mail & Guardian 2019). What is clear from this example is that even reasonably robust anti-corruption systems cannot withstand a sustained, targeted attack or be resilient in the face of subverted human intervention.

Additional mechanisms which may lead to vulnerability within technology procurement relate to the ownership, ongoing support, or licence models. Software and entire systems are more often now provided as services to the end user, with the technology provider retaining greater control over ongoing access and how and when updates are provided. This model is of greater value to the supplier than to the buying organisation, as the buyer loses control over its own compatibility management and a subscription model often reduces options for future competition or changes of supplier — who 'owns' products created using the software and how does the company safeguard its own data? This shift in power can be further exploited by less scrupulous suppliers, where a supplier may either introduce malware or code to block access to the system. Reportedly, this happened when the State Information Technology Agency, which manages technology contracts and services on behalf of state

institutions, apparently failed to make a payment relating to the provision of services to the South African Police Service (Thamm 2018).

Ultimately, one of the biggest failings of procurement's use of technology within South Africa reflects a tendency to automate systems and processes which themselves are not necessarily optimised for the organisation. For technology procurement and technology within procurement to be effective, the procurement process needs to be led by professionals who have a deep understanding of the role the product needs to perform. Where processes are to be replicated, procurement first needs to ensure that steps are taken to optimise these for the organisation. Arguably, the greatest vulnerability is that public procurement departments in South Africa as a result of its legacy, cadre deployment in senior positions and historical ways of working, which tend to encourage focusing on following instructions and overseeing processes than on leading procurement initiatives and challenging the organisation to procure more effectively.

Conclusion

The economic situation in South Africa is perhaps best described as fragile. In the past several years, the governing party has at least, at the level of rhetoric, committed to a 'new dawn' that would not tolerate fraud, corruption, and patronage. Evidence that these had become pervasive within the state over the last decade has been developed clearly and forcefully in testimony given at the Zondo Commission. If the state is to regain public trust as well as provide for its population, it needs to act and be seen to be acting against corruption in public procurement. Whereas in the short-term and to gain that public trust, the state has both enhanced and instituted a number of measures to address the nexus between corruption and procurement, state reforms to deal with the overlap of the political/administrative divide and to professionalise the public service are necessary so that the recurring practices to detect, investigate and combat public procurement corruption by anti-corruption agencies *post-facto* can become an exception rather than the rule.

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