

# **TOWARDS A COMPETITIVE LAW OF PUBLIC PROCUREMENT IN SOUTH AFRICA**

*By*

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## **DECLARATION**

I, **1129138**, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

**31 OCTOBER 2023**

## ABSTRACT

Collusion among firms is widely recognized as a serious violation of competition law globally. Bid rigging, a form of collusion, is particularly concerning in public procurement, leading to the OECD's adoption of Guidelines for fighting Bid Rigging in Public Procurement in 2009.<sup>1</sup> Collusive tendering is significant because it affects public spending, impacting the South African economy's production and supply of goods and services.<sup>2</sup> The substantial sums involved in public procurement make it susceptible to corruption.<sup>3</sup> Recently, a Public Procurement Bill was introduced in Parliament in May 2023, aiming to establish a comprehensive national law governing public procurement, including preferential procurement. Simplifying the legal framework is a crucial step the government can take to enhance the public procurement system.

The research aims to analyse South Africa's current public procurement process and address concerns related to anticompetitive practices. Following South Africa's transition to a constitutional state, key reforms were introduced, including establishing constitutional principles governing public procurement and creating a unified national legislative framework through the Public Finance Management Act (PFMA),<sup>4</sup> and the Local Government: Municipal Finance Management Act (MFMA).<sup>5</sup> A competitive public procurement system is not only constitutionally mandated but also vital for the proper functioning of the government and the delivery of services, which are crucial for the country's advancement, development, and social welfare. The report will specifically examine the legal landscape of public procurement in the construction sector and seeks to contribute to the promotion of effective competition in South Africa's public procurement process by exploring how the development and implementation of procurement procedures can enhance the competitive nature of public procurement law in the country. To achieve this, it's essential for the government to take action to ensure that the procurement process is characterized by openness, transparency, and fairness for all bidders.

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<sup>1</sup> Hardin Ratshisusu 'The Competition Commission of South Africa, Limiting Collusion in the Construction Industry: A Review of the Bid Rigging Settlement in South Africa' <https://jefjournal.org.za/index.php/jef/article/download/386/467> accessed 9 August 2023.

<sup>2</sup> Tebogo Makube 'The Importance of using Different Methods of analysis in dealing with the Challenges of Collusive Tendering and Other forms of Corruption in the South African Public Procurement Sysytem' (2019) 6 APPLJ 42.

<sup>3</sup> Ibid.

<sup>4</sup> The Public Finance Management Act of 1999.

<sup>5</sup> The Local Government: Municipal Finance Management Act of 2003.

Developing procurement procedures that emphasize fairness, openness, and competitiveness is essential in mitigating unwarranted limitations on competition in South Africa. This can be accomplished through practices such as transparent and open tender processes, the use of clear and objective evaluation criteria, support for small and medium-sized enterprises (SMEs), and the adoption of e-procurement systems.

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## 1. Introduction

The aim of this report is to address the common concerns that arise from anticompetitive public procurement practices such as collusive-tendering and bid rigging. As explained further below in this report, standard bid rigging behaviour entails prospective bidders reaching an agreement to collaborate and synchronize their bids with the aim of manipulating the selection of the winning bid at a predetermined price. The report endeavours to enhance competition in South Africa's public procurement process by investigating how the development and implementation of transparent and effective procurement procedures can lead to a more competitive public procurement framework. The report will specifically examine the legal aspects of public procurement in the construction sector. Maintaining a competitive public procurement system is not only constitutionally mandated but also vital for the proper functioning of the government and the delivery of services, which are fundamental to a country's progress, development, and social well-being.

The South African Constitution serves as the fundamental legal framework for regulating public procurement.<sup>6</sup> Section 217 of the Constitution outlines key principles, including fairness, equity, transparency, competitiveness, and cost-effectiveness, which must guide procurement by state entities when contracting for goods and services.<sup>7</sup> This section also emphasizes that procurement processes should align with constitutional principles. Section 217 of the Constitution permits the implementation of affirmative action measures in preferential procurement to address past imbalances and promote the economic participation of historically disadvantaged individuals or groups. In addition to the Constitution, South Africa's public procurement is primarily governed by key legislative acts, specifically the Public Finance Management Act (PFMA) and the Local Government: Municipal Finance Management Act (MFMA). The Preferential Procurement Policy Framework Act (PPPFA) was enacted to give effect to Section 217 of the Constitution.<sup>8</sup> Administrative law also plays a significant role in the public procurement process, although it is not extensively discussed in this report. In summary, Section 217 of the Constitution provides the overarching framework for public

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<sup>6</sup> The Constitution of the Republic of South Africa, 1996 (Constitution).

<sup>7</sup> Sue Arrowsmith and Geo Quinot *Public Procurement Regulation in Africa* (2013) Cambridge: Cambridge University Press 2-9.

<sup>8</sup> The Preferential Procurement Policy Framework Act 5 of 2000.

procurement in South Africa, allowing for preferential procurement measures to promote historically disadvantaged groups' economic participation. However, these measures must adhere to constitutional principles of fairness, equity, transparency, and competitiveness and may be subject to judicial oversight through administrative law.

What is public procurement? Governments purchase goods and services because they need to fulfil their obligations to their citizens. Each government has the choice to purchase the goods or services either internally within government structures, or from private entities. Public procurement refers to where government procures goods and services from private parties, as well as where government structures purchase from other government structures. Serving the legitimate interests of all parties involved and keeping the affected country's economy in mind is the main function of public procurement.<sup>9</sup> Public procurement spending represents 29 per cent of South Africa's GDP.<sup>10</sup> Preferential public procurement constitutes a portion of public procurement. Section 217(2) the Constitution of the Republic of South Africa, provides for a clause enabling the use of "categories of preference in the allocation of contracts, and the protection or advancement of persons or categories of persons, disadvantaged by unfair discrimination" in public procurement policies.<sup>11</sup> The provision mentioned allows for the implementation of a critical social aspect of public procurement, promoting the employment and empowerment of historically disadvantaged individuals. South Africa employs procurement preferences as a form of affirmative action to enhance the economic standing of groups that suffered discrimination during apartheid.<sup>12</sup> The Preferential Procurement Policy Framework Act (PPPFA) was introduced in response to this constitutional imperative, prioritizing the empowerment of historically disadvantaged individuals through preferential treatment in procurement. All government organizations are required by the PPPFA to evaluate and select tenders, in part, on the basis of the supplier's "scorecard" for broad-based black economic empowerment (B-BBEE) criteria.<sup>13</sup> The term "black" as used in B-BBEE refers to people who are Black, Coloured, Indian, Asian, and Second-Generation Chinese. Each of the

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<sup>9</sup> Sue Arrowsmith *The Law of Public and Utilities Procurement* 3ed (2020) 2-9.

<sup>10</sup> Laura Turley, Oshani Perera 'Implementing Sustainable Public Procurement in South Africa: Where to start' [https://www.iisd.org/system/files/publications/implementing\\_spp\\_south\\_africa.pdf](https://www.iisd.org/system/files/publications/implementing_spp_south_africa.pdf) accessed 9 August 2023.

<sup>11</sup> The Constitution.

<sup>12</sup> See generally *Turley* op cit note 6.

<sup>13</sup> *Ibid.*

seven pillars have a relative weighting. The pillars of B-BBEE assessment include equity ownership, management, employment equity, skills development, preferential procurement, enterprise development, and socioeconomic development.<sup>14</sup>

While it is not the focus of this report, it is worth noting that the awareness that procurement also has an impact on sustainability has brought about the development of the sustainable public procurement concept.<sup>15</sup> Another concept, of green procurement is linked to sustainable procurement and refers to the practice of basing all purchasing decisions and allocation of contracts on environmental criteria along with other criteria such as quality, price and delivery.<sup>16</sup> Many countries globally are taking measures to address climate change through both mitigation and adaptation strategies, with green procurement playing a crucial role in these efforts. Some of the most advanced and prominent green procurement practices can be observed in OECD countries.<sup>17</sup>

The Public Procurement Bill,<sup>18</sup> was introduced in Parliament in May 2023. The Bill's main objective is to establish a comprehensive national law governing public procurement, including preferential procurement.<sup>19</sup> It aims to consolidate existing laws and provide new statutory provisions to fully implement section 217 of the Constitution and represents a highly significant milestone in the regulation of public procurement in South Africa. The simplification of the legal framework is the most effective step the government can take towards improving the public procurement system.<sup>20</sup> The introduction of the Bill as an all-encompassing legal framework is a good step towards reform. However, the impact of the introduction of the Bill heavily depends on the strength of its content. The Bill has room for improvement in several key areas. First, through the standardization of Procurement Processes.<sup>21</sup> The Bill still grants significant discretion to public entities in conducting their

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<sup>14</sup> Ibid.

<sup>15</sup> Agyepong, Nhamo 'Green procurement in South Africa: perspectives on legislative provisions in metropolitan municipalities' <https://doi.org/10.1007/s10668-016-9865-9> accessed 9 August 2023.

<sup>16</sup> International Council for Local Environmental Initiatives ICLEI 2000.

<sup>17</sup> Ibid.

<sup>18</sup> The Public Procurement Bill (B 18-2023).

<sup>19</sup> Procurement Reform Working Group 'Public Procurement Bill must undergo 'critical changes' before Parliament gives it the green light' <https://www.dailymaverick.co.za/article/2023-09-11-public-procurement-bill-must-undergo-critical-changes-before-parliament-gives-it-the-green-light/> accessed 29 September 2023.

<sup>20</sup> Ibid.

<sup>21</sup> Simone, Alejandro and Balasundharam, Vybhavi, 2023. 'Public Procurement in

procurement processes, limiting opportunities for standardization, which is crucial for efficiency gains and reduced compliance costs. The introduction of the Online Bid Submission (eSubmission) functionality and the Transparency Dashboard on the eTenders Portal in December 2022 provides an opportunity to standardize procedures and enhance transparency. Second, through leveraging Scarce Procurement Resources.<sup>22</sup> The Bill mandates a resource-intensive institutional structure across public entities, necessitating the establishment of procurement units, bid specification, bid evaluation, and bid adjudication committees.<sup>23</sup> While such a structure may be required in certain specialized procurement areas or due to geographical considerations, there is a need for further efforts to optimize the utilization of scarce procurement resources. This could involve reducing the number of contracting authorities, using Central Procurement Bodies (CPBs), and expanding the use of framework agreements, as seen in many OECD countries. Currently, framework agreements account for less than 2 percent of procurement in South Africa. The Bill continues to provide public entities with a substantial amount of discretion in conducting their procurement processes which limits the opportunities to standardize the process which is a key source of efficiency and reduced compliance costs.<sup>24</sup>

## **2. Problem statement and Methodology**

The research aims to analyse South Africa's current public procurement process and address issues related to anticompetitive practices. It encompasses an examination of the existing public procurement system in South Africa, underscores the significance of fostering competition and innovation in these procedures, and provides recommendations for procurement practices that can reduce and eliminate collusive behaviour, ultimately contributing to a more competitive framework for public procurement in the country. The research will employ a desktop and library methodology, emphasizing pertinent literature. A comparative analysis of legal principles will be included in the report. Articles from subject-matter experts and organizations, treaties, protocols, and case law will all be primary

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South Africa: Issues and Reform Options' IMF Selected Issues Paper (SIP/2023/041). Washington, D.C. International Monetary Fund.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

information sources. Textbooks, as well as information from databases and electronic resources, will be considered secondary sources.

### **3. Bid-Rigging as a Specific Type of Collusion**

A particular type of collusion that is a major concern in South Africa's competitive environment, is bid rigging. It erodes the competitiveness, fairness, and transparency of both public and private sector tendering procedures. Bid rigging occurs when companies that one would normally expect to compete covertly plan to raise prices or degrade the quality of goods or services for buyers who want to acquire products or services through a bidding process.<sup>25</sup> Bid rigging is regarded as an anti-competitive act in South Africa, as it stifles competition and keeps buyers from securing the best deals on goods and services.<sup>26</sup> In addition to preventing the abuse of dominant market positions, the Competition Act seeks to maintain and grow competition in South Africa.<sup>27</sup> There are many different types of bid-rigging schemes, all of which work against buyers, who are often local and national governments, by preventing them from getting the best deals on goods and services.<sup>28</sup> Mechanisms to allocate and distribute the extra profits made possible by the higher final contracted price among the conspirators are frequently included in bid-rigging schemes. The public procurement laws and regulations in South Africa lack sufficient safeguards against bid-rigging and other collusive behaviour. Construction companies and the Competition Commission have reached settlements on fines which total more than R29 Billion for collusive tendering.<sup>29</sup> The Competition Commission has instituted a Fast Track Construction Settlement in an effort to curtail collusion within the construction sector.<sup>30</sup> The Commission developed the fast-track settlement process to encourage companies to engage in comprehensive settlements that offer financial benefits.<sup>31</sup> It

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<sup>25</sup> OECD 'Guidelines for Fighting Bid Rigging in Public Procurement'  
<https://www.oecd.org/competition/cartels/42851044.pdf> accessed 27 October 2023.

<sup>26</sup> Ibid.

<sup>27</sup> The Competition Act.

<sup>28</sup> Ibid.

<sup>29</sup> Shem Oiere, South Africa Fines Contractors R29 Billion Million for Bid Rigging'  
<https://www.enr.com/articles/1583-south-africa-fines-contractors-151-million-for-bid-rigging> accessed 27 October 2023.

<sup>30</sup> The Competition commission 'Competition Commission invites construction firms to settle'  
<https://www.compcom.co.za/wp-content/uploads/2014/09/Media-Release-Competition-Commission-invites-construction-firms-to-settle.pdf> accessed 27 October 2023.

<sup>31</sup> Ibid.

seeks to quickly settle cases and minimize related legal expenses.<sup>32</sup> Moreover, the procedure makes the case against the companies that chose not to participate in this initiative stronger.<sup>33</sup>

In the December 2021 case of *Aranda Textile Mills (Pty) Ltd v The Competition Commission of South Africa*, the Competition Appeal Court overturned a ruling rendered by the Competition Tribunal.<sup>34</sup> In accordance with the Competition Act, the Tribunal had ruled that two businesses, among them, a sole manufacturer, had manipulated bids.<sup>35</sup> In giving varying prices to different bidders for its product and submitting its own bid directly, the manufacturer engaged in bid-rigging. Nonetheless, the Court determined upon appeal that a manufacturer's submission of a bid in conjunction with its resellers' bidding on the same project did not necessarily constitute anti-competitive behaviour.<sup>36</sup> The Court further decided that expert testimony was needed to prove the elements of the collusion offense in the absence of direct evidence.<sup>37</sup> The Competition Tribunal's ruling was consequently overturned because there was insufficient evidence to support anti-competitive behaviour. Bidders were required by the bidding rules to certify that they had not had any correspondence, arrangement, or deal with rivals concerning bid-winning tactics or prices. The government's internal audit committee discovered that, in contrast to the mandatory non-collusion declarations, the defendant had placed a bid with the goal of losing. Notwithstanding these conclusions, the Court noted that there was no concrete proof of prior collusion between the parties when they made their bid submissions. The guilty ruling by the Tribunal was supported by reasoning based on inference. The Court recognized the difficulties in prosecuting bid-rigging cases, which frequently rely on circumstantial evidence. This case illustrates the need for caution and fact-sensitivity when relying solely on circumstantial evidence to conclude a contravention, especially when direct evidence of the alleged misconduct is lacking. The Tribunal had selectively used parts of direct evidence to support its hypothesis.

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> *Aranda Textile Mills (Pty) Ltd and Another v The Competition Commission of South Africa* (190/CAC/DEC20) [2021] ZACAC 1; 2023 (2) SA 182 (CAC); [2023] 1 CPLR 3 (CAC) (17 December 2021).

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

Obtaining direct evidence in cartel cases can be difficult, instead, one must frequently rely only on circumstantial evidence or a combination of direct and circumstantial evidence.<sup>38</sup> As a result, courts frequently must rely on circumstantial evidence, which might be the most advantageous choice. The Court acknowledged that there was probably communication between the distributor and the manufacturer, but this did not establish price-fixing or collusion.<sup>39</sup> It underlined how important it is to weigh the evidence holistically rather than in isolation.<sup>40</sup> It is important to consider all available evidence when using inferential reasoning, rather than just a subset of it. If the inference is not supported by all of the available evidence, it cannot be drawn. Alternatively, it must be the most logical and likely conclusion when probabilities are taken into account. The 56% price disparity that Aranda gave Mzansi was deemed by the Tribunal to be exceptionally large and might have disadvantaged other bidders.<sup>41</sup> Nevertheless, there was no proof that Mzansi lost money even though they got a good price. The Court underlined that price discrimination on its own does not always imply collusion, particularly in cases where there is insufficient economic evidence.<sup>42</sup> The Commission was unable to provide evidence for its improper actions or show how they hurt competition. Consequently, the Court decided that an infringement cannot be proved by inferential reasoning in the absence of established facts and after ruling out other reasonable explanations.<sup>43</sup> The appeal was upheld.

The case demonstrates the intricacy of cases involving bid-rigging, where bidding practices may appear at first to constitute unlawful collusion. However, it's crucial to take into account the entirety of the complete body of relevant evidence in order to come to a just and accurate conclusion.<sup>44</sup> When penalizing suppliers for what might seem to be irregularities in the bidding process, public institutions should proceed with caution.<sup>45</sup> They should also set up procedures for due process to deal with these issues when they occur, making sure that all relevant information is considered fairly and thoroughly before taking any further action.

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<sup>38</sup> The Procurement Office, South African Court Overturns Collusion Ruling, <https://procurementoffice.com/south-african-court-overturns-collusion-ruling/> accessed 27 October 2023.

<sup>39</sup> Supra note 25.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Supra note 29.

<sup>45</sup> Ibid.

#### 4. Literature Review

Collusive tendering is a crucial topic to discuss since public procurement accounts for a significant portion of public spending and has an impact on the supply and production of products and services in South Africa.<sup>46</sup> In any nation, progress, prosperity, and social welfare depend on an effective government that runs efficiently and provides quality services. The substantial financial stakes in governmental procurement render it a desirable target for corruption.<sup>47</sup> Typical bid-rigging behaviour entails prospective bidders coming to an agreement to work together and coordinate their offers in order to select a winner at a specific price. Collusion essentially aims to share markets and customers in order to impede, restrict, or distort competition.<sup>48</sup> Conversely, cartels are collections of separate businesses that band together to set fixed pricing, set output caps, or split customers or markets.<sup>49</sup> Cartelists have also been known to collude. It is well acknowledged that bid manipulation and collusion undermine the value for money in public procurement. However, there is no single method for undertaking this challenge. Multidisciplinary research techniques are crucial for analysing the conditions that lead to collusion as well as for identifying and preventing it from happening in public procurement. Tacit agreements also often take place, and unlike cartels, tacit agreements are not formal arrangements between organisations but rather are agreed practices in a market that are not necessarily communicated or written down.<sup>50</sup> This may resemble a cartel and has the same effect as explicit collaboration, but it results from the power of a dominant firm or viewpoint in the market.<sup>51</sup> This could imply that a pricing leader establishes the industry standard price, and other businesses in the sector imitate it. Since there is typically little concrete proof of communication, it is more challenging to establish the existence of tacit cooperation.

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<sup>46</sup> See generally *Makube* op cit note 2.

<sup>47</sup> Ibid.

<sup>48</sup> OECD 2016 'Recommendation on Fighting Bid Rigging in Public Procurement. Report on Implementing the OECD Recommendation' <https://www.oecd.org/daf/competition/Fighting-bid-rigging-in-public-procurement-2016-implementation-report.pdf> accessed 11 August 2023.

<sup>49</sup> European Commission Competition Policy [https://competition-policy.ec.europa.eu/cartels\\_en](https://competition-policy.ec.europa.eu/cartels_en) accessed 12 August 2023.

<sup>50</sup> Transparency International 'Collusion in Public Procurement Contracts' [https://knowledgehub.transparency.org/assets/uploads/helpdesk/Collusion\\_in\\_procurement\\_2016.pdf](https://knowledgehub.transparency.org/assets/uploads/helpdesk/Collusion_in_procurement_2016.pdf) accessed 11 August 2023.

<sup>51</sup> Marc Ivaldi et al. 'The Economics of Tacit Collusion.' Final Report for DG Competition, European Commission' (2003) [http://mit.econ.au.dk/vip\\_htm/povergaard/pbohome/Course 4-5](http://mit.econ.au.dk/vip_htm/povergaard/pbohome/Course%204-5) accessed 11 August 2023.

South Africa's economy emerged from apartheid with a strong industrial focus, some state remnants permitting marketing in agricultural markets, and a tiny but powerful minority of politically connected white businesspeople controlling the majority of the country's economy.<sup>52</sup> In response to the historical systemic economic exclusion of the black population, South African competition legislation was created. It was intended to serve as a tool for fostering economic transformation and bringing about positive changes to the economy.<sup>53</sup> In its "Prioritization Framework" from 2006, the Competition Commission of South Africa gave the investigation of cartel activity top priority. In addition, the Competition Commission established a Cartels Division in 2009 and implemented a Corporate Leniency Policy in 2004 as part of its efforts to prosecute cartel activity.<sup>54</sup> The Competition Commission has shown over the years that state tender bid-rigging is a frequent occurrence. This is especially concerning because a large portion of the impacted state spending is intended to create the social and economic infrastructure needed to draw in private investment and lessen the extreme unemployment and inequality in South Africa.<sup>55</sup> The Competition Commission made the detection and prosecution of cartels a top priority due to the detrimental effects that cartel behaviour has on the South African economy. In order to include public procurement officials in its efforts to combat cartel behaviour, the Commission made the decision to create and execute a program for detecting bid-rigging in the public sector.<sup>56</sup>

An application for corporate leniency (CLP) by Murray & Roberts in 2007 was one of the earliest examples of collusion in the construction sector. In this case, it was found that there was a cartel producing pipes, culverts, and manholes, in addition to bid rigging in the supply of precast concrete products.<sup>57</sup> In the *Competition Commission v Southern Pipelines Contractors* case, a cartel existed in Gauteng, KwaZulu-Natal, and the Western Cape between 1973 and 2007.<sup>58</sup> After dominating for a considerable amount of time, the cartel was well-

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<sup>52</sup> Mziwodumo Rubushe 'Fostering competition and saving state resources by combatting bid rigging' <http://www.compcom.co.za/wp-content/uploads/2014/09/Annual-Conference-Paper-Combating-Bid-Rigging.pdf> accessed 9 August 2023.

<sup>53</sup> Ibid.

<sup>54</sup> Notice 195 of 2004, Government Gazette No. 25963 of 6 February 2004.

<sup>55</sup> See generally Rubushe op cit note 30.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> *The Competition Commission v Southern Pipeline Contractors and Conrite Walls (Pty) Ltd* case no. 23/CR/Feb09 (29 November 2010).

organized, with one member chosen to serve as a "banker," whose responsibility it was to assemble a list of all contracts that were available for a given time frame.<sup>59</sup> During this time, the members of the cartel were assigned specific regions and a portion of the market share.<sup>60</sup> The effects of the cartel were disastrous. The exposure of collusion in the construction products that involved some of the high-level construction firms, CLPs within the construction sector as well as international trends on bid rigging, the sector came onto the radar of the Commission and led the Commission to implement an importance on the broader infrastructure and construction, and other sectors in 2008. Once the Commission was equipped with the knowledge on the potential anti-competitive conduct in the construction sector, the Commission then launched investigations of bid rigging and collusion in the construction sector in 2009. The Commission concluded from these investigations that collusive behaviour and bid rigging were prevalent in the construction industry. In 2013, the Commission reached settlement agreements with the majority of companies engaged in bid-rigging and collusion on different projects for violations that occurred between 2006 and 2009.<sup>61</sup> R1.46 billion was the total amount of administrative penalties resulting from the settlement process.<sup>62</sup>

Horizontal agreements between businesses, combined practices by businesses, and resolutions made by an association of businesses in a horizontal relationship are all prohibited by Section 4 of the Competition Act.<sup>63</sup> According to the Competition Act, certain practices are forbidden, including the direct or indirect fixing of a purchase or selling price or any other trading condition, the division of markets by assigning clients, suppliers, territories, or particular kinds of goods or services, and collusive tendering.<sup>64</sup> Nonetheless, the Supreme Court of Appeal ruled in the *American National Soda Ash Corporation and Botswana Ash (Pty) Ltd* case, that the Competition Tribunal must admit evidence regarding the nature, purpose, and impact of the horizontal agreement or practice in question when determining whether businesses have violated section 4(1)(b) of the Competition Act by engaging in illegal price fixing.<sup>65</sup> The decision made in this case has raised questions about how to handle agreements between competing businesses.

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<sup>59</sup> See generally *Ratshisusu* op cit note 1.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> Competition Act.

<sup>64</sup> *Ibid.*

<sup>65</sup> *The American National Soda Ash Corporation (Ansac) and Botswana Ash (Pty) Ltd (Botash)* 44.

A case of bid rigging and collusion against *Power Construction (West Cape) (Pty) Ltd (West Cape) and Haw and Inglis (Pty) Ltd* was referred to the Tribunal by the Competition Commission in 2014.<sup>66</sup> The businesses with a focus on the industrial, commercial, residential, and construction sectors were the target of the lawsuit. The lawsuit was filed in connection with the South African National Roads Agency's (Sanral) tender for the upkeep of a portion of the N1 national highway.<sup>67</sup> According to the Competition Commission, Haw and Inglis gave West Cape instructions to submit a bid even though they had no intention of providing the services, rather, their goal was to make sure Sanral received enough bids to award the contract through their tendering procedures.<sup>68</sup> Haw and Inglis were ultimately chosen to receive the tender project. The two aforementioned businesses acknowledged their mistakes and paid an R45 million administrative fine.<sup>69</sup>

In the recent *Tourvest Holdings* case,<sup>70</sup> the dispute centered on whether a horizontal relationship existed between Tourvest, a destination retail business, and a Trust formed to support rural women through economic upliftment projects before a bidding process took place. The question was whether they were competitors under Section 4(1)(b) of the Act. The Competition Appeal Court (CAC) upheld Tourvest's appeal and overturned the Tribunal's decision.<sup>71</sup> The CAC determined that there was no horizontal relationship between Tourvest and the Trust at the time of the alleged contravention. Additionally, it noted that simply tendering for the same opportunity did not automatically create horizontality between them. The Trust's existence as an independent competitor depended on its agreement with Tourvest. This case highlights the importance of accurately characterizing the relationship between parties when assessing a Section 4(1)(b) contravention. Recent case law, including this case, emphasizes that allegations of a horizontal relationship must be supported by a thorough economic analysis to determine the true nature of the relationship and conduct in question. To establish a Section 4(1)(b) contravention, parties must have been actual or potential

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<sup>66</sup> *Power Construction (West Cape) (Pty) Ltd (West Cape) and Haw and Inglis (Pty) Ltd (Haw and Inglis)* CCSA 2015.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Tourvest Holdings (Pty) Ltd v Competition Commission and Another* (195/CAC/Oct21) [2022] ZACAC 5 (30 June 2022).

<sup>71</sup> *Ibid.*

competitors both at the time of the alleged contravention and in the absence of the alleged conduct.

The OECD Guidelines feature a Bid Rigging Detection Checklist for Public Procurement, offering detailed guidance for procurement officials to identify practices that undermine competition during the bidding process.<sup>72</sup> Procurement officials often seek specific indicators, especially in markets prone to bid rigging and collusion.<sup>73</sup> Firstly, bid rigging tends to be more prevalent when there are only a few bidders involved. Second, bid rigging is more likely in markets with standardized or unchanging products or services, as it's easier to reach and maintain collusive agreements. Third, limited entry opportunities, where it's challenging, time-consuming, or costly for new players to enter the bidding market, can foster bid rigging. Fourth, procurement officials watch for signs of communication among bidders and any indications that such communication may have occurred. Fifth, officials may examine relationships among bidders after the successful bid is awarded. Furthermore, they may analyse suspicious bidding patterns, such as inconsistent price submissions for similar tender offers.<sup>74</sup> To aid competition investigations, data screening tools are increasingly employed, utilizing empirical methods that assess market and firm behaviour based on specific parameters derived from datasets.<sup>75</sup> The digital environment has facilitated the use of data screening, with access to large amounts of data and the capability for automated analysis, including machine learning methods, to detect potential collusion.

The International Monetary Fund (IMF) recommends prioritizing several key areas for enhancing public procurement in South Africa.<sup>76</sup> Firstly, the standardization of Procurement Procedures.<sup>77</sup> Efforts to update and harmonize procurement procedures should continue across

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<sup>72</sup> OECD, Guidelines for Fighting Bid Rigging in Public Procurement <https://www.oecd.org/competition/guidelinesforfightingbidrigginginpublicprocurement.htm> accessed 29 September 2023.

<sup>73</sup> Ibid.

<sup>74</sup> OECD 'Detecting Bid Rigging in Public Procurement' <https://www.oecd.org/competition/cartels/42594486.pdf> accessed 9 August 2023.

<sup>75</sup> OECD 'Data Screening Tools in Competition Investigations, OECD Competition Policy Roundtable Background Note' (2022) [www.oecd.org/daf/competition/data-screening-tools-in-competitioninvestigations-2022.pdf](https://www.oecd.org/daf/competition/data-screening-tools-in-competitioninvestigations-2022.pdf) accessed 13 August 2023.

<sup>76</sup> South Africa: Issues and Reform Options" IMF Selected Issues Paper (SIP/2023/041). Washington, D.C. International Monetary Fund.

<sup>77</sup> Ibid.

all levels of government. This includes aligning central and municipal procurement legislation and ensuring it encompasses all public entities, including majority-owned state-owned enterprises (SOEs). Stakeholder consultation is essential to minimize loopholes and resistance to reform. Standardization serves multiple purposes, such as reducing compliance costs, facilitating the use of integrated E-Procurement tools, gathering consistent procurement data for monitoring and strategic procurement, ensuring consistent use of procurement methods for better value for money, and aligning practices with international standards. Conducting assessments using tools like the Method of Assessing Procurement Systems Initiative (MAPS) can identify recommendations for improvement. Secondly, the standardization of Transparency Requirements, making the Open Contracting Data Standard (OCDS) the official standard can significantly improve transparency.<sup>78</sup> OCDS allows structured publication of procurement process information, promotes competition, reduces prices, and provides detailed data for various stakeholders to fight corruption. Thirdly, a transition to an E-Procurement System, an implementation of an E-Procurement system linked to the Integrated Financial Management Information System (IFMIS) and other relevant systems.<sup>79</sup> This system should cover all procurement stages, enabling real-time bidding, monitoring, and contract awarding, reducing transaction costs, and enhancing anti-corruption efforts by minimizing direct contact between officials and bidders. Fourth, an enhancement to Preferential Procurement.<sup>80</sup> An assessment of the impact of preferential procurement by quantifying preferences offered to targeted groups of bidders and their economic benefits is needed. The revised framework needs to be more result-oriented and easy to monitor. Preferences should be based on supplier performance and temporary, allowing firms to graduate when no longer disadvantaged. Lastly, the strengthening of Staff Capacity.<sup>81</sup> There is a need for the enhancement of staff capacity in procurement through specialized training, dedicated competence centres, and professionalization of the procurement workforce. Other countries' approaches can serve as models for developing specialized procurement skills. These measures aim to improve the efficiency, transparency, and fairness of public procurement in South Africa.

In conclusion, bid rigging and collusion occurs when suppliers collude with each other to manipulate the procurement process, such as by agreeing to divide the market between them

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<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

or by submitting coordinated bids.<sup>82</sup> This can lead to inflated prices and reduced competition. These competition issues can undermine the fairness and transparency of the procurement process and can result in the awarding of contracts to unsuitable suppliers or at inflated prices.<sup>83</sup> It is important that the government takes steps to address these issues and ensure that the procurement process is open, transparent, and fair to all bidders. The development of procurement procedures that promote fair, open, and competitive procurement processes is key to reducing unjustified restrictions on competition in South Africa. This can be achieved using transparent and open tender processes, objective and clear evaluation criteria, support for SMEs, and the use of e-procurement systems.

## **5. Legal and Regulatory Frameworks that Deal with Anti-competitive Behaviour in South African Public Procurement System**

In South Africa, collusive tendering or bid rigging is strictly prohibited under both competition law and public procurement regulations. In order to combat collusive tendering as an anti-competitive practice within the public procurement system, South Africa has four main institutional, legislative, and policy frameworks in place. The regulatory framework for public procurement, laws safeguarding whistle-blowers, oversight organizations for public procurement, and competition law are some of these frameworks. These aspects will be discussed prior to delving into the specific sector of construction law.

### **5.1 Competition Law**

The Competition Act prohibits collusive tendering or bid rigging as an anti-competitive practice.<sup>84</sup> Section 4(1)(b)(iii) of the Act states that all forms of collusive tendering are forbidden, describing it as an agreement or concerted practice among firms in a horizontal relationship that involves collusive tendering.<sup>85</sup> An example of this enforcement is the *Cross Fire Management* case, where the Competition Commission took action against Cross Fire

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<sup>82</sup> See generally OCED op cit 33.

<sup>83</sup> Ibid.

<sup>84</sup> The Competition Act.

<sup>85</sup> Bid Rigging 'How to prevent, detect and report collusive tendering or bid rigging' <http://www.compcom.co.za/wp-content/uploads/2017/11/Bid-Rigging-Final.pdf> accessed 23 July 2023.

Management, a company in the fire protection industry.<sup>86</sup> The Commission accused Cross Fire Management and four other fire protection companies of engaging in collusive tendering on various tenders over an extended period.<sup>87</sup> This violation of section 4(1)(b) of the Competition Act led to the Commission imposing a penalty of around R12.8 million on the company.

## 5.2 The Public Procurement Regulatory Framework

The key international agreement concerning public procurement is the World Trade Organisation's (hereinafter referred to as the "WTO") Plurilateral Government Procurement Agreement (hereinafter referred to as the "GPA").<sup>88</sup> Negotiated alongside the Uruguay Round of negotiations from 1983 to 1994, the GPA includes a commitment to further negotiations to update and enhance it in response to technological advancements, broaden its scope, and eliminate discriminatory measures.<sup>89</sup> The Revised GPA, although not yet operational, aims to promote transparent international public procurement and prevent preferential treatment of domestic suppliers and products.<sup>90</sup> Notably, South Africa is not a signatory to the GPA.<sup>91</sup> These international developments are complemented by the United Nations Commission on International Trade Law's (UNCITRAL) adoption of a Model Law on the Procurement of Goods, Construction, and Services in 1994. The Model Law serves as a guide for countries, especially developing ones, looking to reform or establish regulatory systems for procurement.<sup>92</sup>

The PPPFA outlines guidelines for implementing preferential procurement, a process that favours specific bidders due to their ownership, management, or control by previously disadvantaged individuals or groups.<sup>93</sup> This includes awarding contracts to businesses primarily owned by women, people with disabilities, or those who were historically disadvantaged. However, the PPPFA also mandates that preferential procurement must adhere

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<sup>86</sup> *Cross Fire Management (Pty) Ltd v The Competition Commission of South Africa Cross Fire Management (Pty)* [2022] CAC Case Nr. 192/CACFeb21.

<sup>87</sup> Ibid.

<sup>88</sup> WTO 2009 'An agreement on public procurement was first negotiated during the Tokyo Round and entered into force on 1 January 1981' [www.wto.org/](http://www.wto.org/) accessed 15 September 2023.

<sup>89</sup> The Agreement on Government Procurement (1994) article XXIV 7(b) and (c).

<sup>90</sup> GPA Article III.

<sup>91</sup> *Green Paper on Public Sector Procurement Reform in South Africa: An initiative* GN 691 in GG 17928 of 14 April 1997.

<sup>92</sup> UNCITRAL 1994 Model Law [www.uncitral.org/](http://www.uncitral.org/) accessed 15 September 2023.

<sup>93</sup> The Preferential Procurement Policy Framework Act.

to constitutional principles of fairness, equity, transparency, and competitiveness. In essence, the process should not discriminate against any bidders or unjustly favour any particular group.

The Constitutional Court handed down the judgment in the *Afribusiness* case.<sup>94</sup> The *Afribusiness* case largely dealt with s217 of the Constitution, the Preferential Procurement Policy Framework Act,<sup>95</sup> as well as the 2017 Preferential Procurement Regulations. The Apex Court found that the 2017 Procurement Regulations are unlawful, and the Minister of Finance acted beyond his powers when he declared the regulations. In his article, Peter Volmink criticises both the majority and minority judgments in the *Afribusiness* case.<sup>96</sup> He challenges the fundamental principle upon which the majority relied in its reasoning. Volmink argues that the Minister violated s 2(1) of the PPPFA, which furnished state organs the power to set their own policies for preferential procurement.<sup>97</sup> According to the ruling in the *Akani Garden Route* case,<sup>98</sup> it was stated that “laws, regulations and rules are legislative instruments, whereas policy determinations are not”. Legislative tools have legal force and are prescriptive, whereas policies serve as guidelines for the use of public power.<sup>99</sup> The regulations were intended to establish a framework within which state organs could formulate their own policies. Therefore, there is no obvious explanation for why they were regarded as "policy" instead of a legislative tool.<sup>100</sup>

In deciding the invalidity of the regulations in the *Afribusiness* case,<sup>101</sup> the Court, in the majority judgement by Justice Madlanga, considered the constitutional provisions of section 217.<sup>102</sup> The Court recognised that section 217(1) sets the guidelines for the procurement of goods and services by organs of state, while section 217(2) was enacted to guard against the continued exclusion of previously disadvantaged persons from tender awards by state organs, and the Procurement Act is the legislation that was enacted to give effect to section 217(2) of

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<sup>94</sup> *Minister of Finance v Afribusiness NPC* [2022] ZACC 4.

<sup>95</sup> The Preferential Procurement Policy Framework Act.

<sup>96</sup> Peter Volmink ‘Pre-Qualification and Preference in Public Procurement: A Critical Reflection on Minister of Finance v Afribusiness NPC’ *African Public Procurement Law Journal* 9 (2022) at 1–19.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* (252/99) [2001] ZASCA 59 (17 May 2001).

<sup>99</sup> *Property Development (Pty) Ltd v Cape Town City* 2015 (2) SA 584 (CC).

<sup>100</sup> *Ibid.*

<sup>101</sup> *Supra* note 52.

<sup>102</sup> The Constitution.

the Constitution. In its determination of invalidity of the Procurement Regulations, the Court placed great emphasis on the question whether the Minister was empowered by the Procurement Act to make the Procurement Regulations. In answering the question, the court considered the provisions of section 2(1) of the Procurement Act which states:

“An organ of state must determine its preferential procurement policy and implement it within the following framework ...”

It further considered the provisions of section 5(1) of the Procurement Act which states:

“The Minister may make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act”.

The Court held that the Procurement Regulations are intended to operate as a policy for organs of state. It held that what is necessary for purposes of the Procurement Act and giving effect to section 217(2) is provided in section 2(1) of the Procurement Act, making the Procurement Regulations by the Minister unnecessary and thus invalid. The Court further held that the word “expedient” in the Procurement Act still does not give the Minister wide powers to promulgate the Procurement Regulations as such word must also be interpreted in the context of the rest of the Procurement Act. It would not be appropriate for a power that already vests in each organ of state also to be exercised by the Minister. It can therefore be neither necessary nor expedient for the Minister to make regulations that seek to achieve that which can already be achieved in terms of section 2(1) of the Procurement Act. Therefore, in terms of the judgement the Minister acted beyond his legal power or authority by exercising a power that was not conferred on him, the Procurement Regulations were thus found to be invalid. In the case of *Kate v MEC for the Department of Welfare*, Justice Froneman ruled that the state and its institutions only possess authority within the limits defined by the Constitution and legislation that aligns with constitutional principles.<sup>103</sup>

The PPPFA, along with its associated regulations, provides guidelines for public entities in the procurement of goods and services. These regulations specifically prohibit collusive tendering or bid rigging and necessitate bidders to disclose any relationships they may have with other bidders. While the Competition Act only regulates agreements between competing bidders in the tender process, it does not address other behaviours that distort or undermine competition

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<sup>103</sup> *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SE).

during tendering.<sup>104</sup> Irvine argues that South Africa needs swift and effective action to combat corruption in both the public and private sectors, especially in the aftermath of the pandemic.<sup>105</sup> One proposed solution is to amend the Competition Act, enabling the Commission to penalize individuals and companies involved in activities that undermine tenders for personal gain, aligning the Commission with the National Prosecuting Authority.<sup>106</sup> However, it's important to note that corruption issues are also addressed in other legislation, such as the Prevention and Combating of Corrupt Activities Act (PRECCA), which defines corruption and requires a higher criminal standard of proof for enforcement, distinct from the civil standard used in competition law.<sup>107</sup>

### 5.3 Public Procurement Oversight Bodies

The Office of the Chief Procurement Officer and the Public Procurement Regulator are the key entities entrusted with the responsibility of supervising and regulating public procurement processes in South Africa. They possess the authority to investigate and impose penalties on both public entities and suppliers involved in collusive tendering or bid rigging practices.

The National Treasury in South Africa has issued a series of Instruction Notes to provide guidance to public entities on conducting procurement processes that are fair, transparent, and competitive. Instruction Note 3 of 2016 focuses specifically on addressing bid-rigging and collusion in procurement. The National Treasury plays a crucial role in South African politics because it is constitutionally empowered to regulate public procurement.<sup>108</sup> In 2012, during his budget speech, Minister Gordhan, who was the Minister of Finance at the time, announced the establishment of the Office of the Chief Procurement Officer (OCPO). The OCPO was created with the goal of absorbing the functions of the previous Specialists Functions division, particularly in the areas of supply chain policy and contract management. Its mission is to enhance accountability, governance, and oversight by promoting transparency, economic

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<sup>104</sup> Heather Irvine 'Should the competition authorities have more powers to tackle tender corruption?' <https://www.withoutprejudice.co.za/free/article/7095/view> accessed 22 July 2023.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> The Prevention and Combating of Corrupt Activities Act 12 of 2004.

<sup>108</sup> Ryan Brunette, Jonathan Klaaren and Patronella Nqaba. 'Reform in the Contract State: Embedded Directions in Public Procurement Regulation in South Africa - Development Southern Africa' <https://doi.org/10.1080/0376835X.2019.1599712> accessed 15 September 2023.

efficiency, and effective management of revenue, expenditure, assets, and liabilities within the public sector.<sup>109</sup> The OCPO has the potential to bring about positive change. Its centralized and streamlined approach to procurement of goods and services is expected to relieve national and provincial departments from the burdens of routine procurement tasks, allowing them to focus on their core legislative responsibilities.<sup>110</sup> This clear and efficient procurement practice, aligned with constitutional values, is seen as an effective tool in combating corruption and promoting efficiency within the public sector.

#### **5.4 Whistle-blower Protection Law**

The Protected Disclosures Act in South Africa offers protection to whistle-blowers who report instances of collusive tendering or bid rigging in public procurement.<sup>111</sup> The country has established a variety of policy, legislative, and institutional frameworks aimed at addressing collusive tendering as an anti-competitive practice in public procurement. These frameworks are designed to guarantee fairness, transparency, and competitiveness in the procurement process and to ensure the efficient and effective use of public funds.

### **6. An Analysis on the Procurement Process in South Africa**

South Africa's present public procurement system is governed by the PFMA and the PPPFA, with the objective of promoting transparency, fairness, and efficiency in procurement processes. Nevertheless, despite these regulatory frameworks, there have been cases of corruption, fraud, and irregularities in South Africa's public procurement, resulting in the misappropriation of public funds and eroding trust in the procurement process.

During a committee meeting, the Standing Committee on Public Accounts received an oral submission from one of its members regarding allegations of public fund misappropriation mentioned in an audio recording. The leaked audio from an ANC National Executive Committee meeting implicated the President in discussions about the apparent misuse of public

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<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> The Protected Disclosures Act 26 of 2000.

funds for party campaign purposes.<sup>112</sup> The committee member requested that the President be summoned to appear before the Committee to address questions about the leaked audio recording.<sup>113</sup> It was suggested that the President's failure to address the matter before the Zondo Commission might be viewed as 'criminal omission' or perjury and could limit the findings of the State capture report.<sup>114</sup> A major challenge in South Africa's public procurement process is the lack of transparency. This is evident in cases where tender documents are not made public, and the evaluation criteria are unclear or subjective. The absence of transparency often results in suspicion and distrust among stakeholders and can create an environment conducive to corruption.

The preferential procurement regulations in South Africa are also a contentious issue. These regulations prioritize bidders who are historically disadvantaged individuals or entities, which has led to accusations of reverse discrimination and the awarding of tenders to unqualified suppliers. Furthermore, there have been instances of collusion between government officials and suppliers, which has resulted in inflated prices and the awarding of tenders to unsuitable suppliers. These instances of corruption and fraud have led to a loss of public funds and the undermining of public trust in the procurement process. While the regulatory framework for public procurement in South Africa is robust, there are still challenges that need to be addressed to ensure transparency, fairness, and efficiency in the procurement process. These challenges include improving transparency, building capacity within government institutions, addressing preferential procurement regulations, and tackling corruption and fraud.

The promotion of competition in public procurement procedures in South Africa is essential for several reasons. First, efficiency, competition ensures that the procurement process is efficient and cost-effective. By promoting competition, public entities can access a wider range of suppliers, which can lead to better prices, higher quality goods and services, and faster delivery times.<sup>115</sup> Second, transparency, competition ensures that the procurement process is

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<sup>112</sup> Public Accounts (SCOPA) 'Mr M Dirks Letter on alleged misuse of public funds' <https://pmg.org.za/committee-meeting/34120/> accessed on 24 July 2023.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Agustin Gutierrez, Ashish Kothari, Carolina Mazuera, and Tobias Schoenherr 'Taking supplier collaboration to the next level' <https://www.mckinsey.com/capabilities/operations/our-insights/taking-supplier-collaboration-to-the-next-level> accessed 13 August 2023.

transparent and fair. When there is competition, all bidders have an equal opportunity to participate, and the evaluation criteria are clear and objective.<sup>116</sup> Third, innovation, competition promotes innovation and encourages suppliers to develop new and improved products and services to meet the needs of the public entities. This can lead to the introduction of new technologies, better quality products and services, and more efficient processes.<sup>117</sup> Fourth, economic growth, promoting competition in public procurement procedures can also contribute to economic growth. By encouraging SMEs and historically disadvantaged individuals and businesses to participate in procurement processes, the government can stimulate economic growth and create job opportunities.<sup>118</sup> Additionally, anti-corruption, the promotion of competition can also help to reduce the risk of corruption and fraud in public procurement. When there is competition, it is more difficult for suppliers to collude with government officials or engage in corrupt practices, as they are competing against other suppliers.<sup>119</sup> It is crucial that the government takes steps to ensure that the procurement process is open, transparent, and fair to all bidders, and that it encourages the participation of a diverse range of suppliers.

## **7. Overview and Comparison of legal landscapes: Public Procurement in the Construction Sector**

Many of the procurement weaknesses identified in South Africa's procurement system have also been observed in procurement systems in OECD countries.<sup>120</sup> These weaknesses, as reported by the OECD, are commonly identified challenges in procurement systems, include the lack of procurement capacity, these are issues related to insufficient numbers, knowledge, and skills in procurement.<sup>121</sup> Deficiencies in the legislative framework, which are problems related to shortcomings in the legal framework designed to ensure that procurement is conducted fairly and transparently.<sup>122</sup> There are also limitations in remedy and review systems,

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<sup>116</sup> Blackridge 'What is Competitive Bidding Process in Public Procurement?' <https://www.blackridgeresearch.com/blog/what-is-competitive-bidding-in-government-public-procurement-process> accessed 23 August 2023.

<sup>117</sup> Ibid.

<sup>118</sup> Competition Commission 'A Guide on Promoting Competition in Public Procurement' <https://www.compcom.co.za/wp-content/uploads/2022/03/A-Guide-on-Promoting-Competition-in-Public-Procurement-15March2022.pdf> accessed 13 August 2023.

<sup>119</sup> OECD 'Preventing Corruption in Public Procurement' <https://www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf> accessed 13 August 2023.

<sup>120</sup> South Africa: Issues and Reform Options" IMF Selected Issues Paper (SIP/2023/041). Washington, D.C. International Monetary Fund.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

these challenges are related to the timely review of complaints regarding procurement decisions. Where there are inadequate mechanisms for monitoring and identifying irregularities cause insufficiencies in mechanisms for monitoring procurement processes and detecting potential irregularities and corruption, including whistle blower mechanisms.<sup>123</sup> These weaknesses are not unique to South Africa and are common concerns in procurement systems worldwide, highlighting the need for continuous improvement and reform in procurement practices.

Bid rigging is considered illegal in all OECD member countries.<sup>124</sup> Within the EU, the UK, and Japan, approximately 33% of decisions by competition authorities in terms of volume pertain to bid rigging activities. In the United States, this figure is 46%, and in South Korea, it's notably high at 89%.<sup>125</sup> Bid rigging usually falls under national criminal prohibitions against anti-competitive practices. For instance, it is covered by the "cartel offence" defined in section 188 of the UK Enterprise Act.<sup>126</sup> In cases where cartel activity is not criminalized, bid rigging may still be considered a criminal offense.

The role of the Construction Industry Development Board (CIDB) is the main topic of this section of the report. The report looks into the complementary role the CIDB can play to ensure businesses are discouraged from engaging in collusive practices in the construction industry, even though the Competition Commission is mandated to investigate collusive practices in all sectors of the economy, including the construction sector.<sup>127</sup> A focus is also on the potential regulatory measures that could be implemented to guarantee more competition in major infrastructure projects. The study looked at structural factors that may contribute to bid rigging.<sup>128</sup> Namely, the ways in which competition can operate, the ways to unpack regulatory barriers to entry in the construction industry, the ways to look at how the market could be open

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<sup>123</sup> Ibid.

<sup>124</sup> Martin Coleman 'Bid rigging' <https://www.concurrences.com/en/dictionary/bid-rigging> accessed 15 September 2023.

<sup>125</sup> Allen and Overy 'Global Cartel Enforcement Report, 2020' <https://www.allenoverly.com/en-gb/global/news-and-insights/global-cartel-enforcement-control> accessed 30 August 2023.

<sup>126</sup> The UK Enterprise Act 2002.

<sup>127</sup> Sohail and Cavill 'Accountability to Prevent Corruption in Construction Projects' (2008) *Journal of Construction Engineering and Management* Vol. 134, No. 9 (September), at 729-738.

<sup>128</sup> Ibid.

for more participation, and interventions that could help create a transparent but competitive bidding process in order to evaluate the construction sector and, in particular, the role of the CIDB in limiting construction industry cartels.<sup>129</sup>

All public sector procurement in the construction industry must adhere to the CIDB's Standard for Uniformity in Construction Procurement. Collusion investigations, both in the private and public sectors, are not exclusive to South Africa, other countries like the United Kingdom (UK), United States of America (USA), South Korea, and the Netherlands have dealt with similar issues.<sup>130</sup> The efficient procurement of construction services, particularly on significant infrastructure projects, relies on the competitiveness of the construction sector and the prevailing procurement practices. Bid rigging in construction has been uncovered in numerous countries, highlighting the necessity for stringent regulation to encourage competition and create a favourable environment for emerging firms to participate.<sup>131</sup> This challenge is more prominent in large infrastructure projects, where only a limited number of firms possess the capability to compete for such contracts.<sup>132</sup>

### **7.1 Generic pharmaceuticals in Mexico: Improved procurement securing better value for money**

During the period of 2003 and 2006, the Mexican social security agency (IMSS) restricted the procurement of generic pharmaceuticals to domestic firms, resulting in numerous separate and frequent auctions for each product.<sup>133</sup> These auctions often had high reference prices and multiple provision rules.<sup>134</sup> However, in 2007, IMSS revised its approach, allowing international bidders, consolidating purchases into national contracts with competitive maximum prices, and eliminating multiple provision rules.<sup>135</sup> This led to a significant decrease

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<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Hardin Ratshisusu 'The roles of the Competition Commission and the Construction Industry Development Board in promoting competition and limiting construction industry cartels: a review of the Fast Track Construction Settlement Project' [https://nersa.piidigital.co.za/wp-content/uploads/bsk-pdf-manager/2020/10/A-review-of-the-Fast-Track-Construction-Settlement-Project\\_H-Ratshisusu.pdf](https://nersa.piidigital.co.za/wp-content/uploads/bsk-pdf-manager/2020/10/A-review-of-the-Fast-Track-Construction-Settlement-Project_H-Ratshisusu.pdf) accessed 9 September 2023.

<sup>132</sup> Ibid.

<sup>133</sup> OECD 'Competition and Procurement Key Findings' <https://www.oecd.org/daf/competition/sectors/48315205.pdf> accessed 3 September 2023.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

in collusion among bidders and a substantial drop in winning tender prices for generic pharmaceuticals, with a 20% average price decrease for the 20 most important products.

In 2011, IMSS became the first public agency in Mexico and globally to request an OECD review of its procurement regulations and practices, aligning with OECD Guidelines.<sup>136</sup> The review resulted in over 20 recommendations for IMSS to enhance procurement procedures and prevent supplier collusion. Many of these recommendations have been fully or partially implemented, improving procurement outcomes and benefiting IMSS.<sup>137</sup> By successfully addressing bid rigging, IMSS has generated savings that can be redirected to provide better services to its beneficiaries and benefit Mexican taxpayers, ultimately increasing the effectiveness of its procurement strategy.

## **7.2 Korea's Bid Rigging Indicator Analysis System**

In 2006, the Korea Fair Trade Commission (KFTC) implemented a bid rigging indicator analysis system to detect bid rigging in public procurement, building upon their manual data analysis since 1997.<sup>138</sup> Public institutions are legally required to provide bid-related information to the KFTC, which is then automatically analyzed by the system. This analysis calculates the likelihood of bid rigging based on factors such as bid-winning probability, the number of bidders, bid prices, competition methods, unsuccessful bids, reserve price increases, and transition into private contracts. The system helps the KFTC monitor public tenders, conduct on-site investigations, and act as a deterrent by ensuring constant oversight.

Under the Monopoly Regulation and Fair-Trade Act (MRFTA),<sup>139</sup> individuals engaging in cartel activities may face imprisonment for up to three years, a fine of up to 200 million won,

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<sup>136</sup> OECD 'Fighting Bid Rigging in IMSS Procurement: Impact of OECD Recommendations' <https://www.oecd.org/daf/competition/IMSS-procurement-impact-OECD-recommendations2018-ENG.pdf> accessed 9 September 2023.

<sup>137</sup> Ibid.

<sup>138</sup> Changhun Lee, Hyunah Kim, Jae-Hyuk and Joo Young Park 'At a glance: sanctions for cartel activity in South Korea' <https://www.lexology.com/library/detail.aspx?g=02de0656-b6f6-47b6-b776-a93063bb0677#:~:text=A%20person%20that%20engages%20in,up%20to%207%20million%20won>. Accessed 9 September 2023.

<sup>139</sup> Monopoly Regulation and Fair-Trade Act no 4198.

or both. Companies involved in cartels can also be fined up to 200 million won.<sup>140</sup> In the case of corporations, their representatives and employees may also face criminal penalties. Bid rigging prohibited by the Korean Criminal Code can result in imprisonment of up to two years or a fine of up to 7 million won. Under the Framework Act on the Construction Industry,<sup>141</sup> bid rigging can lead to imprisonment of up to five years or a fine of up to 200 million won. Court-imposed sentences vary depending on case specifics, with an increasing trend in recent years of individual employees and executives facing criminal punishment for cartel involvement.

### **7.3 The United Kingdom's Construction Cartel**

In 2009, the Office of Fair Trading (OFT), a the national competition authority in the United Kingdom penalized 103 companies in the construction industry for participating in a bid rigging cartel that employed tactics like cover pricing and associated compensation payments.<sup>142</sup> These practices affected public and private building projects worth over £200 million, including schools, universities, and hospitals.<sup>143</sup> The case was challenging due to the substantial evidence implicating numerous companies in thousands of tender processes. In order to expedite the investigation while maintaining its restrictive effect, the OFT prioritized cases by focusing on stronger evidence and investigating firms involved in bid rigging in at least five tenders. This approach led to a diverse group of defendants, including both leniency applicants and non-applicants.

In July 2013, the South African Competition Tribunal's confirmation of settlements marked a significant milestone in the Competition Commission of South Africa's investigation into bid rigging and collusion in the construction sector. Collusive practices affected 140 projects eligible for settlements, with the Commission reaching agreements with firms on 57 projects, resulting in a total administrative penalty of R1.46 billion.<sup>144</sup> To further combat cartels and promote the involvement of emerging firms, the CIDB (Construction Industry Development Board) could assume a more proactive role by penalizing firms engaged in collusive practices. Proposed measures at regulatory, procurement, and firm levels aim to reduce collusive

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<sup>140</sup> Ibid.

<sup>141</sup> Framework Act on the Construction Industry (Law No. 11015, August 4, 2011).

<sup>142</sup> See generally Ratshisusu note 78.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

behaviour, enhance competition, and foster transparency and fairness in South Africa's construction industry procurement processes.

## 8. Conclusion and Recommendations

Collusion and corruption can occur in any procurement process, be it in the public or private sectors. Public procurement, in particular, has unique characteristics that make it susceptible to anticompetitive and corrupt practices, amplifying the potential harm.<sup>145</sup> In addition to the Competition Commission's role in enforcing competition laws, competition policies and the development of procurement procedures that facilitate the involvement of small and medium-sized enterprises (SMEs) can help reduce unwarranted restrictions on competition and promote pro-competition outcomes. All three procurement regimes, namely the GPA, Model Law, and South African Law, advocate for open tender procedures as the primary method for public procurement to ensure competition.<sup>146</sup> The South African legal system covers essential aspects similar to those addressed by the Model Law and GPA, creating an effective public procurement system. However, there is room for improvement, such as regulations on how procuring entities should handle abnormally low tenders, clarification processes, deadline extensions, and refusing to award tenders when it's in the public interest to do so. While allowing procuring entities to set their own supply chain management policies may lack standardization, it can also lead to more effective policies tailored to their specific circumstances.<sup>147</sup>

Robust public procurement policies aim to achieve value for money.<sup>148</sup> Public procurement is a crucial aspect of any economy, as it involves the purchase of goods and services by governments and other public entities. In South Africa, public procurement is regulated by the PFMA and the PPPFA, which aim to promote transparency, fairness, and efficiency in the procurement process. However, there are concerns that the current procurement laws in South Africa may not be competitive enough to promote innovation and value for money. One of the main criticisms of the PPPFA is that it places too much emphasis on the price of goods and services, rather than considering other factors such as quality and innovation. This can lead to a focus on short-term cost savings, rather than long-term value creation.

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<sup>145</sup> See generally OCED op cit note 80.

<sup>146</sup> Stephanus Petrus Le roux De la Harpe, public Procurement Law: A comparative Analysis [https://uir.unisa.ac.za/bitstream/handle/10500/3848/thesis%20le%20roux\\_pdf.pdf](https://uir.unisa.ac.za/bitstream/handle/10500/3848/thesis%20le%20roux_pdf.pdf) accessed 15 September 2023.

<sup>147</sup> Ibid.

<sup>148</sup> OECD 'Fighting Bid Rigging in IMSS Procurement: Impact of OECD Recommendations' <https://www.oecd.org/daf/competition/IMSS-procurement-impact-OECD-recommendations2018-ENG.pdf> accessed 9 September 2023.

In addressing these concerns and promote a more competitive law of public procurement in South Africa, there are several possible measures that should be implemented. This can be achieved by setting aside a portion of procurement contracts for SMEs, providing training and support to SMEs on the procurement process, and simplifying the procurement process to make it more accessible to SMEs. The adoption of e-procurement systems plays a pivotal role in mitigating unjustified competition restrictions through a more efficient and transparent procurement process<sup>149</sup>. These systems facilitate electronic tender submission, automate tender evaluation, and enable online tracking of the procurement process. This enhances transparency and efficiency, reducing opportunities for unwarranted competition restrictions. Key reform priorities include simplifying and standardizing procurement procedures, aligning with transparency standards like the Open Contracting Data Standards, integrating a new e-procurement system with the government's integrated financial management information system (IFMIS) and other relevant systems, optimizing preferential procurement for cost-effectiveness and goal achievement, encouraging staff capacity for procurement management, and exploring centralized procurement opportunities to maximize limited capacity.<sup>150</sup> Achieving a more competitive public procurement environment in South Africa requires a comprehensive approach addressing various factors. This approach aims to improve efficiency, effectiveness, and transparency while fostering economic growth and development.

Public procurement in South Africa is highly significant and is expected to become even more important in the future. This is due to factors such as climate change, energy shortages, and the need to address the country's unique socio-economic challenges, including poverty and imbalances stemming from apartheid policies. South Africa already has a procurement system that aligns with international standards. In order to fully leverage the advantages of this system, there's a need to continuously evaluate and adjust policies to accommodate evolving circumstances.

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<sup>149</sup> Simone, Alejandro and Balasundharam, Vybhavi, 2023. "Public Procurement in South Africa: Issues and Reform Options" IMF Selected Issues Paper (SIP/2023/041). Washington, D.C. International Monetary Fund.

<sup>150</sup> Ibid.

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