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A STRATEGIC PUBLIC PROCUREMENT PARADIGM FOR SOUTH AFRICA: REFLECTIONS ON THE DEVELOPMENT OF THE PUBLIC PROCUREMENT BILL

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watch** 

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The Joint Strategic Resource (JSR) was constituted to support deliberations on the Public Procurement Bill at the National Economic Development and Labour Council (Nedlac) in the second half of 2022. The group comprised Ryan Brunette (Public Affairs Research Institute: PARI), Jonathan Klaaren (PARI, Wits School of Law, Wits Institute for Social and Economic Research: WISER), Geo Quinot (African Procurement Law Unit: APLU), Ron Watermeyer (Wits School of Construction Economics and Management), and members of the Corruption Watch team.

All co-authors participated in the operation of the JSR; Klaaren wrote the first draft of this collective working paper and all co-authors have participated in its finalisation.

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Summary

Background

South Africa's public procurement regime, established in the context of public sector reform initiatives of the late 1990s and early 2000s, requires reform. The drafting process for new public procurement legislation has been a long and winding one, and much of it has taken place beyond public scrutiny. In 2022 a revised version of the 2020 Public Procurement Bill was introduced into the National Economic Development and Labour Council (Nedlac). The deliberations in Nedlac were attended, at the request of business and labour, by a small number of individuals and organisations with expertise in public procurement. At the request of Nedlac social partners (business and labour), this group of individuals and organisations were formalised to provide technical expertise on the Bill and styled as a Joint Strategic Resource (JSR), coordinated by the Public Affairs Research Institute (PARI), and including the African Procurement Law Unit (APLU), the Wits School of Construction Economics and Management, and Corruption Watch.

A crucial aspect of JSR's work, agreed to in principle between all the social partners, including government, was to provide the legal basis for moving public procurement in South Africa toward a new strategic procurement paradigm. The JSR was asked to support the Task Team by theorising this concept and suggesting how it could be embedded in the Bill. The JSR prepared a proposed draft of the Public Procurement Bill, which is available as [Annexure C of the Final NEDLAC Report on the Bill \("the JSR Draft"\)](#).¹ The present paper explains the strategic procurement paradigm that underpins the JSR Draft of the Bill. We argue that the JSR Bill demonstrates that strategic procurement is appropriate to the South African context for adoption and implementation as the key concept in a comprehensive public procurement statute.

A strategic, not administrative, approach to procurement is needed:

Our analysis of the current procurement regime is that it follows an administrative paradigm, best suited for the procurement of basic, "off-the-shelf" goods and services, but less so for complex purchasing, including for infrastructure projects. The administrative paradigm is aligned with the procedural rules of public financial management, particularly as put into place by the Public and Municipal Finance Management Acts (PFMA and MFMA) and their associated regulations and guidelines.

The administrative paradigm is tightly intertwined with the current problems of the public procurement system, subjecting purchasing processes to constraints that often have little reasonable relationship with delivery priorities. The current system constrains procuring institutions from engaging key suppliers, managing interdependencies between contracts, and responding to unexpected contingencies arising from more complex purchases. This rigidity is a blow to effective preferential procurement, since it impedes the development of the long-lasting relationships needed to build a long-term perspective and enduring capacity within suppliers over time – and it is an obstacle to public infrastructure delivery. The lack of attention or appreciation for public infrastructure in the current regime has been well-recognised in several recent government-approved policy papers, but this policy consensus does not find adequate expression in the recent Public Procurement Bill.

¹ See "Annexure C – NEDLAC Report on the Public Procurement Bill – JSR Version: Public Procurement Bill (14 October 2022)," November 2022, accessible at, <https://nedlac.org.za/nedlac-reports-and-research/>

Further, the current system of one-size-fits-all procurement rules and the location of custodianship of these rules within units of supply chain management, conflicts with the intended PFMA/MFMA location of both power and accountability with the accounting officers/ authorities of government departments and entities. Due to the rigidity of the procurement rules and institutional design requirements, the accounting officers/authorities are prevented from adapting the rules to the specific contracting or acquisition environment of the organisation they are purportedly in charge of. While they may have little to no substantive policy expertise or technical experience in the goods or services being procured clerical personnel in SCM units can end up calling the procurement shots. The administrative approach has thus disempowered technical and operational professionals in the state, and in so doing eroded an important check on illicit interference in the bureaucracy. In the absence of widely-understood principles, transparency and effective enforcement, corrupt actors often have impunity within the current public procurement system. Rather than constraining opportunities for corruption, the administrative paradigm has therefore arguably facilitated state capture, by eroding the authority and influence of professional technical functions which are not as easily politicised.

Embedding strategic procurement in the bill:

The prime significance of the JSR version of the Public Procurement Bill is that it represents a proof of concept. It is – we would argue – a coherent (if imperfect and incomplete) legal instrument building on and embodying the strategic approach to procurement. Unlike the February 2020 version of the Public Procurement Bill, the 2022 version introduced to Nedlac had no specific section or chapter dealing with infrastructure. The JSR restored appropriate regulation of public infrastructure procurement in the alternative legislative text it developed, and extended the ethos of strategic procurement throughout the Bill via the following elements: 1) accounting officers and authorities should have freedom to develop implementation frameworks which respond to the specific purchasing environments of the procuring institutions that they lead, 2) procurement must often be located as a strategic function able to be tightly linked to specialist project and service delivery functions, 3) professionals in these functions should have the flexibility to develop purchasing strategies that tailor processes to the requirements of specific purchases, and 4) the weight of ensuring integrity should be shifted from restrictive rules, toward stronger mechanisms of enforcement.

Procurement integrity:

The JSR version of the Bill adds stronger regulation and transparency around politically-connected persons; it adds requirements for an open contracting system; and provides for the encouragement of whistleblowing in procurement through incentives. In sum, the JSR elaborates five ‘guardrails’ to keep public procurement within constitutional and public parameters: 1) the JSR version of the Public Procurement Bill aligns strongly with the principles and purposes of section 217, in maintaining the public interest purposes of procurement processes, 2) the JSR Public Procurement Bill elaborates clear principles according to which the actions and capacities of procuring institutions and officials will be measured, 3) it extends strategic procurement authorisation to procuring institutions gradually – requiring procuring institutions to adhere to an administrative approach modelled by National Treasury, until they meet objective standards of ability and integrity in implementing the Act, 4) it empowers the Public Procurement Office to prohibit undesirable practices and to monitor procuring institutions, and 5) the JSR Public Procurement Bill bolsters oversight by this office by introducing enhanced procedures for transparency, incentivised whistleblowing, and enforcement.

The primary legislation (the Act) should establish clear procurement principles:

Consistent with the strategic approach to public procurement, the law should allow for the flexible, strategic, and effective pursuit of policy objectives which redress the imbalances of the past and simultaneously commit to sustainable procurement and economic development. The Act should ideally not rely on regulations and Public Procurement Office (PPO) instructions to interpret the intent of the Act, as is the National Treasury's preference. The Act needs to establish clear procurement principles, allowing for effective and strategic action by procuring institutions, and facilitating across-government coordination.

Overall, we worked for a statute that would provide for public procurement which is developmental in economic nature and outlook, aspiring to expand the productive base of the economy and to support innovation and investment. This meant that preferential procurement policies (including local content) were part and parcel of the statute. The legal architecture of the National Treasury Public Procurement Bill of 2022 contains little hope of moving away from a repetition of the lack of success of the earlier generations of regulatory instruments in this field. We argue this is not so much the fault of OCPO drafting, but rather of the fundamental choice not to exercise through Parliament the policy-making power of the state to adopt, promulgate, and enforce a comprehensive public procurement statute. The Bill should itself contain clear and accessible substantive policy choices in this area and not delegate and allow for such decisions to be taken (or fail to be taken) in the sub-units of National Treasury.





One Introduction

South Africa's public procurement regime, established in the context of public sector reform initiatives of the late 1990s and early 2000s, requires reform. Efforts to remodel the country's public procurement legislation were initiated as far back as 2013, with the establishment of the Office of the Chief Procurement Officer (OCPO) – tasked with modernising South Africa's procurement system, reducing leakage from the system, and realising maximum value on the substantial government spending in procurement in line with Section 217 of the Constitution.

The drafting process of the Public Procurement Bill has been a long and winding one. The reform process within which this draft legislation was at least initially embedded was announced by the Minister of Finance in his 2013 Budget Speech.² In 2014, the Office of the Chief Procurement Officer (OCPO), a division of the National Treasury, commissioned Professor Geo Quinot from Stellenbosch University to provide in-depth institutional and policy research on legal reform.³ The research informed an early draft of the Bill, but this work was soon shelved. The OCPO then engaged the Public Affairs Research Institute (PARI) at the University of the Witwatersrand to work on a second draft – that document itself drawing on earlier OCPO texts. In the process, the work became more detailed as Prof Quinot was reengaged to lead the drafting of regulations, alongside the development of the statutory text.

In 2017 and thereafter, coinciding with the emergence of the Preferential Procurement Regulations of that year,⁴ these instruments evolved largely beyond public scrutiny. Civil society grew increasingly concerned about the direction and pace of legislative reform.⁵ The publication for comment of a draft Public Procurement Bill in 2020⁶ was thus cautiously welcomed, although the consensus among both practitioners and civil society actors was that the draft was underwhelming.⁷ In any case, comments were made on the Bill. These have since become the subject of Promotion of Access to Information Act (PAIA) requests and potential litigation to gain access to these public comments by a coalition of civil society organisations. In the meantime, legislative development again disappeared into internal National Treasury processes, until the introduction of a further revised Bill into the National Economic Development and Labour Council (Nedlac) in 2022.

The Bill was introduced into Nedlac on 13 April. The Nedlac Act requires that the 'social partners' of organised labour and business are consulted on major socio-economic policy and legislation, and that a report on Nedlac deliberations on specific policies or legislation is prepared for consideration by the responsible Minister and Parliamentary Portfolio Committee. In subsequent months, the Nedlac Public Finance and Monetary Policy Chamber

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

3 Geo Quinot, "An Institutional Legal Structure for Regulating Public Procurement in South Africa," March 2014, <http://africanprocurementlaw.org/wp-content/uploads/2016/01/OCPO-Final-Report-APRRU-Web-Secure.pdf>.

4 Geo Quinot, "The Third Wave of Preferential Procurement Regulations in South Africa," *Journal of South African Law / Tydskrif Vir Die Suid-Afrikaanse Reg* 2018, no. 4 (2018): 856–67, <http://hdl.handle.net/10019.1/107494>.

5 Ryan Brunette and Jonathan Klaaren, "Reforming the Public Procurement System in South Africa" (Public Affairs Research Institute, May 2020), <https://47zhcvti0ul2ftip9rxo9fj9-wpengine.netdna-ssl.com/wp-content/uploads/2020/05/PROC05-05-20.pdf>.

6 Public Affairs Research Institute, "Draft Public Procurement Bill [B-2020] Submission of Public Comments," July 2020, https://47zhcvti0ul2ftip9rxo9fj9-wpengine.netdna-ssl.com/wp-content/uploads/2020/07/PARI_20200630_DraftProcurementBill_Submission.pdf; Geo Quinot, Sope William-Elegbe, and Dr Allison Anthony, "African Procurement Law Unit Comments," n.d., <http://africanprocurementlaw.org/wp-content/uploads/2020/06/APLU-Submissions-on-the-Draft-Public-Procurement-Bill-2020-South-Africa-Final.pdf>.

7 See the commentary on the draft Bill in the 2020(1) special edition of the African Public Procurement Law Journal at <https://aplj.journals.ac.za/pub/issue/view/10>.

in collaboration with the Trade and Industry Chamber established a Public Procurement Bill Task Team comprised of government, business, and labour to engage on the Bill. The task team met 15 times between 06 May 2022 and 07 October 2022. This excludes the “one-a-sides” and bilateral discussions held between the social partners. Remarkably, business and labour were aligned on most issues. They often found themselves speaking in unison to persuade government about policy positions.

The early meetings of the Task Team were attended, at the request of business and labour, by a small number of individuals and organisations with expertise in public procurement. This group of individuals and organisations were formalised and styled as a Joint Strategic Resource (JSR), coordinated by PARI, and including the African Procurement Law Unit (APLU), the Wits School of Construction Economics and Management, and Corruption Watch. The JSR was asked to support the process as directed by business and labour with research, advice, and related inputs. A crucial feature of input into the Bill, agreed to in principle between all the social partners, including government, was to provide the legal basis for moving public procurement in South Africa toward a new strategic procurement paradigm. The JSR was asked to support the Task Team by theorising this concept and suggesting how it could be embedded in practice in the Bill.

Between June and October 2022, the Joint Strategic Resource (JSR) was established to support the Public Procurement Bill Task Team of the Nedlac. The JSR prepared a proposed draft of the Public Procurement Bill, which is available as Annexure C of the Final Nedlac Report on the Bill (“the JSR Draft”). The present paper explains the strategic procurement paradigm that underpins the JSR Draft.⁸

As part of its work within the Task Team, the JSR were briefed to produce several concept notes. These are available as [hyperlinked concept notes](#) to this paper, and cover the following topics:

- Concept note on recently published infrastructure policy and its implications for the Public Procurement Bill (26 June 2022).
- Concept note on the tension between the draft Public Procurement Bill and Accounting Officer/Authority responsibilities (4 July 2022).
- Concept note on public oversight through an open tendering system for goods, works and services (6 July 2022).
- Concept note on public oversight through an open tendering system for public infrastructure (6 July 2022).
- Concept Note on the Definition of Public Office Bearer, its Application to Clause 17 of the Bill, and the Automatic Exclusion of Political Exposed Persons from Public Procurement (9 July 2022).
- Concept note on centralisation versus decentralisation of public procurement (15 July 2022).
- Concept note on migrating from an administrative to a strategic procurement system (21 July 2022).
- Concept note on Credentialing for those engaged in soliciting and evaluating tenders (9 October 2022).

⁸ “Annexure C – Nedlac Report on the Public Procurement Bill – JSR Version: Public Procurement Bill (14 October 2022),” November 2022, <https://Nedlac.org.za/Nedlac-reports-and-research/>.

By the end of its Nedlac work, the JSR had produced a 14 October 2022 JSR version of the Public Procurement Bill. The intention was to give the social partners a concrete account of how a specific vision of strategic procurement could be incorporated into the Bill.

This paper does not aim to provide justification or to defend the specific text of the JSR version. The reader who is interested in that draft and its specific justification, can refer to Annexure B of the Final Nedlac Report on the Public Procurement Bill, which contains an explanatory memorandum.⁹ Section 5 of this paper below also comments on the structure of the JSR draft and the arrangement of its chapters.

The current paper leaves things there because the JSR version was written under certain significant constraints. First, the JSR was constrained to work from the structure – and, to a significant degree, the content – of the version of the Bill that the OCPO had introduced into Nedlac. Second, the internalised norm of confidentiality practiced by the social partners at Nedlac (including the members of the JSR), and the limited number of interests within the process, constrained the ability to conduct wider stakeholder research and discussion. Once a bill is tabled in Nedlac, the focus is on the views of those at the table. The assumption at Nedlac is that public consultations have been held before a bill comes to Nedlac. A further third fundamental constraint was the limited period allowed for the drafting process, which was pressed into a few weeks of part-time work (this time constraint was established by the National Treasury who were under pressure to finalise this long-outstanding piece of legislation before the end of the current political term of office).

The JSR drafting process therefore often identified serious issues with the National Treasury Bill, but it did not have the time and resources to address these. The Public Procurement Bill as introduced in Nedlac, for instance, applies across national, provincial, and local spheres of government. It tends to take the perspective of a national department's procurement function. Despite the fact that the weight of public procurement in South Africa occurs instead in the parastatals and local government¹⁰, the Bill almost entirely ignores their institutional peculiarities. The Bill therefore carries high risk of producing legal confusion. It could actually undermine the distinctive accountability systems of these spheres of the state. Indeed, worry about such an outcome was why the Public Finance Management Act (PFMA) and Municipal Finance Management Act (MFMA) were drafted separately, but the Public Procurement Bill gives little regard to those intricacies.

Given these limitations to drafting, the prime significance of the JSR version of the Public Procurement Bill is perhaps that it represents a proof of concept. It is – we would argue – a coherent (if imperfect and incomplete) legal instrument building on and embodying the strategic approach to procurement. It demonstrates that the ideas and themes we discuss in this paper are capable of translation and operationalisation in legal text. We argue that the JSR Bill demonstrates that the strategic procurement approach – as we here define and explain it – is appropriate to the South African context for adoption and implementation as the key concept in a comprehensive public procurement statute.

In this paper, however, we go one step further. We will argue that the strategic procurement approach (understood as allowing for an administrative approach in appropriate purchasing contexts) is technically superior to the overall administrative approach to procurement, which still dominates and underpins the OCPO's Bill at the conclusion of the Nedlac process. The remainder of this paper elaborates on this argument.

9 "Annexure B – Nedlac Report on the Public Procurement Bill – JSR Version: Explanatory Memorandum (14 October 2022)," November 2022, <https://nedlac.org.za/nedlac-reports-and-research/>.

10 "2018 State of Procurement Spent.Pdf," accessed February 26, 2023, http://ocpo.treasury.gov.za/Resource_Centre/Publications/2018%20State%20of%20procurement%20spent.pdf.

Two

Strategic Procurement is Not the Administrative Approach to Procurement

Our analysis of the current procurement regime is that it follows an administrative paradigm. This paradigm emerges from and is best suited for the procurement of basic, “off-the-shelf” goods and services, which are well-defined, easily specified, and without critical risks for public finance and service delivery. The administrative paradigm is also aligned with the procedural rules of public financial management, particularly as is put into place by the two principal legal instruments of National Treasury: the PFMA and the MFMA and their associated regulations, guidelines, directions, and instruction notes.

The administrative paradigm stipulates rigid public procurement processes. Consistent with a financial procedures approach, it puts into place such rigid procedures in order to ensure legibility, compliance, and expenditure control. Institutionally, the administrative paradigm is thus characterised by the movement of decision-making powers away from technical professionals in end-user functions toward more clerical purchasing units, bid committees and finance divisions.



Three

The Administrative Paradigm is Both Cause and Effect of the Problems of the Current Procurement System

We argue that the administrative paradigm is tightly intertwined with the current problems of the public procurement system. It is both cause and effect of the ills of the current regime. It is the cause because this way of thinking about procurement has subjected purchasing processes to constraints that often have little reasonable relationship with delivery priorities. It has disempowered technical and operational professionals in the state. This has marginalised expert input into procurement and eroded an important check on illicit interference in the bureaucracy. Issues with the current South African approach to public procurement have been acknowledged by a large number of significant public policy actors, including the Zondo Commission of Enquiry into State Capture.

There are at least five major problems with the current regime. First, the design of the system is more appropriate for off-the-shelf products and well-defined services, than for public infrastructure and other complex purchases. This lack of attention or appreciation for public infrastructure specifically has been well-recognised in several recent government-approved policy papers, but this policy consensus does not find adequate expression in the NT Bill.¹¹

Second, the current system constrains procuring institutions from engaging key suppliers, managing interdependencies between contracts, and responding to unexpected contingencies arising from more complex purchases. This rigidity is, in particular, a blow to effective preferential procurement, since it impedes the development of the long-lasting relationships needed to build a long-term perspective and enduring capacity within suppliers over time – and it is an obstacle to public infrastructure delivery.

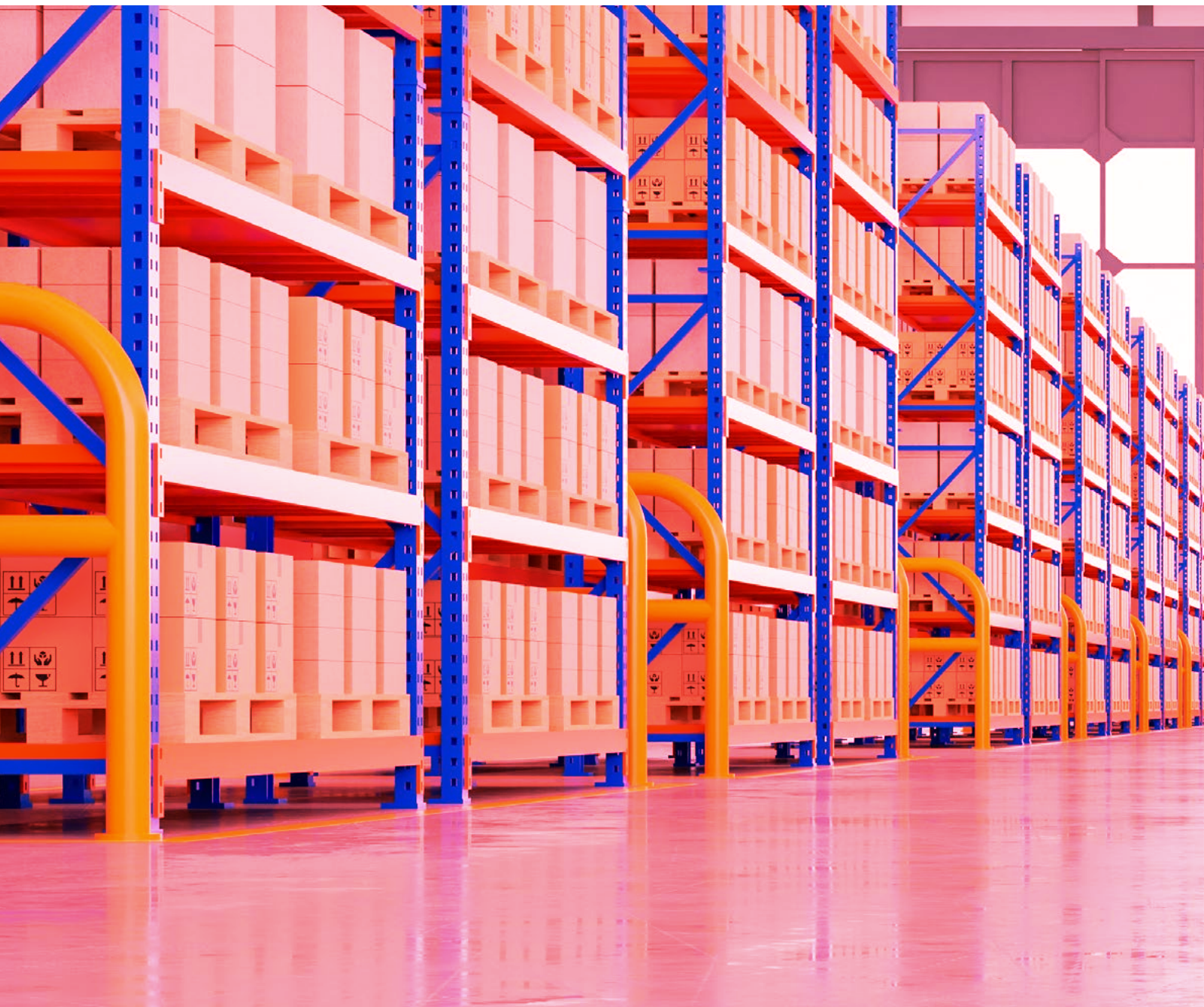
Third, the current system of one-size-fits-all procurement rules based on financial management, and the location of custodianship of these rules within units of supply chain management, actually conflicts with the intended PFMA/MFMA location of both power and accountability with the accounting officers/authorities of government departments and entities. Due to the rigidity of the procurement rules and institutional design requirements, the accounting officers/authorities are prevented from adapting the rules to the specific contracting or acquisition environment of the organisation they are purportedly in charge of. Instead, such officers often end up being told by subordinates that the rules do not allow for procurement to be done in ways the officers and authorities think are appropriate.

Fourth, the influence of the administrative paradigm and the character and institutional location of the specific procurement rules as elaborated by the OCPO distances institutional decision-making on procurements of all types from specialist technicians in portfolio, programme, and project management divisions. While they have little to no substantive policy expertise or experience, clerical personnel in SCM units rather than those in line or operational departments end up calling the procurement shots.

11 Ron Watermeyer and Sean Phillips, "Public Infrastructure Delivery and Construction Sector Dynamism in the South African Economy," Final Report (National Planning Commission, April 25, 2020), <https://www.nationalplanningcommission.org.za/assets/Documents/Public%20infrastructure%20delivery%20and%20construction%20sector%20dynamism%20in%20the%20South%20African%20economy.pdf>.

Fifth and finally, in the absence of well-understood principles, transparency and enforcement, corrupt actors often have impunity within the current public procurement system. Clerical supply chain management units, bid committees, and financial functions have readily been filled with political and other inappropriate appointments. Rather than constraining opportunities for corruption, the administrative paradigm has therefore arguably facilitated state capture, by eroding the authority and influence of professional technical functions which are not as easily politicised.

The result is a procurement system that suffers from the worst of both procedural rigidity for ethical public servants, and rampant non-compliance for the connected. The outcome is a litany of inappropriate purchasing decisions, time and cost overruns, substandard and non-delivery, and high levels of irregularity and corruption.



Four

More than Infrastructure: Embedding Strategic Procurement in the Bill

As explained above, the initial impetus for the JSR version of the Public Procurement Bill was the desire of all Nedlac's social partners to put strategic procurement into the draft legislation it was discussing and developing. The brief was most clear with respect to Chapter 5 of the Public Procurement Bill and its treatment (or lack thereof) of infrastructure. Unlike the February 2020 version of the Public Procurement Bill put out for public comment, the OCPO Public Procurement Bill brought to Nedlac had no specific section or chapter dealing with infrastructure. This was a major surprise to those outside OCPO, since the inclusion of at least a separate chapter dealing with infrastructure was one of the few features of the 2020 Bill that found favour with expert practice, policy communities, and broader civil society.

As it tasked the JSR with drafting provisions of the Bill that would allow for strategic procurement, the Nedlac Task Team's minimum expectation was thus that the JSR would restore appropriate (presumably separate) regulation of public infrastructure procurement in the alternative legislative text it developed. The JSR did restore appropriate regulation of public infrastructure procurement, but it did so by elaborating a conception of strategic procurement which both incorporated infrastructure and moved beyond it. The effect was to obviate the need for a separate chapter dealing with infrastructure, and instead to extend the ethos of strategic procurement throughout the Bill. In this sense, strategic procurement was both taken further than infrastructure alone, and was also mainstreamed within the Bill.

The JSR developed a conception of strategic procurement defined by the following three elements. First, accounting officers and authorities should ideally have freedom to develop implementation frameworks which respond to the specific purchasing environments of the procuring institutions that they lead. Second, procurement must often be located as a strategic function able to be tightly linked to specialist project and service delivery functions. Third, professionals in these functions should have the flexibility to develop purchasing strategies that tailor processes to the requirements of specific purchases. Fourth, the weight of ensuring integrity should be shifted from restrictive rules, toward stronger mechanisms of enforcement, which could be activated by a wider array of stakeholders.

This meant that we developed a generic idea for the subject matter of strategic procurement. What is being procured is a collection of contracts that need to function together as a project. While this fits the classic understanding of public works and of public infrastructure as a category of procurement beyond goods and services, it is not limited to the usual understanding of public infrastructure and includes the public procurement of systems such as information technology systems and others. In this approach, we thus defined procurement as follows: "the process which creates, manages and fulfils contracts which are concluded following the application of a selection method in Part 2 of Chapter 5." This definition is at the heart of the distinction of the strategic procurement paradigm from the existing dominant one of administrative procurement.

Five

Consequential Changes to the Public Procurement Bill

The JSRs concluded that properly embedding strategic procurement in the Bill would require moving beyond Chapter 5 to make consequent changes to other chapters. Given the time available within the Nedlac process, the JSR made changes to chapters 1-4. Two chapters were not thoroughly revised: chapter 6 and chapter 7. Chapter 6 covers the topic of dispute resolution and essentially sets up an administrative tribunal to hear and resolve disputes arising with the public procurement system. Chapter 7 covers the topics of enforcement matters and largely deals with topics such as regulation-making power. One topic of Chapter 7 – confidentiality and access to information – overlapped significantly with the subject matter of Chapter 3 – Procurement Integrity – and thus the JSR did a significant amount of drafting with attention to Chapter 7. Confidentiality and access to information is covered as part of Chapter 3 in the treatment below in this paper.

In brief and summary form, the changes made by the JSR working within the structure of the National Treasury Bill are the following:

In the Preamble to the Public Procurement Bill, procurement is contextualised in terms of constitutional imperatives. Whereas the National Treasury Bill leads with s 216 of the Constitution (providing for financial norms and standards), the JSR Bill leads with s 217 of the Constitution, which has public procurement as its subject matter.

In Chapter 1: Definitions, Objects, Purposes, Application and Administration of Act, the JSR version of the Bill clearly articulates the objects and purposes of the legislation. The purposes describe what this procurement system seeks to promote through the unpacking of the specific concepts associated with the s 217 constitutional principles of fair, equitable, transparent, competitive, and cost-effective procurement. Each of these five principles is given further definition, moving much further beyond the current soft law definition of these terms by Guidelines under the authority of National Treasury.¹²

In Chapter 2: Public Procurement Office (PPO), Provincial Treasuries and Procuring Institutions, the JSR version does not engage with the thorny question of the location of appropriate regulatory authority, but nonetheless reshapes the roles and responsibilities of PPO to cater for the paradigm of strategic procurement. To do so, the JSR version of the Bill establishes clear and comprehensive requirements for procuring institutions.

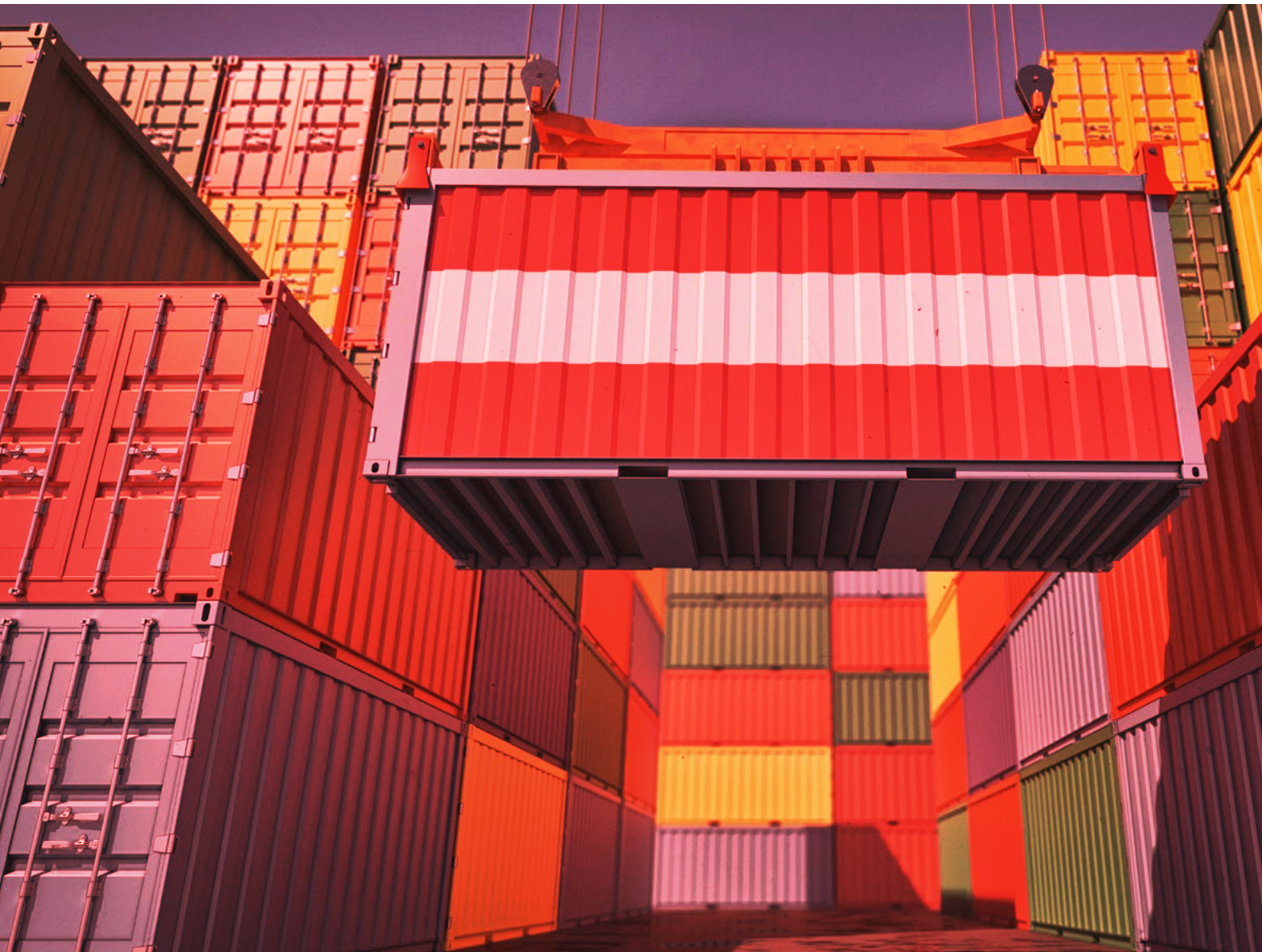
In Chapter 3: Procurement integrity, the JSR version of the Bill adds stronger regulation and transparency around politically-connected persons. Even more fundamentally, the JSR version adds requirements for an open contracting system. This allows for transparency and for coordination, leading to cost-efficient and effective procurements. Additionally, the JSR version of the Bill adds a provision for the encouragement of whistleblowing in procurement through incentives. This policy has been demonstrated to be of particular efficacy in the field of public procurement and was approved in principle by the Zondo Commission. These integrity-enhancing interventions are seen as a critical accompaniment to movement toward strategic procurement generally.

12 National Treasury, "General Procurement Guidelines," accessed November 11, 2022, <http://www.treasury.gov.za/legislation/pfma/supplychain/general%20procurement%20guidelines.pdf>.

In Chapter 4: Framework for Preferential Procurement Policy, the JSR version continued with its theme of constitutional elaboration and aligned the provisions for preferential procurement within s 217. In order to do this, the Bill used the concept of “targeted treatment”, which it drew from international standards from the ISO network.

Chapter 5: Supply Chain Management and Bidding Process saw a nearly complete rewrite from the JSR. The Chapter was redrafted as Procurement Practices, Procedures and Methods, in terms of a vision for an accessible statute outlining and thereby consolidating the South African public procurement system.

The JSR concluded with incidental adjustments to certain sections and sub-sections of Chapters 6 and 7 of the original National Treasury Bill upon which it was working.



Six

Guardrails for a Public Procurement Bill Built Around Strategic Procurement

A common framing of the strategic procurement approach is that it is “relaxing” the rules and allowing for “more flexibility”. We would contest this framing since we have conceived strategic procurement not as a departure from the rules-based administrative paradigm, but rather as a distinct paradigm itself built from constitutional principles as applied to the diversity of public procurement contexts, including but not limited to public infrastructure.

Nonetheless, concern for its anti-corruption resilience is a particular theme of the public discussion of the strategic procurement approach. This is of course fair enough, particularly given South Africa’s recent experience of state capture. This section thus enumerates the specific parts of the JSR version of the Public Procurement Bill that function as guardrails in order to keep public procurement within constitutional and public parameters. There are five of these:

First, the JSR version of the Public Procurement Bill aligns strongly with the principles and purposes of section 217. It also aligns strongly with the public administration principles of Chapter 10 of the Constitution. The soft power of the Constitution is thus mobilised here in maintaining the public interest purposes of procurement processes and preventing diversion of government commercial activity for private gain.

Second, the JSR Public Procurement Bill elaborates, in a Parliamentary accessible statute, clear principles according to which the actions and capacities of procuring institutions and officials will be measured. This measurement occurs of course as an initial matter in the minds of public officials, but also in the legal divisions of both the public and private parties to these government contracts. As necessary, the power of judicial review and the remedies of the courts are available and are indeed enabled and facilitated through the provision of clear Parliamentary parameters for public procurement.

Third, the JSR version of the Public Procurement Bill extends strategic procurement authorisation to procuring institutions gradually. The Bill maintains the possibility of using all the procedures of administrative procurement. It requires procuring institutions to adhere to an administrative approach modelled by National Treasury, until they meet objective standards of ability and integrity in implementing the Act. It is only when procuring institutions meet these standards that they will be allowed to move toward a strategic procurement system, with continuous monitoring and the possibility of imposing tighter constraints should they fall below these standards in future. This differentiated implementation approach is seen particularly in the drafting of Chapter 2 of the Bill.

Fourth, the JSR Public Procurement Bill empowers the PPO to prohibit undesirable practices and to monitor procuring institutions. The PPO as designed here is subject to the internal processes of National Treasury and is organisationally thus short of the capabilities of an independent regulatory authority. Nevertheless, the PPO has a number of tools at its disposal with the JSR version to keep actors within the system on their public missions.

Fifth, the JSR Public Procurement Bill bolsters PPO oversight by introducing enhanced procedures for transparency, incentivised whistleblowing, and enforcement.

Seven

The JSR's Vision for the Public Procurement Bill is as a Statute Implementing Constitutional Policy

As we as the JSR drafted text oriented to strategic procurement and presented such text to the Nedlac Task Team, the response from government was often to the effect that the topics covered in statute could be, would be and should be covered later in regulations. As the JSR process unfolded, we realised however that there was a fundamental difference in the vision for the legislation at issue between ourselves and our colleagues from National Treasury in this process.

In our view, the Public Procurement Bill should create a single regulatory framework consistent with the Constitution. This should be an Act of Parliament that defines and articulates a public procurement system as envisaged in section 217 of the Constitution. The bill should embed statutorily the principles for procurement and establish checks and balances framed around Section 217 of the Constitution.

The law should further allow for the flexible, strategic, and effective pursuit of policy objectives which redress the imbalances of the past and simultaneously commit to sustainable procurement and economic development. The Act cannot rely on regulations and Public Procurement Office (PPO) instructions to interpret the intent of the Act. The Act needs to establish clear procurement principles, allowing for effective and strategic action by procuring institutions, and facilitating across-government coordination.

Accounting officers/authorities and procuring institutions should be allowed to develop and implement their procurement system around the objectives of the Act, the principles embedded in the Act, and the various overarching procedures that it establishes. They should be sure that their decisions and actions will be scrutinised, with data and document disclosures at specified points within the procurement cycle on an open online platform managed by the PPO.

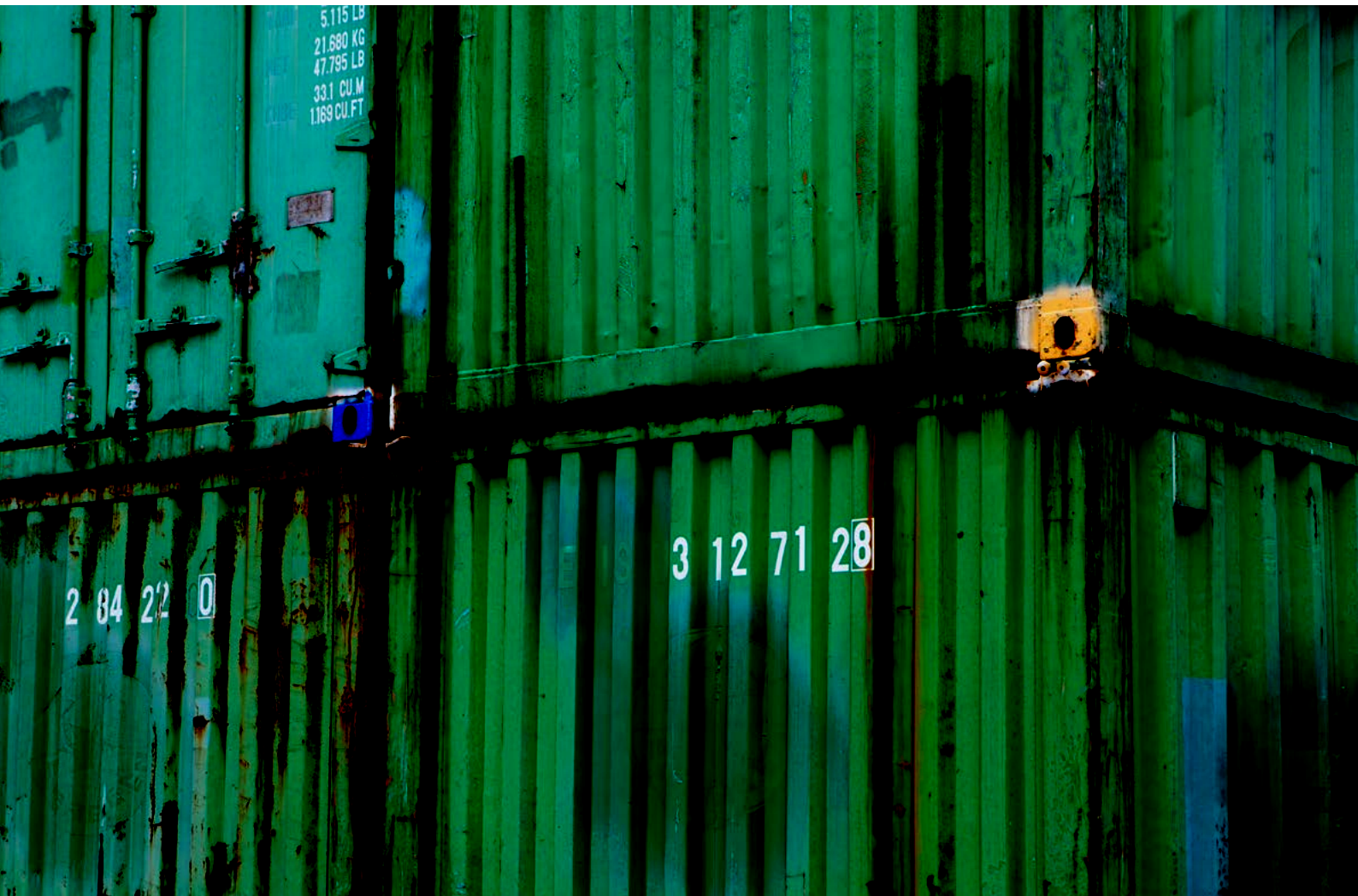
In addition, while the procurement system should not be over-determined by the objective of anti-corruption, the statute must be one that advances transparency and combats corruption. We thus adopted the principle of open contracting in order to advance these objectives as well as efficacy and cost-effectiveness. Overall, we worked for a statute that would provide for public procurement which is developmental in economic nature and outlook, aspiring to expand the productive base of the economy and to support innovation and investment. This meant that preferential procurement policies (including local content) were part and parcel of the statute.

The choice for a statute rather than for regulations and further instructions from the PPO is a fundamental one. The legal architecture of the National Treasury Public Procurement Bill contains little if any hope of moving away from a repetition of the lack of success of the earlier generations of regulatory instruments in this field. We argue this is not so much the fault of OCPO drafting, but rather of the fundamental choice not to exercise through Parliament the policy-making power of the state to adopt, promulgate, and enforce a comprehensive public procurement statute. Thus, the current Public Procurement Bill should itself contain clear and accessible substantive policy choices in this area and not delegate and allow for such decisions to be taken (or fail to be taken) in the sub-units of National Treasury.

Eight Provisional Conclusion

As we finalise this paper in May 2023, the legislative process around the Public Procurement Bill remains somewhat fluid. A later (May 2023) version of the Bill has been approved by Cabinet, though it has yet to be made public, and further changes are expected to the Bill before it reaches Parliament.

The Public Procurement Bill must provide a framework for addressing the manifestly evident problems in South Africa's public procurement system. We are undertaking several actions – including the convening of an inclusive civil society and government legislative development process with actors from across the public procurement system in the first six to nine months of 2023. We invite persons within the formal and the civil society policy formulation and legislative development processes to carefully consider the argument and the issues canvassed in the course of the JSR development of a Public Procurement Bill built around the strategic procurement approach.



Annexure 1

JSR Concept Notes developed for the 2022 Nedlac Deliberations on the Public Procurement Bill

As part of its work within the Task Team, the JSR were briefed to produce several concept notes. These can be accessed by following the links:

1. [Concept note on recently published infrastructure policy and its implications for the Public Procurement Bill \(26 June 2022\).](#)
2. [Concept note on the tension between the draft Public Procurement Bill and Accounting Officer/ Authority responsibilities \(4 July 2022\).](#)
3. [Concept note on public oversight through an open tendering system for goods, works and services \(6 July 2022\).](#)
4. [Concept note on public oversight through an open tendering system for public infrastructure \(6 July 2022\).](#)
5. [Concept Note on the Definition of Public Office Bearer, its Application to Clause 17 of the Bill, and the Automatic Exclusion of Political Exposed Persons from Public Procurement \(9 July 2022\).](#)
6. [Concept note on centralisation versus decentralisation of public procurement \(15 July 2022\).](#)
7. [Concept note on migrating from an administrative to a strategic procurement system \(21 July 2022\).](#)
8. [Concept note on Credentialing for those engaged in soliciting and evaluating tenders \(9 October 2022\).](#)

Annexure 2:

Nedlac Report on the Public Procurement Bill

The full [Nedlac Report on the 2022 Public Procurement Bill](#) can be found on the Nedlac website under Nedlac Reports and Research, and contains the following:

1. The main Nedlac Report on the Public Procurement Bill.
2. Annexure B: JSR Explanatory memorandum to the PPB.
3. Annexure C: JSR Version of the Public Procurement Bill.
4. Annexure D: Government Response to the JSR version of Bill.
5. Annexure E: Government Public Procurement Bill - Post Nedlac consultation.
6. Annexure F: Update on the Implementation of State Capture Recommendations on procurement (National Treasury).
7. Annexure G: Labour motivation on incentivised whistle-blowing provision.
8. Annexure H: Business inputs re JSR.

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