

PUBLIC PROCUREMENT REGULATION IN ZIMBABWE: A CONSTITUTIONAL ANALYSIS

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Abstract

The promulgation of the Constitution of Zimbabwe (Amendment No.20) in 2013 ushered in a new procurement dispensation in Zimbabwe, in that, public procurement has been accorded a constitutional status. Section 315(1) of the Constitution outlines cardinal principles to underpin public procurement. These fundamental principles are transparency, fairness, honesty, cost-effectiveness, competitiveness and openness. To give effect to these principles, their contextual meaning and various constitutional provisions will be examined consistent with the rule that constitutional provisions cannot be construed in isolation. As such an in-depth study of mutually reinforcing and resonating constitutional provisions will be done to establish the constitutional public procurement standard. Aspects connected to public procurement such as sustainable procurement, good governance, public accountability, collateral objectives of public procurement and public procurement and human rights will also come under scrutiny in this article. Findings from this research paper demonstrate that the constitutionalisation of public procurement law is delightedly welcome by suppliers and contractors, and the general public. This lays a firm legal framework for the enactment of public procurement legislation. It is submitted that the magnification of procurement principles enunciated in the Constitution through legislation and the operationalisation thereof is hinged on political will. The principal aim of this article is to provide an exposition of the constitutional foundations of public procurement law in Zimbabwe.



1. Introduction

Public procurement generally refers to the purchase of goods and services by the government or public entities to fulfil their public functions.¹ Public procurement activities are funded from monies collected by governments from taxes and levies, known as public funds. Bureaucratic functionaries exercising public power in terms of enabling constitutional and legislative rules, expend public funds in procuring goods and services as well as construction works, for the wellbeing of the general public.² Furthermore, the notion of the social contract³ between the government and citizens, dictates that public officials must exercise public power for and on behalf of the society.⁴ The social contract has its foundational genesis in the liberal philosophy on which cooperation is hinged on the individuals' consent and the symbiotic relationships emanating therefrom.⁵ In other words, public officials owe a fiduciary duty to the general public who are the beneficiaries of goods and services, and at the same time, the source of funds.

Public procurement has been accorded a constitutional status in the post 2013 dispensation. It signals a fundamental commitment to good governance through the efficient and economical use of public resources.⁶ It is trite that public procurement regulatory framework had been deemed corruption endemic and its reform laid at the core of the prudent financial management.⁷ Numerous related pieces of legislation related to the field of public procurement and meant to improve the efficiency and profitability of public entities were also passed.

¹P Bolton *The Law of Government Procurement in South African* (2007) 2.

²A Schick "Repairing the Budget Contract between Citizens and the State" (2011) Vol 11 *OECD Journal on Budgeting* 3-4 accessed 20 July 2020).

³ The notion of social contract legitimises social rules and institutions on their being freely and publicly acceptable to all individuals bound by them.

⁴ H Walker and S Brammer, *Sustainable procurement in the United Kingdom Public Sector* (2007).

⁵ F Samuel *Justice and Social Contract Essays on Rawlsian Political Philosophy* (2006) 17.

⁶ In terms of section 2 of the Public Finance Management Act, public resources mean, 'public money and State property', and public money means-

(a) revenues; and

(b) all other money received and held, whether temporarily or otherwise, by an officer in his or her official capacity.

⁷ 'World Bank: Zimbabwe' <<https://blogs.worldbank.org/governance/zimbabwe-public-procurement-reform-catalyze-greater-transparency-and-development#:~:text=The%20public%20procurement%20reform%20program,legal%20framework%3B%20the%20development%20of>> accessed 17 July 2020; J Tsabora, 'Public Procurement in Zimbabwe: Law, Policy and Practice' (2014) Vol *African Public Procurement Law Journal* 3.

Section 315(1) of the Constitution provides as follows:

(1) An Act of Parliament must prescribe procedures for the procurement of goods and services by the State and all institutions and agencies of government at every level, so that procurement is affected in a manner that is transparent, fair, honest, cost-effective, and competitive.

This provision is buttressed by section 195(2) of the Constitution, which reads:

Companies and other commercial entities referred to in subsection (1)⁸ must establish transparent, open, and competitive procurement systems.

Public procurement legislation, therefore, must endeavour in broad and unambiguous terms, to give effect to the constitutional principles relating to transparency, fairness, honesty, cost-effectiveness and competitiveness.⁹ Drawing from foundational public procurement principles, the article will examine the Zimbabwean public procurement legislation. This will entail examining the principal public procurement legislation, namely the Public Procurement and Disposal of Public Assets Act (PPDPAA) and related legislation. The question which this article will aim to answer is whether public procurement legislation adequately addresses the principles set out in section 315(1) read with section 195(2) of the Constitution. This will be done by examining the PPDPAA and related legislation.

1.1 The objectives of the public procurement regulatory framework

The term public procurement generally refers to the purchase of goods and services by the government or public entities to fulfil their public functions.¹⁰ Public procurement activities are funded from monies collected by governments from taxes and levies, known as public funds. Bureaucratic functionaries exercising public power in terms of enabling constitutional and legislative rules, expend public funds in procuring goods and services as well as in construction works for the wellbeing of the general public.¹¹ Furthermore, the notion of the social contract¹² between the government and citizens,

⁸ Refers to companies and other commercial entities owned or wholly controlled by the State.

⁹ Sections 195(2) and 315(1).

¹⁰ Phoebe Bolton, *The Law of Government Procurement in South African* (Durban LexisNexis Butterworths 2007) 2.

¹¹ Allen Schick, "Repairing the Budget Contract between Citizens and the State" (2011) 11 (3) OECD Journal on Budgeting 3-4 <https://www.oecd.org/gov/budgeting/Repairing%20the%20Budget%20citizens%20and%20state.pdf> (accessed 20 July 2020).

¹² The notion of social contract legitimises social rules and institutions on their being freely and publicly acceptable to all individuals bound by them.

dictates that public officials must exercise public power for and on behalf of the society.¹³ The social contract has its foundational genesis in the liberal philosophy on which cooperation is hinged on individuals' consent and the symbiotic relationships emanating therefrom.¹⁴ In other words, public officials owe a fiduciary duty to the general public, who are the beneficiaries of goods and services, and at the same time, the source of funds.

The PPDPAA was enacted in direct compliance with the provisions of sub-section 315(1) of the Constitution.¹⁵ Surprisingly, the PPDPAA, does not make reference to the constitutional provision that gave birth to it.¹⁶ However, the preamble to the PPDPAA is patently clear that it seeks to regulate the procurement and disposal of goods and services in a transparent fair, honest, cost-effective and competitive manner.¹⁷ This is further augmented by the Public Finance Management Act (PFMA) which places an obligation on accounting authorities to establish and maintain an appropriate procurement system that is fair, equitable, transparent, competitive and cost-effective.¹⁸ Similarly, the constitutional principles of section 315(1) are mentioned in the preamble to the PPDPAA.¹⁹

The objectives of the PPDPAA are far and wide. These include: to promote and fulfil the constitutional public procurement principles;²⁰ to promote of competition among bidders;²¹ providing for the fair and equitable treatment of all bidders resulting in the execution of public contracts that accords value for money;²² to promote the integrity of, fairness and public confidence in, procurement processes;²³ to secure the

¹³ Hellen Walker and Steven Brammer, *Sustainable procurement in the United Kingdom Public Sector* (University of Bath School of Management 2007).

¹⁴ Freeman Samuel, *Justice and Social Contract Essays on Rawlsian Political Philosophy* (Oxford University Press, 2006) 17.

¹⁵ Act 5 of 2017.

¹⁶ It a fundamental legislative drafting principle that at the very least, the preamble to a legislation should refer to a constitutional provision which would have given birth to it (legislation).

¹⁷ See the preamble to PPDPAA Act.

¹⁸ Section 44(1)(iii) of Act 11 of 2009; Sections 17(3)(c) of Public Finance Management (General) Regulations, 2019 published in the Government Gazette through Statutory Instrument 135 of 2019.

¹⁹ See section 4(1)(a).

²⁰ *Ibid.*

²¹ Section 4(1)(b).

²² Section 4(1)(c).

²³ Section 4(1)(d).

implementation of any environmental,²⁴ social,²⁵ and economic²⁶ and other policy that is authorised by a procuring entity in procurement proceedings.²⁷

It is clear that the Zimbabwean procurement regulatory framework focuses on using public procurement for the attainment of socio-economic development. Therefore, there is an obligation that automatically arises for the public procurement watchdog, the Procurement Regulatory Authority of Zimbabwe (PRAZ), and procuring entities to conduct procurement proceedings in full compliance with the objectives of PPDPA.²⁸ The Act requires suppliers to act in accordance with the law for their bids to be deemed responsive.²⁹ It follows that bids from suppliers who do not discharge their tax obligations and social security contributions, are precluded from participating in public procurement activities.³⁰ These bids would be rejected on account of being non-responsive.³¹

1.2 Collateral objectives

Consistent with government policy in the developing world, public procurement is a conduit for the achievement of social and political development.³² A cursory view of

²⁴ United Nations Environmental Programme Report (2011), Towards A Green Economy: Pathways to Sustainable Development and Poverty Eradication. This Report is consolidated on the groundbreaking 987 Brundtland Commission Report.

https://sustainabledevelopment.un.org/content/documents/126GER_synthesis_en.pdf>accessed 30 March 2021. The environmental issues linked to public procurement are, environmental resource management, urban planning, carbon dioxide reduction, alternative energies such as solar and wind, sustainable agriculture, marine resource management, protection of ecosystems, pollution and waste management, among others.

²⁵ Ibid. The social issues include but not limited to human rights; clean drinking water; food security; observance of labour laws; anti-child labour and forced labour laws; fair trade; health and safety; gender equality including universal education; child mortality and maternal health.

²⁶ Ibid. On the economic aspect the matter pertaining to economic regeneration; sustainable economic development; emerging markets; development of SMMEs; total cost of ownership and life cycle costing; value for money; poverty reduction.

²⁷ Section 4(1)(e)

²⁸ Section 4(2). As noted, the constitutive objectives are set out in terms of 4(1)(a)-(e) of PPDA Act.

²⁹ Subsection 28(1) of PPDPA (General) Regulations, 2018.

³⁰ Section 28(1)(e) of PPDPA (General) Regulations, 2018.

³¹ Ibid.

³² Peter Trepte *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press, 2004). For example, section 217 (2)(a) and (b) of the South Africa Constitution provides for the formulation of preferential public policy geared towards the economic and social emancipation of historically disadvantaged persons, particularly, black people. In accordance with this constitutional bidding, Broad Based Black Economic Empowerment Act (BBBEEA) and the Preferential Procurement Policy Framework Act (PPFA) were enacted.

the PPDPAA reveals that social and economic goals can be attained or achieved through public procurement law.

1.2.1 Sustainable procurement

Despite the absence of an express provision on sustainable procurement in the Constitution, there is ample implied evidence in the form of mutually reinforcing provisions on sustainable resource utilization and environmental sustainability.³³

1.2.1.1 Environmental sustainability

In harmony with its international obligations on sustainable development,³⁴ Zimbabwean public procurement policy has to be pursued in an environmentally sustainable way.³⁵ Using the foregoing as a point of departure, it is abundantly clear that the Constitution lays a strong footing for the use of public procurement as one of the numerous means of achieving environmental, social and economic sustainability, thereby giving effect to the rights set out in the Declaration of Rights.³⁶ Public procurement regulatory framework must promote flourishing of environmental rights enshrined in the Constitution.³⁷

It is trite that sustainable procurement connotes embracing environmental, socio-cultural, planetary and financial considerations in the procurement processes.³⁸ It goes without saying that a well-regulated public procurement system is a precondition for the achievement of the Sustainable Development Goals (SDGs) and sustainable development.³⁹ A delicate balance has to be struck between economic development, social development and environmental protection against business needs.⁴⁰

³³ Sections 73(2)(b)(iii), sections 317(1)(b) and 194(1)(b) of the Constitution.

³⁴ A UNGA, Transforming Our World: The 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1, 25 October 2015 (hereafter 'SDGs'), Goal 12.

³⁵ Section 73 of the Constitution. The right to clean, safe and sustainable environment is protected in terms of the Zimbabwean Constitution. In fact, the foregoing provisions specifically lays out the environmental rights that accrue to both individuals and the community.

³⁶ Chapter 4 of the Constitution.

³⁷ Chapter 4 of the Constitution set out declaration of rights and fundamental rights and freedoms.

³⁸ Helen Borland, 'Conceptualizing global strategic sustainability and corporate transformational change' *International Marketing Review*, (2009)26(4/5) 565.

³⁹ Benon Basheka Public Procurement Reforms in Africa: A Tool for Effective Governance of the Public Sector and Poverty Reduction in Khi V. Thai (ed) *International Handbook of Public Procurement in Africa: A Comprehensive Public Program (2009 by Taylor & Francis Group, LLC USA)* 133.

⁴⁰ Borland (no 39 above)557).

Green procurement has the inexorable potential of yielding environmental financial benefits and ultimately to create a market for sustainable goods and services. Cognisant of this, Zimbabwe's public procurement legislation encourages public entities to include environmental considerations in selecting bids.⁴¹ The adoption of green procurement is indeed consistent with Zimbabwe's international obligations to enact laws that promote, respect and fulfil environmental protection. Zimbabwe has signed and ratified numerous international agreements and conventions regulating environmental sustainability.⁴² Consistent with that the Environmental Management Act⁴³ provides for sustainable natural resource management and environmental protection.⁴⁴ The ambit of the Environmental Management Act is expansive and fleshes out the environmental rights conferred by the Constitution.⁴⁵ Taking full cognisance of these and international legal obligations, infrastructure procurement and the procurement of goods and services, therefore, must be eco-friendly in Zimbabwe.

To illustrate, Zimbabwe's commitment to mitigate the negative impacts of climate change is the basis for the adoption of environmentally friendly energy sources as opposed to the fossil fuels.⁴⁶ This implies that energy procurement must be in consonance with Zimbabwe's environmental obligations.⁴⁷ Furthermore, suppliers with bids for energy efficient goods and whose end life is not environmentally hazardous must be given preference.⁴⁸ Such public procurement policy trajectory is delightedly welcome given that public procurement accounts for a considerably huge activity in national economies globally. Hence, if environmental sustainability is blatantly

⁴¹ Section 50(3)(f) of PPDA Act.

⁴² <<https://www.informea.org/en/node/251/parties>>accessed 31 March 2021. These international agreements and conventions are the Basel Convention; Cartagena Protocol; Convention on Biological Diversity; Kyoto Protocol; Nagoya Protocol; Paris Agreement; Ramsar Convention; Stockholm Convention; United Nation Framework Convention on Climate Change; United Nations on the Law of the Sea; Vienna Convention and Bamako Convention.

⁴³ No. 13 of 2002.

⁴⁴ Preamble to the Environmental Management Act.

⁴⁵ See section 4 enunciating environmental rights and principles underpinning environmental management.

⁴⁶ National Renewable Energy Policy (19 August 2019) para 8.2. <https://www.zera.co.zw/National_Renewable_Energy_Policy_Final.pdf>(accessed 24 May 2021).

⁴⁷ Part of the IV of the Glasgow Climate Pact addresses the mitigatory measures to be instituted by Parties to reduce global warming by 1.5 °C. In terms of section 17 of the Glasgow Climate Pact, Parties made commitments to reduce their greenhouse gases, chiefly, carbon dioxide by forty-five (45) per centum by 2030 relative to the 2010 level and to net zero by 2050. <https://unfccc.int/sites/default/files/resource/cop26_auv_2f_cover_decision.pdf>accessed 25 December 2021.

⁴⁸ Section 50(3)(h) of PPDA Act.

ignored, nations would collectively pay heavily for such recklessness. Arguably, sustainable procurement has become the mainstay for the achievement of SDGs and the fulfilment of international conventions and treaties on environmental rights. However, it is worth noting that green procurement is a new phenomenon which most countries have not fully embraced.⁴⁹

The Zimbabwean public procurement legislation is yet to embrace environmental sustainability in its fullest dimension. For instance, the PPDPAA scantily confers public entities, that are not manned with expertise, with the powers to consider environmental aspects in public procurement activities. The attainment of environmental objectives in public procurement can be made easy if there is an elaborate legal framework to guide public entities. Globally, international development banks are championing environmental and sustainable procurement. The World Bank Group has formulated guidelines which could assist policy makers in Zimbabwe to craft a comprehensive public procurement legislation that is environmentally sustainable as required by the Constitution, as it attempts to fulfil its international obligations.⁵⁰ From the inception of the procurement cycle, public entities have to include technical specifications for goods and services and infrastructure with minimum performance that is eco-friendly and benchmarked at regional and international levels.⁵¹ Public entities should explicitly enumerate environmental characteristics in tender notices to enable suppliers to make bids that are environmentally friendly.

The use of eco-labels that are nationally and internationally certified or information that is self-explanatory on environmental aspects should be distinctly provided for in the legislation.⁵² For transparency, the adoption of eco-labels must be agreed by the numerous stakeholders involved in the public procurement ecosystem. These stakeholders include, the government, the association of industry and commerce, the Environmental Management Authority (EMA) and the Standards Association of Zimbabwe (SAZ). Alternatively, a provision should be made for the acceptance of any written undertaking issued by a competent body stating that a product or service from

⁴⁹ Rajesh Kumar Shakya *Green Public Procurement Strategies for Environmental Sustainability* (The World Bank, USA, 2019)2.

⁵⁰ Shakya (no 52 above) 11.

⁵¹ Shakya (no 52 above) 10.

⁵² Ibid.

a supplier satisfies the stipulated environmental test.⁵³ Pursuant to the use of public procurement law to fulfil environmental rights, EMA should be responsible for the validation of eco-labels to ensure that they are not detrimental to the environment.

Public procurement legislation must also require contractors and suppliers to provide proof of environmental technical expertise in their employ and requisite equipment to execute a public contract in an environmentally friendly manner.⁵⁴ Regarding the functional performance of goods and services, legislation must preferentially promote suppliers whose products, performance and function is not environmentally degrading.⁵⁵ This entails that a provision must be made for the performance of goods and services that are compatible with environmental management systems. The foregoing can be operationalised through certification by competent bodies or comparable environmental standard models. Overall, the awarding of the contract must be done in such a manner that the supplier with the best environmental incentive wins the bid.

1.2.1.2 Social considerations

The social responsibility of public procurement entails procuring from entities that recognise the importance of the social effects of their business operations.⁵⁶ Hence, suppliers, contractors and consultants with proven track record of corporate social responsibility history should be preferred. The statutory requirement for the establishment of ethics and social committees of the boards of governors for public and private companies has gained renown in many jurisdictions across the globe, including Zimbabwe and South Africa.⁵⁷ Social responsibility committees should indeed, provide strategic leadership in promoting responsible corporate citizenship, sustainable development and stakeholder driven relationships.⁵⁸

⁵³ Global directory for ecolabels

⁵⁴ Shakya (no 52 above) 109.

⁵⁵ Ibid.

⁵⁶ Shakya (no 52 above) 2.

⁵⁷ King Code (2016) Institute of Directors in South Africa 56.

⁵⁸ King Code (2016) (no.113) 57.

In pursuit of the social dimension aspect set out in the PPDPA, it is submitted that a policy be crafted in consultation with the organs of states such as EMA,⁵⁹ the Registrar of Labour⁶⁰ and the National Social Security Authority (NSSA); and other relevant stakeholders such as employer organisations and trade unions.⁶¹ The policy should strive to ensure compliance, by entities involved in supply chains, on pertinent issues such as child labour, poor labour practices, occupational health standards and safety. These suppliers would be ranked annually, and certificates issued thereto, in accordance with their performance with regard to their social responsibility.⁶² Surprisingly, the PPDPA has no provision that compels suppliers to submit compliance certificates on these matters.

1.2.2 *Market Consultations*

The purpose of conducting market consultations is to prepare contractual specifications and alerting potential suppliers of the entity's procurement plans and specifications of the procurement requirement.⁶³ While undertaking this exercise, a procuring entity may receive technical information and advice from qualified experts or competent bodies for the purpose of strategizing the execution of the envisaged procurement.⁶⁴ The PPDPA is quite clear that market consultations must not be surreptitiously carried out with the intent of impeding competition and discriminating other suppliers.⁶⁵ To secure transparency, where possible, information gathered from a bidder during the consultations must be subsequently transmitted to other bidders.⁶⁶

⁵⁹ EMA is a statutory body established in terms of section 9 of the Environmental Management Act 13 of 2000, responsible for enforcement of environment laws in Zimbabwe.

⁶⁰ The Registrar of Labour is established in terms of section 121 of Labour Act 16 of 1985 and has a wide variety of functions. To ensure that suppliers fulfil their labour obligations, it is recommended that the Labour Act could be amended insert a provision for the Registrar of Labour to issue annual compliance certificates for employers. Consequently, at the evaluation stage, bids from non-complying employers on the basis of being non-responsive.

⁶¹ NSSA is the national pensions organisation incorporated in terms of section of Part III of National Social Security Authority Act 12 of 1989. In terms of its mandate, NSSA is supposed receive pension contributions from all employers operating in Zimbabwe. Sadly, NSSA does not issue certificates for compliance for defaulting organisations. In order to secure full compliance with the provision of section 28(1)(e) of PPDPA (General) Regulations, 2018 suppliers must be required to provide a compliance certificate from NSSA. This will entail amending the Regulations to cater for this recommendation.

⁶² Such as proof of registration with PRAZ, certificate of incorporation and so forth.

⁶³ Subsection 26(1) of PPDPA Act.

⁶⁴ Subsection 26(2) of PPDPA Act.

⁶⁵ Subsection 26(2)(a) of PPDPA Act.

⁶⁶ Subsection 26(2)(b) of PPDPA Act; Subsection 9 (4) of PPDPA (General) Regulations, 2018.

Market consultations are to be transparently done.⁶⁷ Public entities are required to make invitations for market consultations by way of notice in appropriate media, such as the widely circulating newspaper or Government Gazette, to capture the audience of as many potential suppliers as possible.⁶⁸ The *modus operandi* for gathering information during market consultations can take a wide range of forms, such as written documents soliciting for information on a specified procurement requirement,⁶⁹ open discussion forums such as open days;⁷⁰ interviews with potential suppliers;⁷¹ and request for submissions through electronic means.⁷²

1.2.3 Domestic Preferences

In pursuit of national aspirations synonymous with a developing state, the Zimbabwean public procurement governance, through the PPDPA is crafted with the undeniable intent of favouring domestic suppliers and the growth industries.⁷³ Indeed, the use of public procurement to meet geopolitical strategic objectives, socio-economic and environmental needs, have gained international acceptance.⁷⁴ In tandem, public procurement policy in Zimbabwe is poignantly poised towards meeting socio-economic needs.

Regrettably, the collateral objectives of the PPDPA, in their current form are without a clear-cut roadmap, inadequate and scanty. It clearly shows that the public procurement regulatory framework in Zimbabwe is still searching for a trajectory for itself. This economic path will have to consider the country's historical past while at the same time modelling its socio-economic aspirations. It is observed that the full implementation of these objectives is left to public entities that are not manned by a professionally competent cadre.

Beyond doubt, the national development thrust is to accelerate the emancipation of SMMEs in the mainstream economy through public procurement.⁷⁵ Additionally, the

⁶⁷ Subsection 9 (1) of PPDPA (General) Regulations, 2018.

⁶⁸ Subsection 9 (2) of PPDPA (General) Regulations, 2018.

⁶⁹ Subsection 9 (3)(a) of PPDPA (General) Regulations, 2018.

⁷⁰ Subsection 9 (3)(b) of PPDPA (General) Regulations, 2018.

⁷¹ Subsection 9 (3)(c) of PPDPA (General) Regulations, 2018.

⁷² Subsection 9 (3)(e) of PPDPA (General) Regulations, 2018.

⁷³ Section 29(a); sections 8 and 18 of the PPDPA (General) Regulations, 2018.

⁷⁴ Phoebe Bolton, (2006). Government procurement as a policy tool in South Africa. *Journal of Public Procurement*, 6(3), 193–21.

⁷⁵ Para 439 of the National Development Strategy 1.

PPDPAA strives to achieve economic gender parity through the deliberate selection of women-controlled suppliers and subcontracting.⁷⁶ Realising the economic potential that women controlled financial enterprises can contribute to economic growth, this preferential procurement policy is laudable.⁷⁷ Moreover, the PPDPAA provides that domestic suppliers whose intellectual output, engineering, and industrial designs are registrable within Zimbabwe and generated by local institutions of higher learning must be preferentially favoured ahead of foreign suppliers.⁷⁸ This must be qualified by clearly elaborating it in the tenders as per the guidelines issued by PRAZ.⁷⁹ Perhaps the legislator was alive to the present diminutive potential in the Zimbabwean research institutions to produce registrable intellectual material of international proportion after years of massive brain drain and neglect of these vital institutions. It could also be that the legislator was fully cognisant of the weakened national industrial output that might not competitively match international suppliers whose brands have stood the test of time. Yet, without these guidelines, the operationalisation of the domestic preferences will be in abeyance.

As an insulative measure against financial loss for a contracting authority, successful tenderers are to provide performance security in the form of bank guarantees prior to the commencement of a contract.⁸⁰ The requirement for performance guarantees must be explicitly stated in the bid solicitation notice as a way of ensuring that the rules pertaining to a procurement activity are communicated beforehand to entrench transparency.⁸¹ At the same time, bidders maybe required to furnish procuring entities with bid securities when submitting tenders to deter irresponsible bids and endeavouring to promote the fulfilment of conditions of bids by bidders.⁸²

At a glance, the Zimbabwean public procurement legislation is dovetailed towards meeting the socio-economic goals of Zimbabwe as a developing state. The public procurement legislation in its current state is immensely prohibitive in the emancipation

⁷⁶ Section 29(b).

⁷⁷ Technical Report: Policies that Promote SME Participation in Public Procurement (September 2017) <https://ppp.worldbank.org/public-private-partnership/library/technical-report-policies-promote-sme-participation-public-procurement>>accessed 31 March 2021.

⁷⁸ Section 29(c).

⁷⁹ Section 28(c)(ii) of PPDPAA Act.

⁸⁰ Section 56 of PPDPAA Act.

⁸¹ Ibid.

⁸² Section 44 of PPDPAA Act.

of SMMEs into the public procurement domain. To mitigate, the achievement of socio-economic objective of procurement legislation could be revised to plug in provisions to accelerate the inclusion of SMMEs through subcontracting at the very least, framework agreements and consortia enterprises.⁸³ Additionally, there is a need for legislative changes in the form of embracing e-procurement and relaxation on the qualifications.⁸⁴

1.2.4 *Decentralisation of Public Procurement*

The PPDPA confers public entities with the powers to regulate their own procurement subject to the proviso that the procurement requirement is below the specified financial threshold.⁸⁵ Notably, the PPDPA has different categories of financial thresholds for various procurement arrangements.⁸⁶ The power to determine financial thresholds beyond which the approval of PRAZ is required is bestowed on the minister administering the PPDPA.⁸⁷ Moreover, the PPDPA permits public entities to conclude framework agreements with suppliers.⁸⁸ Framework agreements have been

⁸³Khi V. Thai International Public Procurement: Innovation and Knowledge Sharing In Khi V. Thai (ed)International Public Procurement Innovation and Knowledge Sharing (Springer International Publishing Switzerland 2015)20.

⁸⁴ Ibid.

⁸⁵ These are set out in terms of section 3 of Public Procurement and Disposal of Public Assets (General) (Amendment) Regulations, 2020 (No. 2) Statutory Instrument of 219, hereafter 'Statutory Instrument 219 of 2020. The thresholds are as follows:

- (a) above the equivalent of twenty thousand (20 000) United States dollars, but does not exceed the equivalent of five million (5 000 000) United States dollars, in the case of construction works; or
- (b) above the equivalent of ten thousand (10 000) United States dollars but does not exceed the equivalent of three hundred thousand (300 000) United States dollars, in the case of goods; or
- (c) above the equivalent of five thousand (5 000) United States dollars but does not exceed the equivalent of one million (1 000 000) United States dollars, in the case of consultancy and non-consultancy services.

⁸⁶ See sections 14 and 34.

⁸⁷ Section 101.

⁸⁸ Section 1. In terms of PPDPA Act framework agreement means; an agreement between a procuring entity and a bidder (or bidders consisting of two or more competing suppliers of the procurement requirement) to establish the terms and conditions governing procurement contracts to be awarded during a period, in particular with regard to price and, where appropriate, the quantities envisaged; "goods" means things of any kind or description, including—

- (a) raw materials, products and equipment; and
- (b) things in solid, liquid or gaseous form; and
- (c) electricity; and
- (d) services incidental to the supply of the goods, where the value of the services does not exceed that of the goods themselves.

established to have *quid pro quo* between competition and efficiency.⁸⁹ In fact, the PPDPA prohibits the commencement of procurement proceedings for a procurement requirement in excess of the financial threshold without the express approval of PRAZ.⁹⁰

The Zimbabwean public procurement regulatory framework has a strikingly conspicuous feature in the form of a statutory committee, the Special Procurement Oversight Committee (SPOC).⁹¹ Its function is to scrutinise especially sensitive⁹² or especially valuable contracts and ultimately select the 'best bids'.⁹³ The question that comes to mind is whether SPOC is an indispensable administrative body necessary to entrench efficiency, openness, transparency and effectiveness. The existence of SPOC in the Zimbabwean public procurement governance framework might be prejudicial to the realisation of constitutional principles that underlie public procurement. In simple terms, public entities are obliged to remit a record of the evaluation proceedings to SPOC, through PRAZ before the announcement of the highest ranked bidder for the former to determine the winner. Regrettably, this is immensely retrogressive as it reverses the gains attained downstream that would have been geared towards the realisation of the principles in section 315(1) of the Constitution. It is patently clear that the powers conferred on SPOC are bent on centralising public procurement activities. The composition of SPOC might inherently make it susceptible to political pressure and prejudices.⁹⁴ In South Africa, in the *Inkandla* scandal, the South African Constitutional Court remarked that lowly ranked public officials had the propensity to overzealously spend public resources in an effort to ingratiate themselves with top ranked public officials.⁹⁵

⁸⁹ Robert D. Anderson, William E. Kovacic and Anna Caroline Muller Ensuring integrity and competition in public procurement markets: a dual challenge for good governance In Sue Arrowsmith Robert d. Anderson (eds) WTO Regime on Government Procurement Challenge and Reform (Cambridge University Press 2011)695.

⁹⁰ Section 15.

⁹¹ Constituted in terms of section 54(2) (a)-(d) of PPDA Act.

⁹² In relation to a public contract means a contract negotiated and concluded pursuant to a ministerial waiver to exclude it to the dictates of PPDA Act. The foregoing contract may have significant effect on the national economy or interest of the State; defence and security, public interests; or has monumental impact of the State's foreign international relations.

⁹³ Relates to a public contract whose value exceeds the prescribed threshold.

⁹⁴ It is made of senior government officials who might be insulated from pressure emanating from political superiors.

⁹⁵ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] para 8.

The potential quandary emanating from the powers of SPOC to make procurement decisions on behalf of public entities can also be understood within the context of the duty placed on accounting authorities. Commenting on an almost similarly worded provision in the South African public procurement legislation, Jenkins⁹⁶ noted the imbroglio faced with accounting authorities with regard to the accounting for public resources and the compatibility of that provision with the South African PFMA.⁹⁷ In terms of the PFMA, accounting authorities are vested with the powers to expend public funds within the limits of mandate of entities they superintend and account thereto.⁹⁸ It is trite that accounting authorities must be on the guard against reckless, unauthorised spending. By the same token, a central and bureaucratically inert legislative committee in the form of SPOC, might be susceptible to succumbing to political pressure to corruptly award a tender to a corporation or supplier affiliated with the aristocracy.

The definition of accounting authority is quite clear in that it creates statutory autonomy for accounting authorities. Congruently, accounting authorities have no obligation to cede this power without the express authority of the Treasury.⁹⁹ Sadly, the PPDPAA unjustifiably divests accounting authorities by conferring financial decisions making to a statutory committee such as SPOC to make procurement decisions, while at the same time requiring them (accounting authorities) to account for funds allocated to public entities. This is despite providential monetary oversight and accounting responsibilities conferred on the accounting officers by the PFMA.

From a constitutional perspective, the responsibility of management and expenditure of public funds is placed on public officials who are responsible for the day-to-day operations of public entities.¹⁰⁰ In other words, the PFMA empowers accounting authorities to govern the expenditure of funds in their respective entities and have a

⁹⁶ Frank S Jenkins *Decentralization and Accountability Challenges to Appointing Independent Bid Committees in the Public Sector* Elisabetta Morlino *Procurement by International Organisations A Global Administrative Law Perspective* (Cambridge University Press, UK 2019) 167.

⁹⁷ Coincidentally, in Public Finance Management Act (PFMA), Zimbabwe and South African have legislation with the same nomenclature and to a certain degree, the substance is much of muchness.

⁹⁸ Section 10(1) of PFMA.

⁹⁹ Section 41(3) of PFMA.

¹⁰⁰ Section 308(2) of the Constitution.

corresponding duty to account for those funds.¹⁰¹ This creates inordinate administrative chaos in the public sector. It is suggested that in the spirit of decentralisation and the devolution of public power, public procurement decisions must remain solely in the preserve of public entities.¹⁰²

On another note, SPOC, by virtue of being a government committee, if faced with a decision in which one of the competing suppliers to a tender is a government-controlled entity, is likely to find a decision in favour of such entity, despite being aware of the incapability of the entity to discharge contractual obligations. This scenario would have a ripple effect in that it forestalls the actualisation of the constitutional principle on cost-effectiveness and efficiency. Ultimately, the existence and functions of SPOC offends the statutory autonomy of public entities conferred on them by the Constitution and enabling legislation.

1.3 The organisation of public procurement in Zimbabwe

This segment outlines the institutional power wielded by the public procurement regulator in Zimbabwe. Legislative provisions explaining the professional conduct of public procurement practitioners will be explained. Suffice to say that the efficient and effective functioning of public procurement system is centred on strong organisational architecture. This should be additionally augmented with a professional cadre with the ranks and file of both the regulator, PRAZ, and public entities.

1.3.1 Public Procurement Regulator

Given the extensive and far-reaching powers, conferred upon PRAZ by the PPDPA, there is no doubt that it is the fulcrum of an effective and efficient public procurement governance in Zimbabwe. Notably, PRAZ is an extensively mechanised statutory body with quasi-judicial¹⁰³ and quasi-legislative functions. Mindful of this onerous obligation, therefore, it is needful to provide for a continuum mechanism to ensure the financial and functional independence of PRAZ. This will capacitate it to recruit a highly

¹⁰¹ See comments submitted by the *African Procurement Law Unit* on Draft Public Procurement Bill 2020 of the Republic of South Africa accessible <http://africanprocurementlaw.org/wp-content/uploads/2020/06/APLU-Submissions-on-the-Draft-Public-Procurement-Bill-2020-South-Africa-Final.pdf>.

¹⁰² Preamble to Chapter 14 of the Constitution.

¹⁰³ See section 99 on debarment.

competent and professional cadre to vigilantly monitor public entities to comply with the dictates of the PPDPA.

PRAZ has investigative powers on matters relating to the breaches of the PPDPA.¹⁰⁴ It exercises sole discretion to appoint investigators whose authority carries the same weight as those of commissions of inquiries.¹⁰⁵ PRAZ has colossal power in terms of the PPDPA and can rescind an award of a public contract, on the basis of previous and present violations of the procurement laws by a supplier.¹⁰⁶ Furthermore, PRAZ has the authority to issue circulars on the eligibility criteria for domestic preferences.¹⁰⁷ Public entities are required to immediately notify the regulator on irregular procurement activities that are executed in violation of the PPDPA.¹⁰⁸

On the other hand, the mammoth legislative responsibility imposed on PRAZ, might lead to the proliferation of subordinate legislation which leads to a dysfunctional public procurement system with the effect of negating the constitutional public procurement principles. It is observed that most of the powers to issue practice directions, policies and notes that were unduly assigned to PRAZ could have been incorporated in the principal legislation leading to the consolidation of public procurement legislation. Mindful of the fact that the stakes are high in public procurement, delegating the legislative role to the Minister would not have been ideal either. Historically, political appointees have been known to enact subordinate legislation that is self-serving and detrimental to the actualisation of constitutional aspirations.

The PPDPA provides that funds may be appropriated by Parliament to PRAZ for the purpose of achieving its constitutive functions.¹⁰⁹ It is noted that the wording of the foregoing is directory, implying that the appropriation of funds to PRAZ is a ministerial discretion.¹¹⁰ This leaves PRAZ in a financially precarious position to effectively

¹⁰⁴ Section 96.

¹⁰⁵ Section 97(1) of PPDPA Act.

¹⁰⁶ Section 99.

¹⁰⁷ Section 8 of the Regulations, Statutory Instrument 5 of 2018.

¹⁰⁸ Section 25(4) of the Public Finance Management (General) Regulations, 2019.

¹⁰⁹ Section 16(1)(a) of the First Schedule to PPDPA Act.

¹¹⁰ Section 305 of the Constitution. Whereas the PPDPA Act states that the appropriation of funds for government expenditure is done by Parliament, in practice, it's the minister of finance who draws up consolidated statement from government ministries and agencies showing the estimated expenditure and revenue for each preceding year. What Parliament does is to ratify this statement. This is understandably so due to the complexities of budget crafting process which presumably most members of Parliament would not have expected to comprehend and later on query.

monitor public entities on compliance, in addition to the other numerous functions it performs. Notwithstanding the weighty responsibility saddled on PRAZ, as the public procurement regulator, the duty of ensuring compliance with the PPDPAA squarely falls on accounting authorities.¹¹¹

Regarding constitutional requirements on efficiency and cost-effectiveness, accounting authorities have fiduciary duties to act in the best interest of the public entities.¹¹² These fiduciary duties extend to the manner in which accounting authorities superintend over procurement activities in order to inspire integrity, honesty, fidelity, and economic use of financial resources.¹¹³ Public officials are further directed to guard against riotous, irregular, unbefitting and unrewarding expenditure, while at the same time being warned of the temptations of criminal enterprises in public procurement.¹¹⁴ By extrapolation, this means the prohibition on circumventing and violating the rules laid down in PPDPAA and the constitutional principles on public procurement for personal gain, eroding efficiency, transparency, and cost-effectiveness.

The enactment of the Public Entities Corporate Governance Act¹¹⁵ (PECG Act) pursuant to section 194(1) of the Constitution heralded a new approach in the corporate governance landscape for public entities in Zimbabwe. It must be noted that the codification of good corporate governance norms, principles and rules articulated in the PECG Act further supplements the existing constitutive enactments for public entities.¹¹⁶ The PECG Act seeks *inter alia* to secure ethical and transparent governance of public entities to meet constitutional aspirations and fulfil national development goals.¹¹⁷ In order to promote and inspire corporate transparency, it is a requirement that public entities formulate ethics code and board charters.¹¹⁸ The ethics

¹¹¹ Section 41(2) of Public Finance Management Act No. 11 of 2009.

¹¹² Section 42(1)(b) of PFMA.

¹¹³ Ibid; 44(1)(a)(i) and 44(1)(b)(iii) of PFMA.

¹¹⁴ 44(1)(b)(ii) of PFMA.

¹¹⁵ No. 4 of 2018.

¹¹⁶ For state owned entities and corporations are creatures of statute.

¹¹⁷ These are articulated in terms of section 9(3) of the Constitution namely financial integrity and probity, personal integrity, transparency, accountability, competency, efficiency, honesty, and efficiency.

¹¹⁸ Section 16(2)(a) and (b) of PECG Act.

and board charters should be underpinned by constitutional public governance tenets echoed in terms of sub-section 194(1) of the Constitution.

Public entities are required to institute functional boards and subcommittees focusing on the financial, risk and audit facets of the corporations.¹¹⁹ This resonates with the constitutional injunction for fiscal prudence in state corporations.¹²⁰ As the supreme decision-making organs, corporate boards are enjoined to formulate policies poised towards sustained commercial viability through audits to weed out fraud, corruption, unethical behaviour, and other financial improprieties.¹²¹ Once these operating procedures are in place and religiously adhered to, incidences of financial mishaps relating to public procurement corruption and inefficiencies will be curtailed. In the presence of functional policies, actual and perceived forms of public corruption can be investigated while potential loopholes can be identified, and appropriate remedial actions taken. This sets out clear legal parameters to guard against corporate failures to the detriment of the national economy and the delegitimisation of the entire public procurement ecosystem.¹²²

Alive to the potential unethical pressure exerted on heads of public entities in procurement activities by higher ranked public officials such as cabinet ministers through undue encroachment, the legislator inserted a provision to insulate the public entities' heads from criminal liability and moral blameworthiness.¹²³ This provision permits heads of state-owned entities to meekly submit to political directives from higher ranked public officials despite the unlawfulness of such a directive.¹²⁴ The colossal effect of the foregoing cannot be trivialised. To begin with, this provision essentially means that public officials can raise the defence of duress by awarding tenders to undeserving suppliers thereby negating the principles of cost-effectiveness,

¹¹⁹ See sections 15-6 of the Public Entities Corporate Governance (General) Regulations, 2018 enacted through Statutory Instrument 168 of 2108.

¹²⁰ Section 308.

¹²¹ Section 227(d) of the National Code on Corporate Governance Zimbabwe, 2015 inserted as the *First Schedule* to the PECG Act; Section 84 of PFMA

¹²² The *Enron Debacle* epitomized poor corporate failures at the turn of the 21st century in the United States of America. To curtail future corporate governance scandals, Congress passed the Sarbanes-Oxley Act which among other sought to delineate taxation and auditing functions for auditing and taxation consulting services thereby improving corporate governance aspects.

¹²³ Section 16 of PPDA Act; Section 23 of Public Entities Corporate Governance (General) Regulations, 2018.

¹²⁴ *Ibid.*

honesty, fairness, and transparency. Additionally, the PPDPA shields the heads of state-owned entities from criminal prosecution by instructing them to provide a written report to a long list of higher ranked government officials in the bureaucracy.¹²⁵ It is imperative to note that the provisions permitting public officials to follow questionable and unlawful directives flies in the face of solely the good governance propounded in the Constitution. This is quite telling in the sense that it points to a breakdown of the rule of law. Given that public entities are at the core in the provision of critical infrastructure, such as water, transportation, electricity, and telecommunications, their misgovernance has serious social and economic ramifications for the entire nation.

In a nation with legally ascertainable outcomes, and further reinforced by the strong desire to root out unethical conduct among public officials, upon receipt of an unlawful directive, the heads of public officials should report such cases to the police, thereby initiating prosecution proceedings against the issuer of the directive. This would nip corruption in the bud. Suffice to say that the continued presence of this provision in the PPDPA promotes illegal actions in public procurement activities and violates the Constitution.

1.3.2 Ethical Standards for Practitioners

With regard to ethical standards, procurement officers are to conduct themselves with integrity and fairness,¹²⁶ be responsiveness,¹²⁷ serve public interest,¹²⁸ accountable and transparent,¹²⁹ endeavour to serve legitimate purpose of government,¹³⁰ and be discerning on whether or not accept gifts.¹³¹ Procurement officers must abide by the code of conduct for procurement officers, which among other things, underscores the need for recusal in circumstances where conflict of interest would be inevitable.¹³² The PPDPA also forbids procurement officers from colluding with bidders involved in

¹²⁵ Section 16(2). The officials are Minister responsible for administering the PPDA Act, Auditor-General, Accountant-General, Minister in which the public entity falls and the Chief Secretary to the Cabinet.

¹²⁶ Sections 6 and 7 of PPDA (General) Regulations, 2018.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Section 5 of PPDA (General) Regulations, 2018.

¹³⁰ Section 7 of PPDA (General) Regulations, 2018.

¹³¹ Section 11 of PDPA (General) Regulations, 2018.

¹³² Section 71(2)(b) of PPDA Act.

competitive bidding.¹³³ In a nutshell, procurement officers, as public officials are obliged to uphold the basic principles underlying public administration set in the terms of section 194 of the Constitution.¹³⁴

1.4 Public Procurement Methods

Competitive bidding is the default public procurement method for government contracting in Zimbabwe.¹³⁵ Open tendering or competitive bidding is deliberately structured in such a way that it promotes transparency, competition and advertises government contracting opportunities to all prospective suppliers, striving towards the meeting public procurement objectives.¹³⁶ This resonates with constitutional principles on public procurement set out in the Constitution. The PPDPA, however, has a provision for state owned entities to procure through restricted bidding method;¹³⁷ direct procurement;¹³⁸ request for quotation method;¹³⁹ and request for proposals in the case of consultancy services.¹⁴⁰

1.4.1 Competitive Bidding or Open Tendering

Competitive bidding entails soliciting for bids in accordance with the set criteria from eligible and qualified bidders.¹⁴¹ The PPDPA has a provision for the use of the expression of interest method as alternative to competitive bidding in consulting for services for costs beyond the prescribed amounts.¹⁴² The principal advantage of the competitive bidding method over other procurement methods is that it is best suited to achieve procurement goals such as transparency, openness, and competition.¹⁴³ It is a legal requirement for tender notices to be published by procuring entities. These

¹³³ Section 71(2)(c) of PPDPA Act.

¹³⁴ Subsection 4(2) of PPDPA (General) Regulations, 2018.

¹³⁵ Section 30(1) of PPDPA Act.

¹³⁶ Sue Arrowsmith *Electronic Procurement and Reverse Auctions* in Sue Arrowsmith (ed) *Public Procurement Regulation: An Introduction* (Asia Link Europe Aid Co-operation Office, 2010) 23

¹³⁷ Section 30(1)(a).

¹³⁸ Section 30(1)(b).

¹³⁹ Section 30(1)(c).

¹⁴⁰ Section 30(1)(d).

¹⁴¹ Section 31(1)(b) and (c).

¹⁴² Section 58. In the case of services costing less than the prescribed values, government -controlled entities are permitted to use the request for proposal method. As dictated by the provisions of section 58(3)(a) of PPDPA Act, it's a requirement that the notice inviting for expression of interest be published in an appropriate publication or over the internet to attract to stimulate much potential interest from prospective suitors as such as possible.

¹⁴³ Justin Laing *Deviations and (In)discretions in the Governance of South African Public Entities* In Nyeck S N (eds) *Public Procurement Reform and Governance in Africa Contemporary African Political Economy* (Palgrave Macmillan (2016) 141.

notices should clearly spell out the following: the identity and principal address of business for the procuring entity whereto further information can be sought;¹⁴⁴ the procurement requirement and envisaged place of delivery of goods and services, and location of any construction works, and the time within which the procurement requirement is needed;¹⁴⁵ the manner in which solicitation documents, are obtainable the monies payable thereon, if any;¹⁴⁶ and the site and the time within which bids or applications to prequalify are to be submitted.¹⁴⁷ In the case of high value or complex procurement requirement, public entities can conduct prequalification of bidders with a view to identify prospective bidders before the commencement of submission of bids.¹⁴⁸ The principle behind prequalification of suppliers is to assess the financial and technical capabilities of would be suppliers.

The invitation notice for bids must be published in the *Government Gazette* and a national newspaper of wide enough circulation to reach enough bidders to secure real competition.¹⁴⁹ It is an additional requirement that the notice be broadcasted over telecast and radio, and the tender notice can also be posted online in accordance with the guidelines issued by PRAZ.¹⁵⁰ A further requirement for international procurement, is that the procurement notice has to be published in at least two publications with editorial content focusing on international trade with extensive circulation or other broadcasting networks;¹⁵¹ advertised online;¹⁵² or made available at the Zimbabwean consular and diplomatic missions.¹⁵³ The rationale behind this multifaceted propagation mechanism is to attract as many international suppliers as possible to the bidding process. To guarantee competition, the procurement notice can also be transmitted to professional bodies, sectorial and trade federations, as well to would-be bidders where application to prequalify is anticipated.¹⁵⁴

¹⁴⁴ Section 38(1)(a) of PPDA Act.

¹⁴⁵ Section 38(1)(b) of PPDA Act.

¹⁴⁶ Section 38(1)(c) of PPDA Act.

¹⁴⁷ Section 38(1)(d) of PPDA Act.

¹⁴⁸ Section 33(3) of PPDA Act.

¹⁴⁹ Section 38(2)(a) of PPDA Act.

¹⁵⁰ Section 38(2)(a)-(c) of PPDA Act.

¹⁵¹ Section 38(3)(a) of PPDA Act.

¹⁵² Section 38(3)(b) of PPDA Act.

¹⁵³ Section 38(3)(c) of PPDA Act.

¹⁵⁴ Section 38(4) of PPDA Act.

1.4.2 Restricted Bidding

The restricted bidding method entails the participation of procurement activities by suppliers at the discretion of public entities.¹⁵⁵ It is mandatory that public entities maintain a list of qualified suppliers¹⁵⁶ from which invitation for bids can be dispatched for the purposes of restricted bidding.¹⁵⁷ To justify the use of the restricted method, public officials must reach an objective conclusion that there is disproportionate relationship between the time required to consider a substantially high number of bids and the procurement requirement;¹⁵⁸ or the existence of urgency, not attributable to the procuring entity, to make it impossible to invite suppliers to offer bids within the prescribed bidding periods.¹⁵⁹

The use of the restricted method is limited to procurement requirement which does not exceed monetary thresholds.¹⁶⁰ The draw backs of this procurement route is that it unduly impedes competition and transparency. This negates the attainment of value for money through the exclusion of prospective bidders as few economic operators are initially identified and for the eventual awarding of the contract. The PPDPAA permits public entities to contract with a single contractor without the need of receiving bids from other bidders.¹⁶¹ In order for contracting authorities to use the direct procurement method, certain preconditions must necessitate. This is where non-responsive bids¹⁶² would have been received pursuant to a tender notice, subject to a caveat forbidding procuring entities from altering the specifications of the initial requirement.¹⁶³ This also applies where in the safeguarding of intellectual rights of a supplier or technical reasons it would be impracticable to identify and enlist an alternative supplier;¹⁶⁴ and in cases of urgency where *culpa* is not imputable to the public entity.¹⁶⁵

¹⁵⁵ Section 32(1) of PPDA Act.

¹⁵⁶ These must have registered with PRAZ under different categories of supplies and duly complied with tax obligations.

¹⁵⁷ Section 32(2)(a) of PPDA Act

¹⁵⁸ Section 32(2)(a) of PPDA Act.

¹⁵⁹ Section 32(2)(b) of PPDA Act.

¹⁶⁰ Section 32(2)(c) of PPDA Act

¹⁶¹ Section 33(1).

¹⁶² Section 2 of PPDA Act qualifies a bid as responsive if it meets the requirement of the entity.

¹⁶³ Section 33(2)(a).

¹⁶⁴ Section 33(2)(b).

¹⁶⁵ Section 33(2)(c).

1.4.3 Direct Procurement Method

Direct procurement is also permissible for the auxiliary supply of goods, where a change of contractor would cause difficulties of interoperability or compatibility problems, leading to incurrence of unforeseen additional costs.¹⁶⁶ It also applies where a procurement requirement would have been developed as a result of strategic procurement.¹⁶⁷ Further, the direct procurement method applies where a procuring entity requires additional services that are not beyond the ambit of the initial contract, but where the service is crucial to achieve original objective, and due to unforeseen circumstances, it would have become a necessity to have the service completed, subject to the proviso that the additional service does not exceed fifty (50) *per centum* of the original contract.¹⁶⁸

Furthermore, direct procurement is permissible in terms of PPDPA in respect of new services that repeat similar services provided under a procurement contract awarded following the competitive bidding method of procurement. The procuring entity must indicate in the original procurement notice that a direct procurement method might be used in awarding contracts for such new services;¹⁶⁹ for acquisitions made under extremely favourable conditions from rare disposals such as legal forfeitures, liquidation, insolvency, judicial sale in execution, or other legally permissible disposals;¹⁷⁰ for acquisitions of spare part parts of proprietary nature;¹⁷¹ and the purchase of immovable property.¹⁷²

Public entities seeking to acquire immovable property method can only do so, upon two independent evaluations for the property earmarked for purchase and an additional evaluation by the Ministry of Public Works.¹⁷³ It is submitted that possibly, this is done to mitigate against the fixing of unreasonably high purchase price for corrupt gains by public officials working in concert with suppliers with proclivities for

¹⁶⁶ Section 33(2)(d).

¹⁶⁷ Section 33(2)(e).

¹⁶⁸ Section 33(2)(f).

¹⁶⁹ Section 33(2)(g).

¹⁷⁰ Section 33(2)(h).

¹⁷¹ Section 33(2)(f).

¹⁷² Section 33(2)(j).

¹⁷³ Section 16(2) of PPDA (General) Regs, 2018.

corruption. Hence, this legal provision for three evaluations would ensure that the value for money attained and fosters transparency and integrity of the process.

Direct procurement must be conducted in accordance with document¹⁷⁴ prepared by the procuring entity setting out the specifications, quantity, terms, and delivery¹⁷⁵ and validity period for bids which must be sixty days at minimum.¹⁷⁶ The PPDA Regulations (General) clearly state that procurement entities, where practicable, should allow a contractor to prepare a bid where direct procurement method would have been identified as the identical procurement route.¹⁷⁷

1.4.4 Request for Quotations Method

The PPDA vests public entities with the powers to solicit for competitive quotations from at minimum three established suppliers that meets the specifications for the procurement requirement subject to the contract price being below the threshold levels.¹⁷⁸ There is legislative command on public entities to solicit for quotations by a way of advertising, publication of notice on boards or electronic means.¹⁷⁹ This should be done on template documents issued by PRAZ.¹⁸⁰ Arrowsmith opines that some procurement methods such as the request for quotation is more ideal for use when the procurement requirement is lowly priced such that the cost of executing the tender out would be expensive.¹⁸¹ Thus, it is submitted that numerous procurement methods are meant to promote cost-effectiveness in public procurement systems.

When seeking for quotations, public entities should make written requests to prospective suppliers setting out the procurement requirement(s) clearly indicating the quantity, quality, terms and place of delivery and any other matters incidental

¹⁷⁴ Section 16(1)(a) of PPDA (General) Regs, 2018.

¹⁷⁵ Section 16(1)(a)(i) of PPDA (General) Regs, 2018.

¹⁷⁶ Section 16(1)(a)(ii) of PPDA (General) Regs, 2018.

¹⁷⁷ Section 16(1)(b).

¹⁷⁸ Section 34(1). In accordance with the provisions of section 10(2) (Public Procurement and Disposal of Public Assets (General) (Amendment) Regulations, 2020 (No. 1.) where the price of the procurement requirement for items not covered in a framework agreement is below—

(a) three hundred and fifty thousand dollars (ZWL 350 000.00), in the case of construction works; or

(b) one hundred and seventy-five thousand dollars (ZWL 150 000.00), in the case of goods; or

(c) eighty-seven thousand five hundred dollars (ZWL 87 500.00), in the case of consultancy and non-consultancy services.

¹⁷⁹ Section 17(1) of PPDA (General) Regs, 2018.

¹⁸⁰ Ibid.

¹⁸¹ Arrowsmith *EU-Aisa Link* 42.

thereto.¹⁸² The quotations must state the bid validity period of at least thirty days.¹⁸³ Suppliers will have to prepare and submit quotations within three days of receipt of the written request¹⁸⁴ and are not permitted to alter the quotations.¹⁸⁵ At the end of the bidding period, the sealed quotations will then be opened from tender box by the person designated by the accounting authority for that purpose.¹⁸⁶

Electronic quotations are to be printed and duly repositied into the tender box pending retrieval on the expiry of the bidding period.¹⁸⁷ Notably, this provision shows that Zimbabwean public procurement processes have not fully embraced e-procurement in its fullest dimension. At the effluxion of the bidding period, the contents of the tender box are emptied, signed and stamped by the designated so for tender opening.¹⁸⁸ Public entities are directed to select the bidder with the lowest priced quotation whose bids meets the procurement requirement in relation to delivery and matters connected therewith.¹⁸⁹ Surprisingly, this provision fails to appreciate the whole life cost associated with a procurement requirement that could render it expensive in the long run.

1.5 Review

It is a universally accepted legal principle that public procurement decisions constitutes an administrative action.¹⁹⁰ This has far-reaching consequence, bearing in mind the significance attached to transparency, reasonableness and accountability in public administrative acts.¹⁹¹

1.5.1 Administrative Rights

The right to administrative justice is constitutionally entrenched.¹⁹² For further elaboration of this administrative right in the context of public procurement, it is crucial

¹⁸² Section 17(2)(a)(i) of PPDA (General) Regs, 2018.

¹⁸³ Section 17(2)(a)(ii) of PPDA (General) Regs, 2018.

¹⁸⁴ Section 17(2)(b) of PPDA (General) Regs, 2018.

¹⁸⁵ Section 17(2)(c) of PPDA (General) Regs, 2018.

¹⁸⁶ Section 17(2)(d) of PPDA (General) Regs, 2018.

¹⁸⁷ Ibid.

¹⁸⁸ Section 17(2)(e) of PPDA (General) Regs, 2018.

¹⁸⁹ Section 17(2)(f) of PPDA (General) Regs, 2018.

¹⁹⁰ Hoexter Administrative Law 1; Elisabetta Morlino *Procurement by International Organisations A Global Administrative Law Perspective* (Cambridge University Press, UK 2019)2.

¹⁹¹ Elisabetta Morlino *Procurement by International Organisations A Global Administrative Law Perspective* (Cambridge University Press, UK 2019)12.

¹⁹² Section 68 of the Constitution.

to discuss the provisions of Administrative Justice Act.¹⁹³ According to Administrative Justice Act, an administrative action is defined as follows¹⁹⁴:

“any action taken or decision made by an administrative authority, and the words “act”, “acting” and “actions” shall be construed and applied accordingly; “administrative authority” means any person who is—

(a) an officer, employee, member, committee, council, or board of the State or a local authority or parastatal; or

(b) a committee or board appointed by or in terms of any enactment; or

(c) a Minister or Deputy Minister of the State; or

(d) any other person or body authorised by any enactment to exercise or perform any administrative power or duty; and who has the lawful authority to carry out the administrative action concerned; “empowering provision” means a written law or rule of common law, or an agreement, instrument or other document in terms of which any administrative action is taken;

Pursuant to the tenets of good governance, an administrative authority is enjoined to take an administrative action that is lawful, reasonable, and fair.¹⁹⁵ Arising from this constitutional and legislative requirement, certain stages of procurement cycle,¹⁹⁶ must uphold the right to administrative justice.¹⁹⁷ Therefore, a person aggrieved with the administrative decision, made in accordance with the applicable procurement laws must be furnished with written reasons.¹⁹⁸

1.5.2 Right to Challenge Proceedings

The right to challenge public procurement proceedings is an integral part of ensuring that the procurement activities are conducted in a fair and transparent atmosphere.¹⁹⁹

The PPDPAA has provision for challenging proceedings if a bidder alleges that public procurement proceedings were in breach of the law, and that the supplier is likely to suffer, or has actually incurred a loss.²⁰⁰ Such a bidder is required to file a written notice with the procuring entity.²⁰¹

¹⁹³ Act 12 of 2004.

¹⁹⁴ Subsection 1 of section 2 of the Administrative Justice Act 12 of 2004.

¹⁹⁵ Section 3(1)(a) of Administrative Justice Act.

¹⁹⁶ Such as invitation for bids, bid evaluation and award of the tender.

¹⁹⁷ Justin Laing Deviations and (In)discretions in the Governance of South African Public Entities in Nyeck S N (eds) *Public Procurement Reform and Governance in Africa Contemporary African Political Economy* (Palgrave Macmillan, New York 2016) 158.

¹⁹⁸ Section 3(1)(1)(c) of Administrative Justice Act.

¹⁹⁹ This position is tandem with the provisions of Art 9(1)(d) of the United Nations Convention against Corruption (UNCAC) enjoining member states to institute effective and functional domestic review mechanisms in their public procurement regimes.

²⁰⁰ Section 73(1) of PPDA Act.

²⁰¹ Ibid.

To cure the defect alleged by a bidder, the procuring entity may take remedial actions in the form of concessions and other material actions to ameliorate the breach. This is a laudable approach as it ensures that disputes to procurement are amicably resolved without recourse to the courts to avoid lengthy, cumbersome and financially burdensome dispute resolution. The foregoing bears the hallmarks alternative dispute resolution (ADR). The use of ADR in resolving public procurement disputes has gained international recognition as opposed to the unpleasant nature of litigation.²⁰² However, as the African Procurement Law Unit, (APLU)²⁰³ observed, the independence of public procurement regulator is crucial if disputants and stakeholders are to have confidence in the ADR. Yet, if PRAZ is perceived to be government controlled, the outcome of its ADR mechanism will be the object of ridicule; and litigation will be the default grievance settlement mechanism.²⁰⁴

1.5.3 Judicial Review

The dispute resolution pathway for parties to public procurement proceedings is multi-layered. It has statutory safeguards to ensure fairness, while in the process promoting the right to administrative justice. Delightedly, the provision for the adoption of ADR mechanisms is welcomed given that its quiet and not acrimonious in nature. As noted, the legitimacy of the regulator, PRAZ, to facilitate disputes will largely depend on its functional independence from the government as the stockholder across all public procurement activities.

It is trite that public procurement decisions fall within the administrative law domain. Lawfulness, reasonableness and procedural fairness are the basis for instituting judicial review in public procurement procedures.²⁰⁵ Resultantly, public procurement

²⁰² John R Miller Alternative Dispute Resolution (ADR): A Public Procurement Best Practice that has Global Application *International Public Procurement Proceedings* 2003:654.

²⁰³ APLU Comments on the South Africa Draft Public Procurement Bill 2020: 4 <http://africanprocurementlaw.org/wp-content/uploads/2020/06/APLU-Submissions-on-the-Draft-Public-Procurement-Bill-2020-South-Africa-Final.pdf>. APLU is multi-institutional research housed within the Faculties of Law at the universities of Stellenbosch and University of South Africa. Its thrust is on public procurement within the African context. Researchers affiliated with APLU are drawn from academic institutions across the continent of Africa.

²⁰⁴ Ibid.

²⁰⁵ Phoebe Bolton Public Procurement in South African : Main Characteristics Public Contract Law Journal Vol 37 No 4 Summer 2008 781-802 (802) <<https://o-www-jstor-org.oasis.unisa.ac.za/stable/pdf/25755688.pdf?refreqid=excelsior%3Af54dfc410431b80a3dd3386ccf93c3de>> accessed 10 January 2022.

disputes are likely to find their way before the Administrative Court.²⁰⁶ The Administrative Court has jurisdictional powers to entertain an appeal from the review panel.²⁰⁷ The Administrative Court can award patrimonial damages to the aggrieved party in public procurement proceedings as guided by equity and justice.²⁰⁸ In *Oswell Security (Pvt) Ltd v State Procurement Board and Others*, the Administrative Court invalidated a tender awarded under the Procurement Act, the predecessor to the PPPDAA.²⁰⁹ The tender had been awarded to a supplier with an irresponsible bid. It is submitted that a party aggrieved with an administrative decision pursuant to procurement proceedings may approach the High Court in interlocutory proceedings or on urgent basis for an appropriate relief.²¹⁰

1.6 Conclusion

It is clear that public procurement in Zimbabwe is extensively codified and consolidated. This article shows that the nation has a consolidated and comprehensive public procurement legislation. Public procurement legislation for goods and services and construction works and to a large infrastructure procurement through Public-Private Partnerships (PPP) is regulated by the Zimbabwe Development Agency Act (ZIDA) and the PPDPAA. Overall, public procurement legislation matches the constitutional standard articulated in subsection 315(1). Indeed, other legislation is available to fully elasticise the principles enunciated in the Constitution. Worryingly, little public procurement litigation has so far come through the courts. Recognising that public procurement law had not been until 2013, granted constitutional status, there is some hope that through incremental judicial scrutiny, Zimbabwe will develop its own public procurement jurisprudence as has been the case in other jurisdictions.²¹¹

In synch with its needs as a developing state, public procurement laws in Zimbabwe have been crafted with a view to achieve collateral objectives such as economic emancipation of women and promotion of domestic suppliers. However, it's not yet

²⁰⁶ The Administrative Court is a constitutional creature of similar status with the High Court borne out of section 173 of the Constitution.

²⁰⁷ Section 77(1) of PPDA Act.

²⁰⁸ Section 77(2) of PPDA Act.

²⁰⁹ Case No. P100/11.

²¹⁰ Preamble to the High Court Act 29 of 1981.

²¹¹ The Republic of South Africa is one such country in the SADC region. It recently consolidated its public procurement legislation in the form of a Draft Public Procurement Bill.

clear as to when this is to be put in practice, as legislation is silent on the scoring to be awarded for foregoing categories of suppliers. Therefore, it has been deduced that public procurement legislation signals the use of public procurement for the achievement of social objectives.

As for the specifics, it is noted that the matter has been deferred, and delegated to PRAZ, which will in due course, advise the Government of Zimbabwe. This is further compounded by the fact that Zimbabwe has limited competent professional public procurement cadre to preside over procurement activities in public entities. Simply put, the professionalisation of procurement practitioners is still in infancy. It would be an insurmountable task for the regulator, PRAZ to play a dual role of administering and overseeing the PPDPAA Act by public entities and being the pathfinder in educating practitioners in charge of procurement management units in public entities. The only way out of this quagmire, would be to unbundle this dual function by creating a statutory professional body to regulate the education and professional standards for procurement practitioners.

The enactment of PPDPAA partially decentralised public procurement activities in that procurement requirements beyond prescribed amounts can only be done through a statutory committee, SPOC on behalf of government-controlled entities. The inherent danger in this arrangement is that SPOC, by virtue of being a committee made up of senior government officials, could be subjected to political pressure to award tenders in favour of economic operators that are connected to political elites. It follows therefore that in the event of SPOC succumbing to pressure, constitutional principles on public procurement would be surely violated. On a sad note, it has been observed that the usurpation of this function by SPOC, creates an administrative quandary for accounting authorities who are vested with powers to account for the public resources committed to their trust.

Observations made in this article bemoan the submission of public accounting authorities, in terms of the PPDPAA, to manifestly unlawful directives from higher ranked officials to conduct public procurement activities in parallel to legal prescripts. The import of the foregoing is that it creates a legal route for public procurement not to be done in accordance with constitutional principles set out in subsection 315(1) of

the Constitution. It is suggested that a much legally tenable position would be to strike out the provision in *toto* and insert a provision that permits the recipient of the unlawful directive to report to law enforcement agencies for prosecution in courts.

It was also explained that public procurement is highly vulnerable to corruption if not clearly regulated to give effect to constitutional principles stated in sub-section 315(1) of the Constitution. Regrettably, the PDPDAA contains some provisions that confers the President with legislative functions through a proclamation, to designate unspecified categories of procurement to be conducted contrary to the generally acceptable norms set in the legislation, under the guise of pursuit of national interests. This article notes that this could pose a serious challenge towards the achievement of a public procurement system that is fair, open, transparent, honest, efficient and cost-effective. An amenable way would have been to specify such categories through a legislative provision as opposed to leave the characterisation of categories to a presidential determination. It is submitted that the lawfulness of this legal position would be doubtful. Presumably, a much clearer picture will be worked out once the legality of the relevant provision in the PDPDAA is subject to judicial scrutiny.

The Zimbabwean public procurement regulatory framework has multidimensional procurement methods to cater for varying degrees of circumstances. Notably, competitive bidding remains the first-choice method for public procurement, and this is commendable as it endeavours to promote the constitutional principles set out in sub-section 315(1) of the Constitution. The direct procurement method can only be resorted to in terms prescribed in legislation such as in the event of extreme urgency and epidemics as was the situation when nations were grappled with the global pandemic, Corona Virus 19. The restrictions placed on government-controlled entities to use the direct procurement method in limited circumstances is gladly welcome in view of the inherent potential to susceptibility of this method to corruption.

Competitive bidding as articulated in PDPDAA is concise and straightforward. It encompasses disclosure of contractual opportunities, having predetermined rules that restrict the discretionary whims of public officials, the timely revelation of contracts

to be observed during proceedings, and the means for monitoring and adhering to the applicable laws.²¹²

Notwithstanding, transparency in the Zimbabwean public procurement is somewhat lagging in that e-procurement is still to be embraced fully, and legislation clearly shows that submission of bids is still paper-based. Presumably, the legislator took notice of the fact that Zimbabwe was still developing its information communication technology infrastructure to fully support e-procurement, and thus, delegated the formulation of guidelines for e-procurement to the regulator, PRAZ.

Surprisingly, despite PPDPA having numerous provisions to promote sustainable procurement, it is disheartening to note that the actual regulations for it are still to be made. In fact, rulemaking function is delegated to PRAZ, the regulator in the form of policy directives for public entities. The ideal scenario would have been to have explicit rules for sustainable procurement articulated in the PPDPA itself or at the very least ministerial regulations. Put differently, the provisions of PPDPA on green procurement are scanty and need to be elaborated further to effect to constitutional requirements on environmental sustainability. It is respectfully submitted that the legislation in its current form does not adequately address the use of public procurement to promote environmental sustainability. The PPDPA Act only attempts to address this matter by conferring public entities to make environmental considerations when evaluating tenders without a clear roadmap on the execution thereof.

The Zimbabwean public procurement legal framework employs a three-way method to enforce compliance with the PPDPA Act for supplies. It is observed that the methods are meant to promote high ethical standards and deterring suppliers from engaging in underhand dealings in public procurement. In tune with the global trends, Zimbabwe has adopted the administrative method, a classical method of fighting public procurement corruption. Suppliers that violate public procurement principles negating on competition, transparency, openness fairness and honesty are barred from

²¹² Arrowsmith, *The Law of Public and Utilities Procurement* (2005) 3.9.

participating in public procurement activities for certain period. While criminal sanction is also available for use should circumstance warrant.

It was the purpose of this article to establish whether public procurement legislation conforms to constitutional dictates as outlined in terms of subsection 315(1) as read with subsection 195(2). Having carefully examined the legislation, it can therefore be concluded that by and large, legislation endeavour to ensure that public procurement is conducted in a transparent, fair, honest, cost-effective, competitive and open manner. However, there remains several issues which at times are conflictual, and opaque. To begin with, in the spirit of devolution, the statutory autonomy of public entities and the function of SPOC needs to be addressed. Secondly, the immense quasi-legislative powers on PRAZ require further scrutiny with a view to reduce it and have some of the issues in the PPDPAA purportedly conferred upon it being directly addressed and dealt with comprehensively by the legislator. It is recommended that there be the unbundling of functions of PRAZ with a view to make it more efficient. This means that PRAZ would only play an oversight role, while a separate body is created for the professionalisation of public practitioners. The foregoing could be made possible by amending the PPDPA Act.