**CONTROL AND LITIGATION IN PUBLIC CONTRACTS IN SOUTH AFRICA**

by

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# Introduction

South Africa does not have a single procurement law or code. Instead, a large number of statutory instruments, ranging from primary acts to regulations, codes, guidelines and administrative circulars, govern various aspects of public procurement and state contracting[[1]](#footnote-1). In addition, since South Africa is (partially) a common-law system[[2]](#footnote-2), there is also a significant volume of judge-made law that has emanated from decided cases in the area of public procurement. The mechanisms available in law to enforce compliance with the legal rules governing public procurement are accordingly also fragmented across the South African legal system. These mechanisms consist of procurement-specific regulatory instruments as well as generic legal instruments applicable to procurement contracts simply because they involve contracts or amount to public action. This chapter will analyse the system of legal enforcement pertaining to procurement rules in South Africa.

The analysis starts by briefly setting out, as background, the legal framework within which control of procurement contracts occur in South Africa, including the basic characteristics of the judicial system. It then focuses on the various mechanisms available in the system to settle disputes and/or enforce procurement rules firstly in the award stage of the procurement and secondly in the contract performance stage. General oversight mechanisms that apply across all stages are thirdly set out. The chapter concludes by noting the uncoordinated and fragmented enforcement landscape in South African procurement law and the dire need for reform.

# The procurement legal framework in brief

There is no distinct concept of a public contract in South African law[[3]](#footnote-3). Procurement contracts are subject to the "normal" rules of contract[[4]](#footnote-4). The process leading up to the conclusion of a procurement contract is, however, viewed as administrative action with the result that general administrative law applies to all decisions taken in adjudicating bids and awarding a tender.[[5]](#footnote-5) There are furthermore a number of statutes that govern specific aspects of procurement, in particular the process of adjudicating and awarding bids as well as general public finance oversight over the funds expended by way of procurement contracts. Public procurement contracts are thus legally situated within the intersection of general contract law, general administrative law and procurement-specific (statutory) law.

Procurement law is premised on section 217(1) of the Constitution of the Republic of South Africa, 1996, which states five core principles governing state contracting. Such contracting must be in terms of “a system which is fair, equitable, transparent, competitive and cost-effective”. No further detail is given on what this entails and it is left to legislation to determine the particular procurement rules giving effect to these principles.

The procurement-specific statutory instruments are mostly contained in the Public Finance Management Act[[6]](#footnote-6) and the Treasury Regulations[[7]](#footnote-7) made under it, the Local Government: Municipal Finance Management Act[[8]](#footnote-8), and the Municipal Supply Chain Management Regulations[[9]](#footnote-9) made under it, and the Preferential Procurement Policy Framework Act[[10]](#footnote-10), and the Preferential Procurement Regulations, 2011[[11]](#footnote-11), made under it. Under these provisions all government entities (departments, agencies, state-owned companies, local government administrations, etc.) conduct their own procurements and are primarily responsible for the design, implementation and monitoring of their own supply chain management systems. There is no formal structure in law overseeing all procurement activities or practices, although the Office of the Chief Procurement Officer, an office within the National Treasury, has in recent years started to perform a general coordination and oversight role. In terms of current law, however, this office does not have any dedicated mandate[[12]](#footnote-12).

Since public contracts are thus largely conceptualised in South African law as “normal” commercial contracts with an administrative-law overlay, disputes regarding these contracts are mostly dealt with in terms of general contract law and/or general administrative law by the ordinary civil courts as elaborated below. In South Africa there is no special court structure for administrative-law disputes, such as for example an administrative-law court. The judicial system in South Africa was largely determined by the influence of English law and procedure[[13]](#footnote-13) with the result that there is a single court structure that deals with all matters, civil and criminal and involving private parties, state parties and a mixture of the two.

# Disputes and enforcement in the award stage

As stated in the previous section, the process leading up to the award of the public tender is subject to general administrative law in South Africa. The result is that disputes in this stage of the public contracting process is largely dealt with in terms of general administrative law, which is dominated by the enforcement mechanism of judicial review. There are also a number of administrative mechanisms created in statute for purposes of dispute settlement and enforcement of procurement rules during the award stage.

In most instances, the administrative mechanisms precede judicial intervention in disputes during the award stage. This is to some extent due to the fact that the Promotion of Administrative Justice Act[[14]](#footnote-14), expresses a strong preference for internal remedies to be exhausted before a court is approached to enforce administrative-law rules, including rules pertaining to public procurement decisions. Section 7(2) of PAJA states that “internal remedies” must be exhausted before a court may be approached and instructs courts to refer matters back to the relevant body where an internal remedy has not been exhausted. Only under “exceptional circumstances” may a court entertain a review while an internal remedy has not been exhausted. The courts have interpreted “internal remedy” to refer to any legal mechanism available to an aggrieved person facing an administrative action that can provide that person with effective legal redress in respect of his or her complaint[[15]](#footnote-15). The result of this statutory provision is that persons aggrieved by a public contract decision taken during the award stage must turn to administrative remedies first or risk having the court dismiss their review applications as premature.

## *- Administrative redress and enforcement*

The extra-judicial, administrative mechanisms available in South Africa to deal with disputes in the award stage of public contracting and to serve as enforcement mechanisms of the law applicable to this stage of the procurement process can be divided into two main categories. On the one hand there are the mechanisms that provide remedies to suppliers that are aggrieved by decisions of the contracting authority. On the other hand, there are administrative mechanisms available to the contracting authority to enforce the rules of procurement, or put differently, to ensure compliance with the law. These two types are analysed separately below.

### 3.1.1. *Supplier remedies*

There is no single administrative structure for review of public contract decisions or tasked with enforcement of procurement rules in South Africa. At national and provincial government level, the relevant treasury is obliged “to establish a mechanism ... to receive and consider complaints regarding alleged non-compliance with the prescribed minimum norms and standards” in the supply chain management system[[16]](#footnote-16). No further statutory content is given to this mechanism and it is largely left to individual treasuries to determine the structure and scope of the mechanism. The powers granted to decision-makers within this mechanism would also largely depend on how the individual treasuries set them up. The absence of any explicit statutory mandate in respect of the powers of these complaint mechanisms has the result that they are fairly weak in terms of the relief that they can grant.

A notable exception is the Bid Appeals Tribunal for the province of KwaZulu-Natal. This body consists of four expert members from outside the administration appointed by the provincial government and functioning independently from the government[[17]](#footnote-17). The Tribunal is authorised to consider appeals by any bidder against an award decision of any provincial government department. Although the grounds of appeal are limited to the following, the formulations are very broad so that the scope of the appeal is also quite broad. Arguments may be advanced on appeal that the decision-maker:

“(a) committed misconduct in relation to their duties concerning the awarding of contracts;

(b) committed a gross irregularity;

(c) exceeded its or their power;

(d) awarded a bid in an improper manner; or

(e) awarded a contract inconsistent with the objectives of the Act”[[18]](#footnote-18).

The one weakness in the structure of the Tribunal is that it cannot itself order relief upon deciding an appeal. Its remedial power is restricted to make a recommendation to the member of the provincial executive to “confirm, vary or set aside the decision” appealed against[[19]](#footnote-19). The Practice Note does not give any detail on how the member of the executive must deal with the recommendation, although such further action will certainly constitute administrative action and will in its own right be subject to administrative-law control. An appellant-bidder that is still not satisfied with the outcome of the award decision may thus have two causes of action in subsequent judicial proceedings – one against the original award decision and one against the appeal decision.

At local government level the Municipal Supply Chain Management Regulations provide in more detail for administrative mechanisms to deal with disputes. Regulation 49 prescribes that a local authority’s “supply chain management policy ... must allow persons aggrieved by decisions or actions taken ... in the implementation of its supply chain management system, to lodge within 14 days of the decision or action a written objection or complaint to the municipality or municipal entity against the decision or action.” Regulation 50 furthermore sets out that the mechanism envisaged in regulation 49 must include the appointment of an independent and impartial person to assist in dispute resolution. However, as with the administrative mechanisms noted above in respect of national and provincial government, these regulations do not set out exactly what the remedial powers of the appointed person is. The regulation only states that the person must “strive to resolve promptly” the disputes submitted to him or her[[20]](#footnote-20). Disputes that are not resolved within 60 days may be referred to the relevant provincial treasury and if it remains unresolved may be referred to the national treasury for resolution[[21]](#footnote-21). In none of these instances does the regulation specify what remedial actions the relevant review body may take.

A parallel provision at local government level applicable to dispute resolution in respect of any administrative decision taken under delegated powers is contained in section 62 of the Local Government: Municipal Systems Act[[22]](#footnote-22). This provision has been extensively relied upon in disputes emanating from the award stage of public contracting. The section creates a wide appeal opportunity to anyone whose rights have been affected by a local government decision. The appeal authority will be either the municipal manager (the head of the local government administration), the executive mayor or the local government council, depending on who took the original decision. In contrast to the administrative mechanisms set out above, this provision explicitly grants the power to “confirm, vary or revoke the decision”[[23]](#footnote-23). In the procurement context, this provision has, however, created a number of difficulties. Some judgments of the High Court have raised doubts about whether an aggrieved bidder that was not awarded the contract can be viewed as “a person whose rights are affected” by the procurement decision and consequently have standing under section 62[[24]](#footnote-24). However, the recent ruling of the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency[[25]](#footnote-25),* which held that “tenderers have a right to a fair tender process, irrespective of whether they are ultimately awarded the tender” have arguably put these doubts to bed. Under this ruling an aggrieved bidder would always be able to argue that his or her rights to fair tender processes have been affected by the relevant decision and consequently gain access to the mechanism in section 62.

A further complicating factor is that section 62(3) states that remedial action taken in terms of this section may not “detract from any rights that may have accrued as a result of the decision”[[26]](#footnote-26). In the procurement context it is arguable that rights vest in the winning bidder at the moment that the award decision is taken and communicated with the result that an appeal under section 62 cannot interfere with the award. The remedy accordingly becomes meaningless. Different views have been expressed in High Court judgments about whether the existence of the section 62 appeal mechanism results in the suspension of the vesting of rights until such time as the period for lodging appeals (21 days) has passed or an appeal finally decided[[27]](#footnote-27).

3.1.2. *Mechanisms available to contracting authorities*

The various procurement statutes provide for a number of mechanisms that contracting authorities can use to enforce procurement rules against suppliers. The strongest of these is contained in the Preferential Procurement Regulations, 2011. Regulation 13 places an obligation on contracting authorities to take action against suppliers that have obtained preference on a fraudulent basis as well as when "any of the conditions of the contract have not been fulfilled". The latter creates an enforcement mechanism for the performance phase of the contract to which we shall return below.

The Regulations list a number of far-reaching sanctions that the contracting authority may impose in these instances. These include disqualifying the supplier from the current tender process as well as future public contracts for a period of up to 10 years. This is one of several debarment mechanisms created in procurement regulation to which we shall return below. The Constitutional Court has taken a very strict view of contracting authorities’ obligations to investigate and take steps under these Regulations. In *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd and Another*[[28]](#footnote-28) the Court held that the duty to act is triggered by “the awareness of information which, if verified through proper investigation, could potentially expose a fraudulent scheme”[[29]](#footnote-29). As to the appropriate steps to be taken by the contracting authority once the duty to act has been triggered, the Court held that the duty “includes conducting an appropriate investigation which is designed to respond adequately to the complaint lodged, as well as the determination of both culpability and penalty”[[30]](#footnote-30).

Both the Treasury Regulations[[31]](#footnote-31), applying to national and provincial contracting authorities, and the Municipal Supply Chain Management Regulations[[32]](#footnote-32), applying to local government contracting authorities, place further obligations on contracting authorities to take steps against suppliers that contravene procurement rules. In both instruments the relevant contracting authority is given very wide powers to “take all reasonable steps to prevent abuse of the supply chain system”[[33]](#footnote-33). The regulations continue to list a number of sanctions that may be imposed, which include rejecting a bid or even cancelling a contract already awarded. Although neither of these sets of regulations explicitly provide for debarment of the supplier as a sanction, the wide powers granted in the regulations have been read to include such debarment power[[34]](#footnote-34). That prospective disqualification, i.e. debarment, must be included in the wide sanctioning power is further borne out by the explicit requirement that contracting authorities must disregard bids from suppliers that appear on National Treasury’s database of persons prohibited from doing business with the state as well as from suppliers that have not performed satisfactorily on past contracts[[35]](#footnote-35).

Decisions taken in terms of the administrative debarment mechanisms created by the various statutory instruments outlined above are all consolidated in National Treasury’s database of restricted suppliers, which is publicly available[[36]](#footnote-36). In all instances a listing on the database will result in the supplier being debarred from receiving state contracts for a stated period from any contracting authority. Very little further guidance is given in the regulations on how contracting authorities should exercise their discretion in listing a supplier on the database. There is for example no guidance on how the period of debarment is to be determined, apart from the maximum periods that are prescribed[[37]](#footnote-37). There is no indication of what type of investigation is required before a supplier may be debarred and by whom. There is no description of exactly what type of misconduct may lead to debarment, apart from the general references to abuse of the supply chain system, fraud, corruption, “other improper conduct” and failed performance. For example, the relevance of the materiality or extent of the supplier’s failure in performing under a public contract is left completely to the discretion of the contracting authority in deciding whether the supplier should be debarred and for how long.

The debarment decision will, however, amount to administrative action, which means that it must be taken in a procedurally fair manner, including giving the supplier an opportunity to state its case. The decision must also be rational, which requires a measure of investigation and alignment of the information of the particular case and the decision to debar. It also means that the debarment decision is subject to judicial scrutiny in terms of general administrative law[[38]](#footnote-38).

In addition to these administrative debarment mechanisms, the Prevention and Combating of Corrupt Activities Act[[39]](#footnote-39) creates the possibility of debarment as a criminal sanction, to which we shall return below[[40]](#footnote-40).

## *- Judicial mechanisms*

Against the backdrop, and perhaps because of, the haphazard administrative redress and enforcement mechanisms in South African procurement law, the emphasis in controlling public contract decisions has been on judicial mechanisms. Judicial intervention in procurement disputes are fairly common in South African law, leading the Supreme Court of Appeal to note in *South African Post Office v De Lacy and Another*[[41]](#footnote-41): “Cases concerning tenders in the public sphere are coming before the courts with disturbing frequency.”

As stated above, since this phase of public contracting is viewed as subject to general administrative law it means that decisions taken during the award stage are subject to judicial review on administrative law grounds of review. This review is done by the “normal” civil courts, starting in the High Court with appeal opportunities to the Supreme Court of Appeal and eventually the Constitutional Court. This type of review is premised on section 33 of the Constitution, which guarantees the right to just administrative action. However, the specific grounds of review are codified in section 6 of PAJA. Section 6 does not contain a strictly closed list of grounds given that section 6(2)(i) allows for review of administrative action on the grounds that it was “otherwise unconstitutional or unlawful”. This general ground of review is particularly relevant for public procurement cases. As we have noted above, section 217(1) of the Constitution lists the basic norms that state contracting must comply with. When a supplier is thus of the view that a particular procurement decision taken by a contracting authority does not comply with these principles, section 6(2)(i) of PAJA will provide a ground of review. The argument will be that the decision is "otherwise unconstitutional" in that it falls foul of section 217. This approach to litigation in public contracting was confirmed by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others[[42]](#footnote-42)* where the Court stated: “The requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system will thus inform, enrich and give particular content to the applicable grounds of review under PAJA in a given case”.

It is primarily those who have participated in the tender process that will have standing to bring a review application in respect of a decision taken in the process. Contracting authorities also have standing to seek the review of their own decisions. In fact, the Supreme Court of Appeal has suggested that a contracting authority may be obliged to bring such an application where it is convinced that an award was irregularly made[[43]](#footnote-43). Although it is mostly aggrieved bidders and contracting authorities that bring applications to review public contract decisions, mostly award decisions, the law grants a much broader category of persons standing to challenge procurement decisions. The standing provisions set out in section 38 of the Constitution also apply to challenges of procurement decisions in judicial review proceedings under PAJA[[44]](#footnote-44). This means that apart from bidders acting in their own interest, a person could also challenge procurement decisions in one of the following roles:

"(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members"[[45]](#footnote-45).

In the procurement context, this implies that a very wide range of different parties may challenge procurement decisions. This would include ratepayers' associations; members of the public or non-governmental organisations that are dependent on or take an interest in the relevant procurement for some public service or supplier organisations. While it is not common to find these latter organisations acting as parties in procurement litigation, it is fairly common to find especially non-governmental organisations join public contract litigation as *amicus curiae* to place the perspectives of particular affected interests before the court[[46]](#footnote-46).

### 3.2.1. *Timing and interim relief*

Once an aggrieved bidder has exhausted all available internal remedies, that is administrative remedies that can provide effective relief provided for in the relevant law, it has 180 days to bring a judicial review application in the High Court challenging the relevant procurement decision[[47]](#footnote-47). This period can be extended either by agreement between the parties, or more likely by the court if the applicant can show that it is in the interest of justice that the review be heard despite the delay[[48]](#footnote-48). Courts take a fairly strict view of extending the time limit requiring the applicant to provide adequate explanation for the entire period of delay. In procurement cases the courts seem even stricter and place a high premium on the swift resolution of disputes in order not to delay the procurement and the government function depending on the procurement unduly. Noting the particular difficulties that may flow from delayed judicial resolution of procurement disputes, the Supreme Court of Appeal stated in *Millennium Waste Management v Chairperson Tender Board*[[49]](#footnote-49):

"It appears that in some cases applicants for review approach the high court promptly for relief but their cases are not expeditiously heard and as a result by the time the matter is finally determined, practical problems militating against the setting aside of the challenged decision would have arisen. Consequently the scope of granting an effective relief to vindicate the infringed rights become drastically reduced. It may help if the high court, to the extent possible, gives priority to these matters".

As is clear from this extract and as we shall see below, delay in bringing the review application may also impact on the availability of particular remedies in the review proceedings and essentially on the effectiveness of the review. Because there is no formal standstill period between the award of the tender and the conclusion of and performance under the public contract in South African law, aggrieved bidders run the risk that the contract would have been fully executed by the time that the dispute is judicially addressed.

The Constitutional Court judgment of *Steenkamp NO v Provincial Tender Board, Eastern Cape*[[50]](#footnote-50) has effectively judicially introduced a type of standstill period in South African law, albeit an informal and unenforceable one. In this matter the award of a bid and conclusion of a public contract was set aside in judicial review proceedings just over a year after the award. The originally successful bidder, who had no guilt in the eventual invalidation of the contract, subsequently claimed damages from the contracting authority for its loss, because of the unlawful administrative action that resulted in the contract being invalidated. The Constitutional Court rejected the claim, holding that a winning tenderer should “curb its commercial enthusiasm”[[51]](#footnote-51) and “may not leap without looking”[[52]](#footnote-52), but must wait for the legal position to settle before performing under a contract. This in effect means that there is an administrative injustice risk in all state contracts and that the winning bidder carries that risk until the period for launching a judicial review challenge has passed, which can be seen as a standstill period[[53]](#footnote-53).

In order to avoid the difficulties that may emerge at the remedial stage of judicial intervention because of delays, aggrieved bidders routinely seek interim judicial relief on an urgent basis when they perceive a particular procurement decision to be unlawful[[54]](#footnote-54). The aim of the interim relief is to restrain the contracting authority from implementing the impugned decision pending the judicial review[[55]](#footnote-55). This may either be in the form of a court order interdicting the contracting authority from awarding the bid to a particular bidder or interdicting the contracting authority and winning bidder from performing under the contract already awarded.

The applicant for interim relief must show a clear right, which, “though prima facie established, is open to some doubt”, the apprehension of irreparable harm if the relief is not granted and the absence of an alternative remedy[[56]](#footnote-56). The remedy is an extraordinary one and in the court's discretion and the court will apply a balance of convenience test to weigh up the interests of the respective parties in granting or withholding the relief[[57]](#footnote-57). In procurement cases the prima facie right requirement is mostly established with reference to the grounds of review that will be put forward in the subsequent review application showing that the contracting authority did not comply with section 217[[58]](#footnote-58) and/or section 33[[59]](#footnote-59) of the Constitution in taking the relevant decision. The irreparable harm requirement is typically premised on the aggrieved bidder's loss of a fair chance to win the public contract and/or simply to participate in a fair public tender process. The third requirement of the absence of an alternative remedy may be problematic in light of the extensive remedies that are available in judicial review proceedings. The applicant for interim relief will have to show that the invalidation of the relevant decision at a much later stage, when the contract had already been concluded and partially or fully executed, will not be effective relief in its particular dispute.

The balance of convenience test is also a critical element of interim relief applications in procurement disputes. The court will weigh up the applicant's rights and the harm it has shown will follow in the absence of interim relief against the prejudice that the contracting authority will suffer if the interim relief is granted[[60]](#footnote-60). The stronger the applicant's review case seems to be, the better chance it will have of tipping the balance of convenience test in its favour[[61]](#footnote-61). However, on the other side of the scale will not only rest the contracting authority's own direct interest in seeing the procurement proceed and (where applicable) the interests of the bidder that has already been awarded the tender or contract, but also the ultimate public function that will be served by the procurement and that consequently will be delayed or derailed if the procurement is halted for an extended period of time under the interim relief. In the recent judgment in *Ikwezi Quarries t/a Blue Rock Quarries (Proprietary Limited) v MEC for Roads and Public Works, Eastern Cape Province and Others*[[62]](#footnote-62)these latter considerations weighed heavily in the court's assessment of the balance of convenience. In this matter the contract was for the upgrade of a gravel road leading to a rural hospital. The gravel road was in very poor condition and became impassable during bad weather resulting in members of the public not having access to the hospital as well as documented fatalities where patients could not be transported to the hospital quickly enough for treatment. In light of these facts that court concluded that: "the prejudice to the larger community of Elliotdale and beyond, should there be a lengthy delay in the implementation of the tender, is incontrovertible and the effect of an interim interdict leading to such delay in the upgrading of the road would be devastating for the community. In the circumstances the balance of convenience is, in my view, overwhelmingly against applicant.  On this ground alone the application for interim relief cannot succeed"[[63]](#footnote-63).

If an aggrieved bidder fails to obtain interim relief suspending the contracting process, the contracting authority can proceed with the contract despite the threat of judicial review. However, there will be considerable risk, especially for the eventually successful tenderer, should the review be successful at a later date as is evident from the judgment in *Steenkamp NO v Provincial Tender Board, Eastern Cape*[[64]](#footnote-64)noted above. At the same time, if the contracting authority proceeds with the implementation of the contract, the contract may be fully executed by the time that the matter is finally decided by the review court and the aggrieved bidder may be left with severely restricted relief.

### 3.2.2. *Judicial relief*

A court hearing an application for judicial review of a decision taken during the procurement process may grant "any order that is just and equitable"[[65]](#footnote-65). Section 8 of PAJA continues to list a number of orders that a court may grant, although this is not a closed list. The most important orders for current purposes are that the court may invalidate or set aside the relevant decision, including the decision to award a bid and conclude a contract, the court may replace the decision of the contracting authority with its own or the court may order compensation to be paid.

The starting point to remedies in judicial review of public contracting decisions is that an administrative decision remains valid and binding, regardless of any irregularities in the taking of the decision, until that decision is set aside by a court upon review[[66]](#footnote-66). Barring any express authorisation to cancel a decision already taken or to amend it, even a contracting authority will have to seek an order to set aside its own erroneous decision.

In the context of public contracting, authorities have a very limited power to cancel decisions already taken without approaching a court. This power is restricted to the cancellation of the invitation to submit bids and is granted in regulation 8 of the Preferential Procurement Regulations, 2011. The regulation stipulates in exact terms when an invitation for bids may be cancelled. This may only be done prior to the award of the bid and only under one of the following circumstances:

- The wrong point scale for measuring preference in the adjudication of tenders was identified in light of the value of all bids received;

- Due to changed circumstances, there is no longer a need for the services, works or goods requested;

- Funds are no longer available to cover the total envisaged expenditure; or

- No acceptable tenders were received.

In *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another[[67]](#footnote-67)* the Constitutional Court held that even where a contracting authority attempted to create a discretion in the invitation to bid not to award any tender, which would effectively allow it to cancel the invitation to bid at its discretion, it would still be bound by this regulation. This means that the contracting authority could only cancel the public contract process if one of the above-mentioned conditions is met, regardless of what is stated in the bid documents[[68]](#footnote-68).

The default remedy when an administrative decision has been found irregular by the review court is to set the decision aside. In *Eskom Holdings Ltd and Another v The New Reclamation Group (Pty) Ltd[[69]](#footnote-69),* where the award of a public tender was challenged, the Supreme Court of Appeal held that “[o]rdinarily, where there has been a reviewable irregularity in the award of the tender, an unsuccessful tenderer would be entitled to call for the award to be set aside”. In this matter the court granted such an order despite the fact that only three months of the two-year term of the contract remained. This judgment also illustrates that once the award decision is set aside, the subsequent contract will also be invalidated and that this can happen at any point in time after the award decision (subject of course to the time limit for bringing the review application noted above). The invalidation of the procurement decision, and where applicable the contract, is *ex tunc,* it never existed in law following the invalidation order*.* South African law also takes the view that without a valid award decision there can be no valid public contract.

Review courts, however, have a discretion to set administrative decisions aside or not. Even though setting aside is the default remedy, the court may refuse to set the irregular decision aside under particular circumstances. The result will be that the decision remains valid and binding. The Supreme Court of Appeal has explained this discretion in the following terms:

“The difficulty that is presented by invalid administrative acts, as pointed out by this court in *Oudekraal Estates* [(*Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA)], is that they often have been acted upon by the time they are brought under review. That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable”[[70]](#footnote-70).

Courts have accordingly exercised their discretion not to set aside an award decision and the resultant contract where the contract had been substantially performed and it was not practical to replace the supplier at such a late stage[[71]](#footnote-71). Courts have also refused to set award decisions aside where the impact on the public will be severe if the particular service is interrupted.[[72]](#footnote-72)

Under extraordinary circumstances a review court may invalidate the impugned decision and replace the decision with its own, that is substitute the decision[[73]](#footnote-73). This is an extraordinary remedy since it raises separation of powers concerns. The review court is usurping the role of the (executive) contracting authority. In *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*[[74]](#footnote-74) the Constitutional Court issued an order replacing the contracting authority’s decision to award the bid to a particular bidder with a decision that the bid is awarded to the applicant at a stated price. The court set out the requirements for a substitution order as follows:

“The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties”[[75]](#footnote-75).

In public contract cases these conditions will almost only be met if there was only one qualifying bidder remaining at the end of the adjudication phase and the contracting authority did not have a valid ground to cancel the tender process. A substitution order will also be more likely where the contracting authority's own assessment committees recommended the bidder bringing the review and seeking the substitution order as the preferred bidder, but for some reason the final decision-maker decided on another bidder.

The final judicial remedy worth noting is that of compensation or damages. There are two avenues open to an aggrieved bidder to seek a monetary order against a contracting authority for failures in the procurement process. The first is a normal civil claim for delictual (tort) damages. While this is a possibility in theory, the scope of this form of redress has been significantly curtailed in recent years. It is now held that only in instances of fraud in the tender process will an aggrieved bidder possibly succeed with a delictual damages claim[[76]](#footnote-76). A mere administrative error will not constitute a cause of action for damages. This is because of the Constitutional Court ruling in *Steenkamp NO v Provincial Tender Board, Eastern Cape[[77]](#footnote-77)* that a contracting authority's negligent but *bona fide* conduct in the public tender process would not be wrongful in a delictual sense. The court reasoned that the contracting authority owes no legal duty to tenderers to avoid pure financial loss in such instances. Absent fraud, neither the disappointed bidder nor the winning bidder will be able to claim damages from the contracting authority because of the latter’s administrative failures for loss of profits, out-of-pocket expenses in preparing the tender or “financial loss on the strength of the award which is subsequently upset on review by a court order”[[78]](#footnote-78).

The second avenue to compensation is as relief following judicial review of the offending decision. PAJA recognises compensation as an alternative, extraordinary remedy to substitution[[79]](#footnote-79). However, this remedy remains largely unexplored in the procurement context. In only one case has compensation been awarded where an award was irregularly made and only for out-of-pocket expenses relating to the tender, not loss of profits[[80]](#footnote-80). More generally, the Supreme Court of Appeal has held that the remedy is only available if the default remedy of setting aside and remitting to the administrator is not available *and* where the court decides not to grant a substitution order[[81]](#footnote-81).

## *- Alternative dispute resolution*

It used to be fairly common to find alternative dispute resolution (ADR) clauses in invitations to bid for public contracts. These clauses would enjoin the parties to pursue particular forms of ADR, typically mediation or arbitration, to resolve disputes emerging from the tender process. This practice has now essentially been halted by a line of judgments that have questioned reliance on ADR in these types of disputes.

The first case to raise doubts about the use of ADR in procurement disputes was *Airports Company South Africa Ltd and Another v ISO Leisure OR Tambo (Pty) Ltd*[[82]](#footnote-82)*.* In this matter the High Court held that an arbiter did not have jurisdiction to settle a dispute between an aggrieved bidder and a contracting authority under an invitation to submit tenders. The dispute related to a decision taken by the contracting authority to disqualify the bidder from the tender. Despite an explicit arbitration clause in the bid documents, the High Court held that since such a dispute relates to the validity of administrative action and is thus a constitutional matter, it cannot be resolved by way of private dispute resolution mechanisms such as arbitration. Only the courts could resolve these types of disputes.

Subsequently, in *Telkom SA Ltd v ZTE Mzanzi (Pty) Ltd*[[83]](#footnote-83)the Supreme Court of Appeal seems to suggest that ADR will never be available to resolve disputes in the award phase of procurement since there is at that stage, in the court's view, no contractual relationship between the parties yet that can provide the basis for the ADR. This approach is difficult to reconcile with earlier statements by the same court that have accepted a two-contract analysis of public contracting[[84]](#footnote-84). In terms of this analysis the award stage of public contracting is governed by a first contract setting out the rights and duties of the bidders and the contracting authority in relation to the adjudication of the bids. A second contract will come into being once the award has been made to a particular bidder. Under this approach there would indeed be a contractual basis for ADR during the award stage.

# Disputes and enforcement in the contract performance stage

In stark contrast to the range of remedies and enforcement mechanisms governing the award stage of public contracting, there are very few mechanisms available aimed at resolving disputes in the contract performance stage. This is largely due to the view taken at times by South African courts that this stage of public contracting, that is after the award had been made and performance under the contract has commenced, is not governed by administrative law, but purely by contract law. Following this view, disputes emerging at this stage of public contracting must be dealt with in terms of normal contract-law remedies and public contracts are interpreted exactly as any other commercial contract. As a judge in a Supreme Court of Appeal judgment has concisely stated: "I do not believe that the principles of administrative law have any role to play in the outcome of the dispute. After the tender had been awarded, the relationship between the parties in this case was governed by the principles of contract law"[[85]](#footnote-85).

This view is, however, not universally accepted. Most notably in another Supreme Court of Appeal judgment, *Logbro Properties CC v Bedderson NO[[86]](#footnote-86),* the court held that the contracting authority "was therefore burdened with its public duties of fairness in exercising the powers it derived from the terms of the contract." In this case the dispute related to a decision to cancel a public contract. The question was whether administrative-law rules applied to the cancellation decision, which in turn would determine what remedies were available. Similar reasoning applies to other decisions that may be taken at this stage, such as decisions regarding variation of the terms of the contract or waiver of particular entitlements under the contract.

The outcome of the assessment whether the particular decision taken under the contract amounts to administrative action or not will also determine who has standing to litigate around the decision. If the decision is characterised as an administrative action, the broad standing rules of section 38 of the Constitution will apply, as set out above, with the result that a broad range of parties may launch judicial proceedings to test the decision. However, if the decision is viewed as purely commercial or contractual, only the parties to the contract will have standing to litigate a dispute emerging from the contract.

Because contracts concluded by public bodies are considered ordinary commercial contracts and there is no distinct concept of a public contract in South African law, courts have no special powers in relation to public contracts. In disputes emerging from such contracts the courts thus cannot interfere in the relationship between the contractual parties any more than they would be able to do in ordinary commercial contracts, which is very little based on contractual freedom and sanctity of contract.

In those instances where courts have accepted that particular action taken under the contract amounts to administrative action, the review court has more extensive powers to intervene in the relationship between the contracting parties based on the courts' broad remedial powers to issue any "just and equitable order". This is also the case where the court reviews a decision taken in the award phase after the contract had already been concluded and performance commenced. In such cases the court may interfere with the existing contractual relationship as part of the resolution of the dispute. One example is the case of *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*[[87]](#footnote-87)*.* Here the court reviewed the award of a tender based on irregularities in the award phase, but at a time when the contract was already in operation. However, in order not to interrupt the service being rendered under the contract, the court ordered that the incumbent supplier remains bound by the unlawful contract until a new one had been concluded. The court rejected arguments against such an order which contended that "the Court has no power to make a contract for SASSA [the contracting authority] and Cash Paymaster [the incumbent supplier], or to amend the existing contract"[[88]](#footnote-88). The court held that the remedial powers granted to it under the Constitution in judicial review proceedings gave it exactly such power.

Again, in contrast to disputes in the award stage of procurement, alternative dispute resolution is commonly relied upon during the contract performance stage. The standard General Conditions of Contract issued by National Treasury for use by all contracting authorities include a mandatory ADR clause. The Municipal Supply Chain Management Regulations furthermore require all contracts to include a dispute resolution clause requiring disputes to be addressed by means of mutual consultation and mediation before a court is approached[[89]](#footnote-89). The ADR processes applicable to public contracts are the same that are available to ordinary commercial contracts and there are no distinct rules applying only to the procurement context.

As we have noted above[[90]](#footnote-90), the power to debar suppliers from future public contracts may be exercised in relation to conduct during the contract performance stage as well. The Treasury Regulations[[91]](#footnote-91), Preferential Procurement Regulations[[92]](#footnote-92) and Municipal Supply Chain Management Regulations[[93]](#footnote-93) all provide for the debarment of a supplier that has failed to perform under a previous public contract. The effect will be the same as in the case of debarment for fraud or other forms of abuse of the supply chain management system.

1. - Public oversight

Apart from the remedies and mechanisms available to suppliers, contracting authorities and a limited category of third parties to enforce compliance with procurement rules, there are also a number of mechanisms in South African law that aim to create more general public oversight over public procurement functions.

The main form of public oversight over procurement is the public audit function fulfilled by the Auditor-General ("AG"). The position of AG is created in sections 181 and 188 of the Constitution as a public body independent from the government and subject only to the Constitution and the law. The AG reports to the National Assembly, the directly elected house of Parliament[[94]](#footnote-94). The function of the AG is to "audit and report on the accounts, financial statements and financial management" of public entities[[95]](#footnote-95). Reports of the AG must be made public[[96]](#footnote-96).

An overview of recent reports of the AG indicates that public procurement has been one of the areas that has received particular attention in public audits in recent years[[97]](#footnote-97). The AG evaluates and reports on whether contracting authorities follow prescribed procurement processes, including statutory prescripts. The audits look at all stages of the procurement process, including the award stage and the contract management stage. In the 2014/5 general report on national and provincial audit outcomes, the AG reported that irregular procurement was the single biggest contributor to irregular expenditure during the financial year and that 44% of government departments and one in three public entities did not comply with procurement legislation[[98]](#footnote-98).

The AG's function is exclusively a reporting one. It serves primarily to enable Parliament to fulfill its role of oversight over the executive in terms of the Constitution. However, the findings of the AG attract significant attention in the media with the result that AG reports have become an important mechanism in terms of which the general public are informed of government's compliance with procurement rules.

A more hard-line oversight and enforcement mechanism of procurement rules is contained in the Prevention and Combating of Corrupt Activities Act[[99]](#footnote-99), which creates two procurement-specific criminal offences. These two offences focus on corruption in procurement. A person found guilty of these offences by a criminal court may, as an additional sanction, be debarred from doing business with the state in future[[100]](#footnote-100). The court may order that the person and a host of related parties be listed on the Register for Tender Defaulters, which is maintained by National Treasury alongside the list of restricted suppliers that captures all administrative debarments[[101]](#footnote-101). This is quite a severe enforcement mechanism since there is no possibility of derogation once a person has been listed. However, this mechanism is rarely used and there is at the time of writing no persons listed on the Register for Tender Defaulters.

# - Conclusion

Public procurement law in South Africa is highly fragmented and the mechanisms aimed at enforcing the rules of procurement or settling disputes in procurement processes are likewise ad hoc and haphazard. There seems to be very little coordination or alignment between the various legal mechanisms that may be employed at different stages of the procurement process and the remedies that may be pursued under each.

Notably absent is any form of overarching administrative review structure or approach. As a direct response to the lack of effective redress at the administrative level, the courts have become the main arena for engaging with procurement disputes. This is unfortunate since the judicial process is very time-consuming and very costly and often not well-suited to resolving disputes turning on technical aspects of procurement. The dichotomous nature of litigation also often distorts the complexity of the relationships behind procurement disputes. It is mostly overly simplistic to analyse procurement disputes only in terms of the perspectives of the disappointed bidder and the contracting authority. The procedure and structure of litigation do not adequately allow for a multidimensional perspective to be considered where the distinct interests of various disappointed bidders, the winning bidder, the contracting authority, the interests of the particular community or group(s) that would benefit from the public function served by the procurement, the broader public interest and the interests of the fiscus do not neatly fit into two opposing camps.

South Africa would do well to consider drastic reform of its procurement dispute resolution and enforcement regime. In such reform initiatives it should learn from systems where more modern forms of control have been implemented. Good examples to consider include the notion of a procurement ombudsman as implemented in the Netherlands or Canada or more modestly just a single, independent procurement oversight agency as is common in many other African systems such as Botswana, Ethiopia, Ghana, Kenya, Nigeria, Rwanda, Tanzania and Uganda[[102]](#footnote-102).

1. G. Quinot, *An Institutional Legal Structure for Regulating Public Procurement in South Africa*,2014, pp. 9-47 (<http://africanprocurementlaw.org/wp-content/uploads/2016/01/OCPO-Final-Report-APPRRU-Web-Secure.pdf>); P. Bolton, "South Africa" in G. Quinot & S. Arrowsmith (eds), *Public Procurement Regulation in Africa*,2013, pp. 183 – 186. [↑](#footnote-ref-1)
2. South Africa has a mixed legal system with elements of both civil and common-law systems as well as an indigenous law system. D. Visser "Cultural Forces in the Making of Mixed Legal Systems", 2003-2004, *Tulane Law Review*,pp.50-70. In the context of state contracts, the mixed nature of the system is significant since public law, particularly administrative law, is mostly based on common law, while contract law is based on civil-law traditions. [↑](#footnote-ref-2)
3. See P.J.H. Maree, *Investigating an Alternative Administrative-Law System in South Africa* (unpublished doctoral dissertation, Stellenbosch University 2013, available at <http://scholar.sun.ac.za/handle/10019.1/85591>). [↑](#footnote-ref-3)
4. *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA) para 18. [↑](#footnote-ref-4)
5. *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*, 2014 (1) SA 604 (CC) para 31, 45; *Steenkamp NO v Provincial Tender Board of the Eastern Cape*,2007 (3) SA 121 (CC) para 21. [↑](#footnote-ref-5)
6. Act 1 of 1999, governing all public finances of national and provincial government entities (“PFMA”). [↑](#footnote-ref-6)
7. Notice R225 of 2005 in *GG* 27388 of 15 March 2005. [↑](#footnote-ref-7)
8. Act 56 of 2003, governing all local government entities (“MFMA”). [↑](#footnote-ref-8)
9. Notice R868 of 2005 in *GG* 27636 of 30 May 2005. [↑](#footnote-ref-9)
10. Act 5 of 2000, applicable to all public entities (“PPPFA”). [↑](#footnote-ref-10)
11. Notice R502 of 2011 in *GG* 34350 of 8 June 2011. [↑](#footnote-ref-11)
12. It must be noted that legal reforms have been announced, aimed at extending and formalising the mandate of the Office of the Chief Procurement Officer, see the 2016 Budget Speech by Minister of Finance, Pravin Gordhan on 24 February 2016 (<http://www.gov.za/speeches/minister-pravin-gordhan-2016-budget-speech-24-feb-2016-0000%20>) and the 2015 Medium Term Budget Policy Statement by the former Minister of Finance, Nhlanhla Nene, on 21 October 2015 (<http://www.gov.za/speeches/minister-nhlanhla-nene-2015-medium-term-budget-policy-statement-21-oct-2015-0000>). [↑](#footnote-ref-12)
13. C. Hoexter, “The structure of the courts” in C. Hoexter & M. Olivier (eds), *The Judiciary in South Africa*,2014, p. 3. [↑](#footnote-ref-13)
14. Act 3 of 2000 (“PAJA”). This is the main general administrative-law statute governing judicial review of administrative action. [↑](#footnote-ref-14)
15. *Koyabe and Others v Minister for Home Affairs and Others*, 2010 (4) SA 327 (CC) para 44. [↑](#footnote-ref-15)
16. Treasury Regulations 16A9.3. [↑](#footnote-ref-16)
17. KwaZulu Natal Provincial Treasury *Practice Note Number: SCM – 07 of 2006: Bid Appeals Tribunal* (2006) para 2. [↑](#footnote-ref-17)
18. KwaZulu Natal Provincial Treasury *Practice Note Number: SCM – 07 of 2006: Bid Appeals Tribunal* (2006) para 4. [↑](#footnote-ref-18)
19. KwaZulu Natal Provincial Treasury *Practice Note Number: SCM – 07 of 2006: Bid Appeals Tribunal* (2006) para 6.1. [↑](#footnote-ref-19)
20. Municipal Supply Chain Management Regulations 50(4)(a). [↑](#footnote-ref-20)
21. Regulation 50(5)(a), (6). [↑](#footnote-ref-21)
22. Act 32 of 2000 (“Systems Act”). [↑](#footnote-ref-22)
23. Systems Act section 62(3). [↑](#footnote-ref-23)
24. *Loghdey v City of Cape Town* (Western Cape High Court, unreported case no 100/09, 20 January 2010) para 33. [↑](#footnote-ref-24)
25. 2014 (1) SA 604 (CC) para 60. [↑](#footnote-ref-25)
26. Systems Act section 62(3). [↑](#footnote-ref-26)
27. Cf. *Loghdey v City of Cape Town* (Western Cape High Court, unreported case no 100/09, 20 January 2010); *Loghdey v Advanced Parking Solutions CC*,2009 (5) SA 595 (C) and *Syntell (Pty) Ltd v The City of Cape Town*, 2008, ZAWCHC 120. [↑](#footnote-ref-27)
28. 2011 (6) BCLR 646 (CC). [↑](#footnote-ref-28)
29. Para 31. [↑](#footnote-ref-29)
30. Para 36. [↑](#footnote-ref-30)
31. Regulation 16A9. [↑](#footnote-ref-31)
32. Regulation 38. [↑](#footnote-ref-32)
33. Treasury Regulation 16A9.1(a); MSCM Regulation 38(1)(a). [↑](#footnote-ref-33)
34. S. Williams-Elegbe, *Fighting Corruption in Public Procurement*, 2012, p. 76; P. Bolton, *The Law of Government Procurement in South* Africa, 2007, pp. 388-394. [↑](#footnote-ref-34)
35. Treasury Regulation 16A9.2; MSCM Regulation 14(1)(c), 38(1)(c), (d). [↑](#footnote-ref-35)
36. See, <http://www.treasury.gov.za/publications/other/Database%20of%20Restricted%20Suppliers.pdf>. [↑](#footnote-ref-36)
37. The maximum periods differ under the various statutory instruments. Under the Preferential Procurement Regulations, 2011 it is ten years; under the MSCM Regulations it is five years and under the Treasury Regulations there is no stated maximum period. [↑](#footnote-ref-37)
38. *Chairman, State Tender Board & Another v Supersonic Tours (Pty) Ltd*,2008 (6) SA 220 (SCA) para 14; *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd, Chairman of the State Tender Board v Sneller Digital (Pty) Ltd*,2012 (2) SA 16 (SCA) para 31. [↑](#footnote-ref-38)
39. Act 12 of 2004. [↑](#footnote-ref-39)
40. See section 5 below. [↑](#footnote-ref-40)
41. 2009 (5) SA 255 (SCA) para. 1. [↑](#footnote-ref-41)
42. 2014 (1) SA 604 (CC) para. 43. [↑](#footnote-ref-42)
43. *Qaukeni Local Municipality v F V General* Trading, 2009, ZASCA 66 para 23. [↑](#footnote-ref-43)
44. *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) para 29. [↑](#footnote-ref-44)
45. Constitution section 38. [↑](#footnote-ref-45)
46. See e.g. *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*, 2014 (1) SA 604 (CC) where the NGOs Corruption Watch and the Centre for Child Law joined the litigation as *amicus curiae* to advance the anti-corruption agenda and the interests of children that may be affected if the public contract award at stake (payments services for social grants) is invalidated. [↑](#footnote-ref-46)
47. PAJA section 7(1). [↑](#footnote-ref-47)
48. PAJA section 9. [↑](#footnote-ref-48)
49. [2007] SCA 165 (RSA) para 34. [↑](#footnote-ref-49)
50. 2007 (3) SA 121 (CC). [↑](#footnote-ref-50)
51. Para. 52. [↑](#footnote-ref-51)
52. Para. 51. [↑](#footnote-ref-52)
53. G. Quinot, “Worse Than Losing a Government Tender: Winning It”, 2008, 19, *Stellenbosch Law Review* pp. 113-114; M. Du Plessis & G. Penfold, “Bill of Rights Jurisprudence”, *Annual Survey of South African Law,*  p. 93, 2007. [↑](#footnote-ref-53)
54. J. Bleazard & S. Budlender, "Remedies in judicial review proceedings", *in* G. Quinot, *Administrative Justice in South Africa: An Introduction,* 2015, p. 268. [↑](#footnote-ref-54)
55. PAJA section 8(1)(e). [↑](#footnote-ref-55)
56. *Digital Horizons (Pty) Ltd v SA Broadcasting Corporation*,2008, ZAGPHC 272 para 7; also see *TBP Building & Civils (Pty) Ltd v East London Industrial Development Zone (Pty) Ltd*,2009, JDR 0203 (ECG) para 30; *Matlafalang Training CC and Another v MEC: Free State, Department of Public Works*,2008 ZAFSHC 136 para 7. [↑](#footnote-ref-56)
57. *Ikwezi Quarries t/a Blue Rock Quarries (Proprietary Limited) v MEC For Roads and Public Works, Eastern Cape Province and Others*, 2015; ZAECGHC 45 para 54; *Digital Horizons (Pty) Ltd v SA Broadcasting Corporation*, 2008, ZAGPHC 272para 7, 24 – 28; *TBP Building & Civils (Pty) Ltd v East London Industrial Development Zone (Pty) Ltd*,2009, JDR 0203 (ECG) para 34. [↑](#footnote-ref-57)
58. The duty on contracting authorities to conclude public contracts in terms of “a system which is fair, equitable, transparent, competitive and cost-effective”. [↑](#footnote-ref-58)
59. The right to just administrative action, i.e. administrative action that is lawful, reasonable and procedurally fair. [↑](#footnote-ref-59)
60. *Ikwezi Quarries t/a Blue Rock Quarries (Proprietary Limited) v MEC For Roads and Public Works, Eastern Cape Province and Others*, 2015, ZAECGHC 45 para 54. [↑](#footnote-ref-60)
61. J. Bleazard & S. Budlender, "Remedies in judicial review proceedings" *in* G. Quinot (ed), *Administrative Justice in South Africa: An Introduction,* 2015, p. 268-269. [↑](#footnote-ref-61)
62. 2015, ZAECGHC 45. [↑](#footnote-ref-62)
63. Para 65 – 66. [↑](#footnote-ref-63)
64. 2007 (3) SA 121 (CC); see G. Quinot, “Worse Than Losing a Government Tender: Winning It”, 2008, 19 *Stellenbosch Law Review* 101. [↑](#footnote-ref-64)
65. PAJA section 8(1). [↑](#footnote-ref-65)
66. *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*, 2014, ZACC 6. [↑](#footnote-ref-66)
67. 2015 (5) SA 245 (CC) para. 68. [↑](#footnote-ref-67)
68. In *City of Tshwane v Nambiti Technologies (Pty)* Ltd, 2016, 1 All SA 332 (SCA) the Supreme Court of Appeal took a different view and noted in an *obiter dictum* that the cancellation of an invitation to bid does not amount to an administrative decision that is reviewable and that such a decision is in any case not restricted to the conditions stated in regulation 8 of the Preferential Procurement Regulations, 2011. Apart from the fact that these were *obiter* remarks, they are in clear conflict with the judgment of the (higher) Constitutional Court in the *Trencon* case and is for that reason not binding. See G. Quinot, "Public Procurement", *Juta's Quarterly Review of South African Law,* 4; 2015*,* para. 2.1. [↑](#footnote-ref-68)
69. 2009 (4) SA 628 (SCA) para. 11. [↑](#footnote-ref-69)
70. *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*,2008 (2) SA 481 (SCA) para 23. [↑](#footnote-ref-70)
71. *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*,2008 (2) SA 638 (SCA); *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another*,2010 (4) SA 359 (SCA). [↑](#footnote-ref-71)
72. *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others*,2008 (2) SA 481 (SCA); *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*,2014 (4) SA 179 (CC). [↑](#footnote-ref-72)
73. PAJA section 8(1)(c)(ii)(aa). [↑](#footnote-ref-73)
74. 2015 (5) SA 245 (CC). [↑](#footnote-ref-74)
75. Para 47. [↑](#footnote-ref-75)
76. *Minister of Finance v Gore NO*,2007 (1) SA 111 (SCA)*; Transnet Limited v Sechaba Photoscan (Pty) Limited*,2005 (1) SA 299 (SCA). [↑](#footnote-ref-76)
77. 2007 (3) SA 121 (CC). [↑](#footnote-ref-77)
78. *Steenkamp NO v Provincial Tender Board, Eastern Cape*,2007 (3) SA 121 (CC) para. 54, 56. [↑](#footnote-ref-78)
79. PAJA section 8(1)(c)(ii)(bb). [↑](#footnote-ref-79)
80. *Darson Construction (Pty) Ltd v City of Cape Town and Another*,2007 (4) SA 488 (C). [↑](#footnote-ref-80)
81. *Trustees of the Simcha Trust (IT 1342/93) v De Jong and Others*, 2015 (4) SA 229 (SCA) para. 27. [↑](#footnote-ref-81)
82. 2011 (4) SA 642 (GSJ). [↑](#footnote-ref-82)
83. 2013, ZASCA 14. [↑](#footnote-ref-83)
84. *Steenkamp NO v Provincial Tender Board, Eastern* Cape, 2006 (3) SA 151 (SCA) para 12, 51; *Logbro Properties CC v Bedderson NO and Others*,2003 (2) SA 460 (SCA) para. 7. [↑](#footnote-ref-84)
85. *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd,* 2009 (1) SA 163 (SCA). [↑](#footnote-ref-85)
86. 2003 (2) SA 460 (SCA) para 11. [↑](#footnote-ref-86)
87. 2014 (4) SA 179 (CC). [↑](#footnote-ref-87)
88. Para. 61. [↑](#footnote-ref-88)
89. Municipal Supply Chain Management Regulations, 2005, regulation 21(e). [↑](#footnote-ref-89)
90. See section 3.1.2 above. [↑](#footnote-ref-90)
91. Regulation 16A9.2. [↑](#footnote-ref-91)
92. Regulation 13(1)(b) [↑](#footnote-ref-92)
93. Regulation 38(1)(d)(ii), (g)(iii). [↑](#footnote-ref-93)
94. Constitution section 181(5). [↑](#footnote-ref-94)
95. Constitution section 188(1). [↑](#footnote-ref-95)
96. eports of the AG are available at <http://www.agsa.co.za/Documents/AGSAreports.aspx>. [↑](#footnote-ref-96)
97. G. Quinot, *An Institutional Legal Structure for Regulating Public Procurement in South Africa,* 2014, p. 48 (<http://africanprocurementlaw.org/wp-content/uploads/2016/01/OCPO-Final-Report-APPRRU-Web-Secure.pdf>). [↑](#footnote-ref-97)
98. Auditor-General of South Africa *Consolidated General Report on National and Provincial Audit Outcomes 2014/5* (2015) 2, 67. [↑](#footnote-ref-98)
99. Act 12 of 2004. [↑](#footnote-ref-99)
100. Section 28. See S. Williams & G. Quinot, "To Debar or not to Debar: When to Endorse a Contractor on the Register for Tender Defaulters", *South African Law Journal,* 125, 2008, p. 248; S. Williams & G. Quinot, “Public Procurement and Corruption: The South African Response”, *South African Law Journal ,* 124, 2007 p. 339. [↑](#footnote-ref-100)
101. The Register for Tender Defaulters is publicly available at: <http://www.treasury.gov.za/publications/other/Register%20for%20Tender%20Defaulters.pdf>. [↑](#footnote-ref-101)
102. See G Quinot*, An Institutional Legal Structure for Regulating Public Procurement in South Africa*,2014, para. 86-93 <http://africanprocurementlaw.org/wp-content/uploads/2016/01/OCPO-Final-Report-APPRRU-Web-Secure.pdf>). [↑](#footnote-ref-102)