

Re-Categorising Public Procurement in South Africa: Construction Works as a Special Case



AM Anthony*

P·E·R

Pioneer in peer-reviewed,
open access online law publications

Author

Allison Anthony

Affiliation

University of South Africa

Email

anthoam@unisa.ac.za

Date Submission

22 June 2018

Date Revised

14 January 2019

Date Accepted

15 January 2019

Date published

26 February 2019

Editor Prof O Fuo

How to cite this article

Anthony AM "Re-Categorising
Public Procurement in South Africa:
Construction Works as a Special
Case" *PER / PELJ* 2019(22) - DOI
<http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5270>

Copyright



DOI

<http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5270>

Abstract

Public procurement is generally known to be the acquisition of goods and services by the government from the private sector. Construction works are considered to constitute services and as such are not specifically referred to in the *Constitution of the Republic of South Africa, 1996*. Re-categorising public procurement may hold many advantages for the regulation of construction procurement law as a unique form of public procurement in South Africa. The definition of construction works is thus important when establishing what is procured in construction procurement. This definition in turn may indicate that the procurement of construction works is indeed a unique form of procurement and should accordingly be re-categorised in South African public procurement law.

Keywords

Construction procurement; public procurement law; defining construction procurement.

.....

1 Introduction

In general, public procurement refers to the acquisition of goods and services.¹ In other countries² an additional category has been added, that of works. However, in South Africa, section 217 of the *Constitution*³ provides that organs of state contract for the provision of goods or services only. There is thus no third category for works. In South Africa, construction is considered to be a service, and it therefore resorts under "services" in section 217. In this article the argument will be made that works should constitute a separate category of procurement for several legal reasons and that categorising construction works separately holds various advantages for the regulation of construction procurement law in South Africa. However, in order to categorise construction procurement separately, a definition of it needs to be established. This definition is what this article aims to provide.

In formulating this argument, the law regulating general procurement and construction procurement will be looked at. Next, the current categorisation of construction procurement will be discussed. Following this, the meaning of construction procurement and whether it indeed constitutes a service or whether it is in fact a category of procurement on its own will be established. A definition of construction procurement will be proffered in an attempt to identify the product procured during the construction procurement process. How construction procurement differs from the procurement of general goods and services and current attempts at illustrating this in the practice of construction procurement will be discussed. Lastly, a workable definition of construction procurement will be proffered as well as the placing of construction procurement within the broader public procurement regime in South Africa.

2 Legal regulation of public procurement in South Africa

Section 217(1) of the *Constitution* provides that when contracting for goods or services, organs of state in the national, provincial or local sphere of government or institutions identified in national legislation must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Section 217(2) provides for the use of procurement as a

* Allison Anthony. BA LLB LLM LLD (Stellenbosch University), South Africa. Senior Lecturer of Public Procurement Law, University of South Africa, Pretoria. E-mail: anthoam@unisa.ac.za.

¹ Bolton *Law of Government Procurement* 1.

² Such as the UK and the USA.

³ *Constitution of the Republic of South Africa, 1996 (the Constitution)*.

policy tool. This provision states that subsection (1) does not prevent organs of state or institutions in subsection (1) from implementing procurement policies providing for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons disadvantaged by unfair discrimination. Section 217(3) prescribes a national legislative framework to be enacted in terms of which preferential procurement policies as contemplated in subsection (2) are to be implemented.

Legislation applicable to procurement in general includes the *Preferential Procurement Policy Framework Act* (PPPFA)⁴ and its Regulations⁵ which regulate preferential procurement by providing a framework in which preferential procurement policies are to be implemented. At national and provincial government level, the *Public Finance Management Act* (PFMA)⁶ and its Regulations⁷ govern public finance in general and public sector procurement. The *Local Government: Municipal Finance Management Act* (MFMA)⁸ with its Regulations⁹ and the *Local Government: Municipal Systems Act*,¹⁰ manage public finance and thus public sector procurement at local government level.

The Supreme Court of Appeal (SCA) has held that the invitation, evaluation and award of tenders is of the nature of administrative law;¹¹ therefore, the *Promotion of Administrative Justice Act* (PAJA)¹² applies. Furthermore, the *Promotion of Access to Information Act* (PAIA)¹³ is also applicable, as it regulates access to any information held by both the government and private parties. The *Broad-Based Black Economic Empowerment Act* (BBBEEA)¹⁴ is applicable to preferential procurement in that it regulates black economic empowerment. Lastly, the *Prevention and Combating of*

⁴ *Preferential Procurement Policy Framework Act* 5 of 2000 (the PPPFA).

⁵ GN R32 in GG 40553 of 20 January 2017 (PPPFA Regulations).

⁶ *Public Finance Management Act* 1 of 1999 (the PFMA).

⁷ GN R1737 in GG 25773 of 28 November 2003 (PFMA Public-private Partnership Treasury Regulation 16); GN R225 in GG 27388 of 15 March 2005 (PFMA Supply Chain Management Treasury Regulation 16A).

⁸ *Local Government: Municipal Finance Management Act* 56 of 2003 (the MFMA).

⁹ Gen N 868 in GG 27636 of 30 May 2005 (MFMA Municipal Supply Chain Management Regulations).

¹⁰ *Local Government: Municipal Systems Act* 32 of 2000.

¹¹ See *Umfolozu Transport (Edms) Bpk v Minister van Vervoer* 1997 2 All SA 548 (A) paras 552-553; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 2 BCLR 176 (SCA) para 23; *Logbro Properties CC v Bedderson* 2003 2 SA 460 (SCA) para 5; *Metro Projects CC v Klerksdorp Municipality* 2004 1 SA 16 (SCA) para 12.

¹² *Promotion of Administrative Justice Act* 3 of 2000 (PAJA).

¹³ *Promotion of Access to Information Act* 2 of 2000 (PAIA).

¹⁴ *Broad-Based Black Economic Empowerment Act* 53 of 2003 (BBBEEA).

*Corrupt Activities Act*¹⁵ is aimed at curbing corruption in procurement processes and is therefore relevant. Legislation which regulates procurement in general also prescribes that the specific prescripts of the CIDB apply to construction procurement alongside the general legislation.¹⁶

The law applicable throughout the procurement process is the private law of contract.¹⁷ However, because the government is a party to the contract and is obliged to act in the public interest, possesses public powers and is generally in a more powerful position, public law also applies.¹⁸

3 Legal regulation of construction procurement in South Africa

The legislation applicable to public sector construction procurement is the legislation applicable to procurement in general, the *Construction Industry Development Board Act* (CIDB Act),¹⁹ the Regulations to the Act²⁰ and the prescripts issued by the Construction Industry Development Board (CIDB) in terms of the CIDB Act. Section 2 of the Act establishes the CIDB as a juristic person and regulatory board for the construction industry and construction procurement in particular. The Act sets out the powers and functions of the Board and it requires a register of contractors to be created to enhance the efficiency of the procurement practices and to facilitate public sector construction procurement. In order to establish what construction procurement constitutes, a definition of construction procurement must be provided.

4 Construction procurement defined

The CIDB Act does not provide a definition for construction procurement. However, Regulation 1 of the Construction Industry Development Regulations defines it as "construction procurement in the construction industry, including the invitation, award and management of contracts". This definition is wide and does not give any indication as to what the subject of

¹⁵ *Prevention and Combating of Corrupt Activities Act* 12 of 2004.

¹⁶ See PFMA Supply Chain Management Treasury Regulation 16A 6.3(a)(ii); MFMA Municipal Supply Chain Management Regulations Reg 1 under "other applicable legislation".

¹⁷ Bolton *Law of Government Procurement* 16; Quinot *State Commercial Activity* 258.

¹⁸ Ferreira sets out how the government as a party to the contract is different from a private contractant. See Ferreira 2011 *SALJ* 173.

¹⁹ *Construction Industry Development Board Act* 38 of 2000 (the CIDB Act).

²⁰ GN R1224 in GG 31603 of 14 May 2008 (Construction Industry Development Regulations).

construction procurement in South Africa is. It appears from the CIDB Act and its Regulations that the items that are procured, thereby forming the subject of construction procurement, are referred to as "construction works". This is in turn defined in section 1(j) of the Act as:

[T]he provision of a combination of goods and services arranged for the development, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of a fixed asset including building and engineering infrastructure.

The Regulations to the Act in turn refer to "classes of construction works" that are set out in Schedule 3 to the Regulations, which provides a table of the various classes of construction works which may be procured. These include civil engineering works, electrical engineering works and general building works. In the case of electrical engineering works, a further distinction is made between electrical engineering works which constitute infrastructure and those which constitute buildings. Further classes of construction works include general building works, mechanical engineering and specialist works. The latter category consists of works identified by the CIDB, which involve specialist capabilities.

In line with the duty of the CIDB to issue guidelines for best practice within the construction industry,²¹ the CIDB Standard for Uniformity has been published, which provides guidelines for the type of works and contracts used in the construction procurement process. The standard, unlike the CIDB Act and its Regulations, refers to the various classes of construction as consisting of engineering and construction works, supplies and services other than professional services.²² The definitions of what constitutes construction works in the legislation and guidelines are therefore contradictory.

5 Categorising construction procurement in South Africa

Section 217(1) of the *Constitution* provides that organs of state when contracting for goods and services should do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. It appears therefore that procurement consists of two categories – goods and services. This raises the question whether construction procurement or more specifically, construction works resorts under goods or services.

²¹ Defined in s 1(h) of the CIDB Act as "the broad conglomeration of industries and sectors which add value in the creation and maintenance of fixed assets within the built environment".

²² See Table 3 at 9.

According to De la Harpe, "services" can include any kind of work, ranging from cleaning services to professional services, such as that of a banker for example. He further notes that it may at times be difficult to distinguish between "goods" and "services" and that a wide interpretation should be given to both terms as, he argues, the purpose of section 217 is to provide for principles which would regulate all government procurement and not to limit these principles through a narrow interpretation of "goods" and "services". De la Harpe is furthermore of the view that "goods or services" are wide enough to include "works" or "construction" and that no additional category is needed for this.²³

International instruments, however, regard goods, works or construction and services as three separate categories. The 1994 United Nations Commission on International Trade Law (UNCITRAL) *Model Law on Procurement of Goods, Construction and Services* provides for three separate categories for goods, construction and services.²⁴ The 2011 *UNCITRAL Model Law on Public Procurement* was adopted on 1 July 2011 and replaces the 1994 version. It defines "public procurement" in Chapter 1 Article 2(j) as "the acquisition of goods, construction or services by a procuring entity", thereby making a distinction between goods, construction and services.²⁵ Furthermore, the World Bank in the January 2011 Procurement Guidelines also distinguishes between goods, works and non-consulting services.²⁶

Regulations 5 and 6 of the 2011 Preferential Procurement Regulations provide for a point system in terms of which preference should be awarded to contractors. In terms of the Regulations, a procuring body may award points for the acquisition of goods, services and/or works. This differs from the 2001 Regulations, which referred to a point system for tenders or procurement and not for goods, works or services.²⁷ These Regulations seem therefore to follow the approach adopted by international legal instruments with regard to the classification of procurement into goods, works and services as opposed to goods and services as generally done in South Africa. It may be advantageous to re-categorise construction procurement as works under section 217 of the *Constitution* in order to

²³ De la Harpe *Procurement Law* 23-24 para 2.2.1.

²⁴ See UNCITRAL Date unknown <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf>.

²⁵ UNCITRAL 2014 <https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf>.

World Bank 2011 http://siteresources.worldbank.org/INTPROCUREMENT/Resources/278019-1308067833011/Procurement_GLs_English_Final_Jan2011.pdf.

²⁷ See Regulations 3 and 4 of the 2001 Regulations.

provide for its own category. The significance and potential advantage of this will be discussed next.

6 A case for categorising construction procurement separately

Arrowsmith²⁸ notes that for the purposes of control and regulation, procurement is generally classified into three categories – "supplies", "services", and "works". She writes that "supplies" normally refers to the acquisition of "off the shelf" items such as stationery and office furniture.²⁹ "Works" refers to construction and engineering activities such as the building of a road, and the term "services" is generally used to refer to non-construction services.³⁰ At the same time, she notes that "construction" is a type of service and that the term is often used in a broader sense providing for both construction and non-construction services.³¹

As noted, public procurement has been categorised internationally as consisting of goods, services and works. One may ask what the significance of this is and what impact it would have on South African public procurement law if the same classification were to be used. The division of public procurement into three categories creates the impression that each category is regulated either individually or somewhat differently from each other. In countries where procurement is classified as such, this is indeed the case. In other words, where public procurement is divided into goods, services and works, each of the categories is regulated individually, each with its distinct rules. Classifying construction works as a service creates the impression that when procuring works, a service is procured. However, the categorisation of works in the CIDB Regulations indicates that both goods and services are procured, making works a combination of goods and services and therefore a unique form of procurement.

For regulation purposes, section 217 of the *Constitution* should refer to the procurement of goods, works and services. Construction procurement should therefore consist of four sub-categories: firstly, construction works, which will consist of those classes set out in the CIDB Regulations, namely civil engineering, electrical engineering, general building works, mechanical engineering and specialist work; secondly, supplies, which are "goods" in

²⁸ Arrowsmith *Law of Public and Utilities Procurement* 1.1.

²⁹ Arrowsmith *Law of Public and Utilities Procurement* 1.2.

³⁰ Arrowsmith *Law of Public and Utilities Procurement* 1.2.

³¹ Arrowsmith *Law of Public and Utilities Procurement* 1.2. Non-construction services, Arrowsmith writes, include manual services such as gardening and advertising.

general procurement - in other words tangible items used in the construction industry such as cement, wood, steel etc; thirdly, non-professional services such as cleaning services; and fourthly, professional services, which should entail the services of those persons registered with a professional body to perform a professional service, such as engineers or architects who fulfil consulting services. It is further submitted that it may at times be difficult to determine whether supplies, services or a combination of the two is procured at any one time. However, the aim in providing this separation of works from services in section 217 of the *Constitution* is not to create a strict divide between the three categories at all times but rather to indicate that construction procurement is a category on its own, with nuanced and complex rules causing its procurement to be different from the general procurement of goods or services as understood in section 217.

If construction procurement were to be given a separate category of procurement in section 217 of the *Constitution*, this might attract foreign contractors to engage in contracts in South Africa. It would also bring South African public procurement law in line with international trends, thereby attracting foreign contractors who may identify similarities between their own and the South African procurement system. It might also indicate the South African government's willingness to align its legislation and policies with international norms and standards, with the result that construction procurement and its regulation might be given increased attention if it were seen to be regulated separately.³²

At present, public procurement regulation in South Africa is undergoing amendments which will have an impact on the regulation of construction procurement. A new standard, the Standard for Infrastructure Procurement and Delivery Management, has been published in terms of section 76(4)(c) of the PFMA and came into operation on 1 July 2016.

³² Watermeyer records a number of changes which should be brought about in what he terms "a culture change" to bring about better outcomes in the delivery of construction works. One of these changes is progressing from poorly structured procurement documents based on local standards which in turn are based on local knowledge to structured procurement documents based on international standards which are standardised and need minimal customisation. This illustrates the need for the procurement process to become aligned with international standards, which might attract international construction works opportunities to South Africa. See Watermeyer 2012 <http://www.ioptions.co.za/Files/Doc/RBWnew/P7-5.pdf>

7 New Standard for Infrastructure Procurement and Delivery Management

On 1 July 2016 a new Standard for Infrastructure Procurement and Delivery Management (SIPDM)³³ came into operation. The standard was issued as National Treasury Instruction Note 4 of 2015/2016 in terms of section 76(4)(c) of the PFMA³⁴ and Regulation 3(2) of the MFMA Supply Chain Management (SCM) Regulations. It applies to all departments, constitutional institutions and public entities listed in Schedules 2 and 3 to the PFMA including the CIDB and organs of state in terms of section 239 of the *Constitution*.³⁵ The instruction note introduces a new term into South African public procurement, that of "infrastructure procurement", which is defined as "the procurement of goods or services including any combination thereof with the acquisition, refurbishment, rehabilitation, alteration, maintenance, operation or disposal of infrastructure".³⁶ No reference is made in the instruction note to construction procurement or construction work or even the construction industry. It appears therefore that the intention is to re-name procurement in the construction industry, infrastructure procurement. It is unclear what the purpose of the change in terminology is, but it appears that the term "infrastructure" is intended to be an umbrella term for all activities in the construction industry which lead to the creation of infrastructure. This is evident from the definition of "infrastructure delivery", which is:

³³ National Treasury 2015 [http://www.treasury.gov.za/legislation/pfma/Treasury Instruction/Treasury%20Instruction%20No.%204%20of%202015%202016%20on %20Std%20for%20Infr%20Proc%20and%20Delivery%20Mngmt.pdf](http://www.treasury.gov.za/legislation/pfma/Treasury%20Instruction/Treasury%20Instruction%20No.%204%20of%202015%202016%20on%20Std%20for%20Infr%20Proc%20and%20Delivery%20Mngmt.pdf) (Instruction Note 4).

³⁴ Section 76(4)(c) of the PFMA provides that National Treasury may make regulations or issue instructions applicable to all institutions to which the PFMA applies concerning the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. Regulation 3(2), in turn, provides that an accounting officer may make use of any Treasury guidelines which determine standards for municipal supply chain management policies.

³⁵ Instruction Note 4 3. It is clearly stated at 1 that the instruction note does not apply to a) the storage of goods and equipment, following their delivery to an organ of state, which are stored and issued to contractors or to employees of that organ of state b) the disposal or letting of land c) the conclusion of any form of land availability agreement and d) the leasing or rental of moveable assets.

³⁶ Instruction Note 4 4. "Infrastructure" in turn is defined at 3 as "a) immovable assets which are acquired, constructed or which result from construction operations; or b) movable assets which cannot function independently from purpose-built immovable assets". Neither "constructed" nor "construction operations" is defined, however, "construction" according to the instruction note at 3 means "everything that is constructed or results from construction operations".

[t]he combination of all planning, technical, administrative and managerial actions associated with the construction, supply, renovation, rehabilitation, alteration, maintenance, operation or disposal of infrastructure.³⁷

Based on this definition, construction procurement, or rather, infrastructure procurement therefore forms part of infrastructure delivery as a whole.

It appears as though the main purpose of the standard is to create a more efficient and streamlined framework within which infrastructure procurement will function. It is therefore a process rather than a law. This is evident from the various stages of the process, from a needs analysis to the final delivery of the works. The Infrastructure and Delivery Management System (IDMS) was developed by National Treasury, the CIDB, the Departments of Public Works, Education and Health and the Development Bank of Southern Africa.³⁸ After the Instruction Note was published, various role players in construction procurement were asked to comment on the new standard.³⁹ It appears to be the unanimous opinion of all role players that firstly, the current general public procurement regime is not well suited to the complexities of the construction industry.⁴⁰ Secondly, it is believed that this standard creates a:

³⁷ See Instruction Note 4 3 under "terms and definitions".

³⁸ Watermeyer, Nevin and Langenhoven note that the SIPDM consists of a number of stages. Firstly, an infrastructure planning system, an infrastructure gateway system which will serve as control points in the process where a decision is required as to whether the procurement is still in accordance with the plans and specifications. The last two stages of the process consist of the construction procurement system, the programme and project management system and lastly an operation and maintenance system. The SIPDM therefore provides for a process in which construction works are planned, specified, procured and the entire project is managed until its conclusion. According to the authors, therefore, construction procurement forms one stage in the entire process. See Watermeyer, Nevin and Langenhoven 2012 *Civil Engineering* 51-52.

³⁹ Such as the South African Institute of Electrical Engineers (SAIEE), Institute of Municipal Engineering of Southern Africa (IMIESA), South African Forum of Civil Engineering Contractors (SAFCEC), Consulting Engineers South Africa (CESA), South African Institution of Civil Engineering (SAICE), CIDB, and Council for the Built Environment (CBE) according to the *Civilution* magazine of February 2016, which is a special issue published by National Treasury to explain the working of the new standard.

⁴⁰ Watermeyer illustrates the complex operations in the procurement of construction works in describing the process as one where professional services are required to plan, budget and conduct assessments of existing works, scope requirements in response to the owner's brief, propose solutions, evaluate alternative solutions, develop the design for the selected solution, produce production information which enables construction and confirm that design intent is met during construction. On the other hand, contractors are required to construct or refurbish works in accordance with requirements or perform maintenance services. See Watermeyer 2012 <http://www.ioptions.co.za/Files/Doc/RBWnew/P7-5.pdf>.

[s]eparate industry-based procurement process for obtaining contracting services. Making a distinction between the procurement of general goods and services, and construction activities, the SIPDM will be better placed to accommodate the requirements of the construction industry.⁴¹

It is noted by National Treasury that:

The delivery and maintenance of infrastructure differ considerably from those for general goods and services required for consumption or operational needs, in that there cannot be the direct acquisition of infrastructure. Each contract has a supply chain which needs to be managed and programmed to ensure that the project is completed within budget, to the required quality, and in the time available. Many risks relate to the 'unforeseen' which may occur during the performance of the contract. This could, for example, include unusual weather conditions, changes in owner or end user requirements, ground conditions being different to what were expected, market failure to provide materials, or accidental damage to existing infrastructure. Unlike general goods and services, there can be significant changes in the contract price from the time that a contract is awarded to the time that a contract is completed.⁴²

Watermeyer, Wall and Pirie⁴³ are of the opinion that some general procurement practices are not suited to construction procurement. These include awarding a tender to the tenderer with the lowest price, generic conditions of contracts which provide only for the rights and obligations of parties and not for the management of the contract, negotiation of terms after the evaluation of tenders, lack of standardised procurement documents, reliance on a "check-list" of procedures that are applied indiscriminately, and the inflexible allocation of risk to parties.⁴⁴ They rightly indicate that the risks to be managed and skills required by the role players are different from those for the procurement of general goods and services.⁴⁵ It has further been noted by Consulting Engineers South Africa (CESA) that due to the fact that the procurement of works is done in terms of the rules for the procurement of general goods and services, an emphasis

⁴¹ This was highlighted by the SAFCEC at *Civilution* 2016 7.

⁴² *Civilution* 2016 15. Also see Watermeyer, Wall and Pirie 2013 <http://www.ioptions.co.za/Files/Doc/RBWnew/P7-6.pdf> 4. According to the authors, the procurement of general goods and services entails merely sourcing, purchasing, receipt, storage and issuing of the goods or payment of the services provided. In contrast, the procurement of works involves a wide range of goods (or supplies as referred to in the construction industry) and services which are required to develop or maintain a fixed asset on site. Construction works are therefore not readily available or attainable. They note that "non-construction procurement deals with direct acquisitions which involve standard, well defined and scoped services, off-the-shelf items and readily available commodities. The business need is commonly achieved through the production of a specification, which then forms a requisition for the procurement of goods or services. An immediate choice can generally be made in terms of the cost of goods or services satisfying specified requirements".

⁴³ Watermeyer, Wall and Pirie 2013 *IMIESA* 21.

⁴⁴ Watermeyer, Wall and Pirie 2013 *IMIESA* 21.

⁴⁵ Watermeyer, Wall and Pirie 2013 *IMIESA* 21.

is placed on price.⁴⁶ However, functionality as referred to in the PPPFA⁴⁷ is treated as an obstacle. All products procured in terms of the PPPFA are subjected to minimum functionality requirements, which according to CESA is not feasible for the procurement of works, since every project is unique.⁴⁸ There may be instances where price plays a much smaller role than functionality, or *vice versa*. It therefore appears that the construction procurement role players are of the opinion that a more flexible approach than that in the PPPFA to the evaluation of functionality should be adopted.

Furthermore, a concern raised by Watermeyer, Wall and Pirie⁴⁹ is the lack of use by municipal entities of budgets allocated for infrastructure. This is an indication either that planned infrastructure projects are not being performed or that low-quality works are being constructed to the personal financial benefit of state officials. There are therefore various indications that there is a need to transform the process followed to deliver high-quality and cost-effective infrastructure. This can be addressed through public procurement law.

8 Legal implications of the meaning of construction procurement

Although, as indicated above, the SIPDM highlights a number of important factors to be considered in amending the law, it naturally has a number of legal consequences for construction procurement law as it is currently (May 2018) implemented. The new standard effectively creates a parallel system in terms of which construction procurement is implemented. On 1 July 2016 when the standard came into operation, and at present (May 2018), the CIDB Act and its Regulations, together with guidelines issued by the CIDB for construction procurement, are still in operation. The new standard creates definitions different from those in the Act, which makes it problematic to determine whether supplies or services in fact constitute construction works as per the definition in the Act and its Regulations.

To illustrate this, "construction procurement" is defined in the CIDB Regulations⁵⁰ as "procurement in the construction industry including the

⁴⁶ It has been noted that the primary goal of public procurement is the attainment of goods or services at the best possible price. See Bolton *Law of Government Procurement* 99.

⁴⁷ See Regulation 4 of the PPPFA Regulations.

⁴⁸ *Civilition* 2016 6.

⁴⁹ Watermeyer, Wall and Pirie 2013 <http://www.ioptions.co.za/Files/Doc/RBWnew/P7-6.pdf> 1.

⁵⁰ See Reg 1 of the Construction Industry Development Regulations.

invitation, award and management of contracts".⁵¹ "Construction works" in turn are defined in section 1(j) of the CIDB Act as "the provision of a combination of goods and services arranged for the development, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of a fixed asset including building and engineering infrastructure". "Infrastructure procurement" appears to exclude the development, extension, installation, repair, renewal, removal, dismantling and demolition, yet adds the refurbishment,⁵² rehabilitation,⁵³ operation and disposal of infrastructure. Moreover, "infrastructure" refers to immovable assets which result from "construction operations", which are not defined. The result is that a number of works are not subject to the new standard but may arguably resort under "construction operations", a term which has been left open for interpretation.

Further to this, the new standard may influence the registration of construction contractors on the CIDB Register of Contractors⁵⁴ if the Act and its Regulations were to be repealed or amended to bring them into line with the standard. The effect would be that the class of construction works in Schedule 3 to the CIDB Regulations would fall away and a new way of placing contractors on the Register of Contractors would have to be determined, since contractors are currently registered based on the class of works they are able to perform.

The definition of "construction works" indicates that this is a combination of goods and services and the subject of a construction contract. There is therefore no strict divide between goods and services when procuring construction works, as there is in general procurement. In addition to this, professional services may also be procured. Neither the Act nor its Regulations defines services, but the Standard for Uniformity for Construction Procurement issued by the CIDB defines a services contract

⁵¹ According to Watermeyer, procurement is a process which creates, manages and fulfils contracts. He notes that procurement commences once the need for goods, services and works or disposals has been identified, and ends when the goods are received and the services or works are completed or the relevant asset is disposed of. He writes that construction procurement consists of six phases, namely the establishment of what should be procured, a decision on a procurement strategy, the solicitation of tender offers, the evaluation of those tender offers, the award of a contract and administration of the contract, and the confirmation that the requirements for the procurement were indeed met. See Watermeyer 2012 *Civil Engineering* 46-47, 51.

⁵² Defined in *Civilution* 2016 5 as "modification and improvements to existing infrastructure in order to bring it up to an acceptable condition".

⁵³ Defined in *Civilution* 2016 5 as "extensive work to bring infrastructure back to acceptable functional conditions, often involving improvements".

⁵⁴ This is provided for in Ch 3 of the CIDB Act.

as a "contract for the provision of labour or work, including knowledge-based expertise, carried out by hand, or with the assistance of equipment and plant".⁵⁵ To this end Regulation 1 refers to a "qualified person", which is defined as "a person who is recognised by virtue of his or her training and experience as having the necessary qualifications to undertake construction works in a specific category as contemplated in regulation 12(8)". Regulation 12(8) in turn refers to professionals registered as such.⁵⁶ These are the professional services of engineers, architects, construction managers and quantity surveyors.

Watermeyer notes that construction procurement involves construction works, supply contracts which entail the purchase of construction materials and equipment, service contracts relating to construction, professional service contracts, the disposal of surplus materials and equipment, and demolition.⁵⁷

It is suggested that procurement be referred to in section 217 of the *Constitution* as goods, works and services for which organs of state contract. A proposed definition for construction procurement is the procurement of works, supplies and services, including professional services in the construction industry. Works in turn, can refer to the various classes of works as described by the CIDB Regulations, which will keep the Register of Contractors in place, which in turn will promote the fairness and transparency required by section 217 of the *Constitution*. The word procurement in the context of construction can have a determined meaning in order to make clear what is being procured. In other words, "procurement" as referred to in "the procurement of works, supplies and services" in the proposed definition of "construction procurement" can refer to the list of services performed in the industry, such as the acquisition, sale, refurbishment, alteration, development, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition, rehabilitation and disposal of construction works in the invitation, award and management of contracts.⁵⁸ Any service which is not covered by

⁵⁵ See 3.12 at 5 of the Standard for Uniformity in Construction Procurement May 2010.

⁵⁶ These are professionals registered in terms of the *Engineering Profession Act* 46 of 2000, *Project and Construction Management Professions Act* 48 of 2000, *Architectural Profession Act* 44 of 2000, *Quantity Surveying Profession Act* 49 of 2000 and the *Landscape Architectural Profession Act* 45 of 2000.

⁵⁷ Watermeyer 2012 *Civil Engineering* 49.

⁵⁸ Arrowsmith, Linarelli and Wallace write that in a broad sense, the term "procurement" refers to the entire process of acquisition, from the planning decision to making a purchase, to choosing a provider, and finally to administering the contract. The proposed definition of construction procurement therefore refers to procurement in

one of these terms can resort under "specialist works", one of the classes of construction works provided for in the Regulations.

It is further submitted that there is no benefit in changing the terminology to infrastructure procurement. All terms relating to procurement in the construction industry refer to "construction". Therefore, to maintain the uniformity and clarity of what is actually procured, the reference to "construction" should remain. The Oxford Dictionary defines "infrastructure" as "the basic physical and organisational structures (eg buildings, roads, power supplies) needed for the operation of a society or enterprise". The term "infrastructure" therefore describes all forms of construction. It is a "catch-all" term and does not indicate a particular kind of construction. It also defines "construction" as "the action or process of constructing – the industry of erecting buildings". "Works", on the other hand, is defined as an "activity involving construction or repair" and "the materials for this". As noted, procurement in the construction industry more often than not refers to a combination of goods or supplies and services. Therefore, it is apt that the subject of construction procurement is referred to as "construction works" by definition.

Uniformity in definitions and wording will ensure that all role players in the construction procurement process are in agreement with regard to the subject of procurement, the process to be followed and the aims of the procurement process which are *inter alia* to achieve fairness, equity, transparency, competition and cost-effectiveness. All terminology should therefore be linked and clearly defined for the purpose of legal certainty and establishing contractual relations where all of the parties involved in each construction procurement process are sure of their rights and obligations. Establishing repetitive construction procurement processes where this occurs will go a long way to ensuring value for money in the delivery of infrastructure.⁵⁹

9 Conclusion

A contradictory definition of construction procurement and what construction works constitute is found in the CIDB Regulations and the guidelines issued by the CIDB. These guidelines are not law, however, and

the broad sense. See Arrowsmith, Linarelli and Wallace *Regulating Public Procurement*.

⁵⁹ Watermeyer describes value for money in infrastructure projects as "the optimal use of resources to achieve the intended outcomes". See Watermeyer 2014 <http://www.ioptions.co.za/sites/default/files/rbwpapers/P7%2B%20P8%20papers/P7-9.pdf>.

therefore the definitions in the Act and its Regulations prevail. In practice, however, construction contractors make use of the guidelines rather than the law to assist them in following construction procurement rules. Therefore, it is important that all CIDB guidelines be brought in line with the CIDB Act and its Regulations.

Currently in South Africa "public procurement" refers to contracting for goods and services. Some authors⁶⁰ are of the view that "construction" constitutes a service and can resort under "services" in section 217 of the *Constitution*, and that there is therefore no need to create an additional category. However, it is submitted that this is not the case. Procurement in the construction industry is in fact a combination of goods and services and therefore a unique form of procurement. Furthermore, construction procurement is regulated by specific legislation. The CIDB is a juristic body appointed to regulate the activities of the construction industry, including construction procurement. It is also empowered by the CIDB Act to publish guidelines for construction procurement. It is therefore clear that construction procurement is legally regulated separately from general goods and services.

A number of benefits would flow from categorising construction procurement on its own. The creation of such a category might attract foreign investment, improve the international perception of South Africa's compliance with international trends, and direct more attention both legally and economically on the performance of the construction industry and therefore construction procurement as a big contributor to the country's Gross Domestic Product (GDP).

The new standard published by the National Treasury, which attempts to change the nature of construction procurement, has both positive and negative aspects. It affirms that construction procurement is different from the procurement of general goods and services and legally cannot be treated in the same way. It also highlights the fact that the construction of infrastructure in general could improve South Africa economically if managed better to attain better value for money. However, where the standard does not assist the development of construction procurement is in changing a number of terms. The new terms "infrastructure procurement" and "infrastructure" add no value to the legal regulation of construction procurement. Instead, they create a parallel system for construction contractors to comply with. In order to attain value for money in construction

⁶⁰ De la Harpe *Procurement Law* 23; Bolton *Law of Government Procurement* 66.

procurement, it is recommended that uniformity be maintained in the relevant terminology. Therefore, the references to the construction industry, construction procurement and construction works should be maintained.

It is recommended that section 217 of the *Constitution* should read "When organs of state contract for goods, works or services they should do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective". Construction procurement could be defined as "the procurement of construction works, supplies and services, including professional services in the construction industry". "Procurement" in this definition would therefore refer to the acquisition, sale, refurbishment, alteration, development, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition, rehabilitation and disposal in the invitation, award and management of contracts. "Construction works" in turn would refer to the various classes of construction works, namely civil engineering works, electrical engineering works, mechanical engineering works, general building works and specialist works identified by the CIDB. This would ensure legal certainty and that contractors are at all times aware of the subject of procurement and what the objectives of the projects are. In ensuring that consistency is maintained, the aim must be that each procurement of construction works, supplies or services including professional services reflects the principles of clarity, integrity, certainty, transparency, fairness and competition. This in turn would strengthen the relationship between the various phases in the construction procurement process.

Bibliography

Literature

Arrowsmith *Law of Public and Utilities Procurement*

Arrowsmith S *The Law of Public and Utilities Procurement* (Sweet & Maxwell London 2010)

Arrowsmith, Linarelli and Wallace *Regulating Public Procurement*

Arrowsmith S, Linarelli J and Wallace D *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International The Hague 2000)

Bolton *Law of Government Procurement*

Bolton P *The Law of Government Procurement in South Africa* (LexisNexis Durban 2007)

De la Harpe Procurement Law

De la Harpe S Procurement Law: A Comparative Analysis (LLD-dissertation University of South Africa 2009)

Ferreira 2011 *SALJ*

Ferreira C "The Quest for Clarity: An Examination of the Law Governing Public Contracts" 2011 *SALJ* 172-200

Quinot *State Commercial Activity*

Quinot G *State Commercial Activity – A Legal Framework* (Juta Claremont 2009)

Watermeyer 2012 *Civil Engineering*

Watermeyer R "A Systems Approach to the Effective Delivery of Infrastructure" 2012 *Civil Engineering* 46-54

Watermeyer, Nevin and Langenhoven 2012 *Civil Engineering*

Watermeyer R, Nevin G and Langenhoven K "The Supply Chain Management System for the Delivery and maintenance of infrastructure by organs of state" 2012 *Civil Engineering* 51-58

Watermeyer, Wall and Pirie 2013 *IMIESA*

Watermeyer R, Wall K and Pirie G "How Infrastructure Delivery Can Find its Way Again" 2013 *IMIESA* 17-29

Case law

Logbro Properties CC v Bedderson 2003 2 SA 460 (SCA)

Metro Projects CC v Klerksdorp Municipality 2004 1 SA 16 (SCA)

Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 2 BCLR 176 (SCA)

Umfolozzi Transport (Edms) Bpk v Minister van Vervoer 1997 2 All SA 548 (A)

Legislation

Architectural Profession Act 44 of 2000

Broad-Based Black Economic Empowerment Act 53 of 2003

Constitution of the Republic of South Africa, 1996

Construction Industry Development Board Act 38 of 2000

Engineering Profession Act 46 of 2000

Landscape Architectural Profession Act 45 of 2000

Local Government: Municipal Finance Management Act 56 of 2003

Local Government: Municipal Systems Act 32 of 2000

Preferential Procurement Policy Framework Act 5 of 2000

Prevention and Combating of Corrupt Activities Act 12 of 2004

Project and Construction Management Professions Act 48 of 2000

Promotion of Access to Information Act 2 of 2000

Promotion of Administrative Justice Act 3 of 2000

Public Finance Management Act 1 of 1999

Quantity Surveying Profession Act 49 of 2000

Government publications

GN R1737 in GG 25773 of 28 November 2003 (PFMA Public-private Partnership Treasury Regulation 16)

GN R225 in GG 27388 of 15 March 2005 (PFMA Supply Chain Management Treasury Regulation 16A)

Gen N 868 in GG 27636 of 30 May 2005 (MFMA Municipal Supply Chain Management Regulations)

GN R1224 in GG 31603 of 14 May 2008 (Construction Industry Development Regulations)

GN R32 in GG 40553 of 20 January 2017 (PPPFA Regulations)

Internet sources

National Treasury 2015 <http://www.treasury.gov.za/legislation/pfma/TreasuryInstruction/Treasury%20Instruction%20No.%204%20of%202015%202016%20on%20Std%20for%20Infr%20Proc%20and%20Delivery%20Mngmt.pdf>

National Treasury 2015 *Instruction Note 4 of 2015/2016* <http://www.treasury.gov.za/legislation/pfma/TreasuryInstruction/Treasury%20Instruction%20No.%204%20of%202015%202016%20on%20Std%20for%20Infr%20Proc%20and%20Delivery%20Mngmt.pdf> accessed 22 May 2018

UNCITRAL Date unknown <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf>

UNCITRAL Date unknown *UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment* <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf> accessed 14 October 2017

UNCITRAL 2014 <https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf>

UNCITRAL 2014 *UNCITRAL Model Law on Public Procurement* <https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf> accessed 14 October 2017

Watermeyer 2012 <http://www.ioptions.co.za/Files/Doc/RBWnew/P7-5.pdf>

Watermeyer R 2012 "Changing the Construction Procurement Culture to Improve Project Outcomes" Unpublished contribution delivered at the *Joint CIDB W070, W092 and TG72 International Conference on Facilities Management, Procurement Systems and Public Private Partnerships* (23 – 25 January 2012 Cape Town) <http://www.ioptions.co.za/Files/Doc/RBWnew/P7-5.pdf> accessed 22 April 2016

Watermeyer 2014 <http://www.ioptions.co.za/sites/default/files/rbwpapers/P7%2B%20P8%20papers/P7-9.pdf>

Watermeyer R 2014 "Realising Value for Money through Procurement Strategy in the Delivery of Public Infrastructure" Unpublished contribution delivered at the *8th CIDB Post Graduate Conference* at the University of the Witwatersrand (Johannesburg) <http://www.ioptions.co.za/sites/default/files/rbwpapers/P7%2B%20P8%20papers/P7-9.pdf> accessed 14 October 2017

Watermeyer, Wall and Pirie 2013 <http://www.ioptions.co.za/Files/Doc/RBWnew/P7-6.pdf>

Watermeyer R, Wall K and Pirie G 2013 *The Case for a Separate Supply Chain for the Delivery and Maintenance of Infrastructure* <http://www.ioptions.co.za/Files/Doc/RBWnew/P7-6.pdf> accessed 12 April 2016

World Bank 2011 [http://siteresources.worldbank.org/INTPROCUREMENT/Resources/278019-](http://siteresources.worldbank.org/INTPROCUREMENT/Resources/278019-1308067833011/Procurement_GLs_English_Final_Jan2011.pdf)

1308067833011/Procurement_GLs_English_Final_Jan2011.pdf

World Bank 2011 *Guidelines: Procurement of Goods, Works, and Non-consulting Services under IBRD Loans and IDA Credits and Grants by World Bank Borrowers* <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/278019->

1308067833011/Procurement_GLs_English_Final_Jan2011.pdf accessed
14 October 2017

List of Abbreviations

BBBEEA	Broad-Based Black Economic Empowerment Act 53 of 2003
CBE	Council for the Built Environment
CESA	Consulting Engineers South Africa
CIDB	Construction Industry Development Board
IDMS	Infrastructure and Delivery Management System
IMIESA	Institute of Municipal Engineering of South Africa
MFMA	Local Government: Municipal Finance Management Act 56 of 2003
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
PFMA	Public Finance Management Act 1 of 1999
PPPFA	Preferential Procurement Policy Framework Act 5 of 2000
SAICE	South African Institution of Civil Engineering
SAIEE	South African Institute of Electrical Engineers
SAFCEC	South African Forum of Civil Engineering Contractors
SALJ	South African Law Journal
SCM	Supply Chain Management
SIPDM	Standard for Infrastructure Procurement and Delivery Management
UNCITRAL	United Nations Commission on International Trade Law