Dispute Resolution

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In this issue

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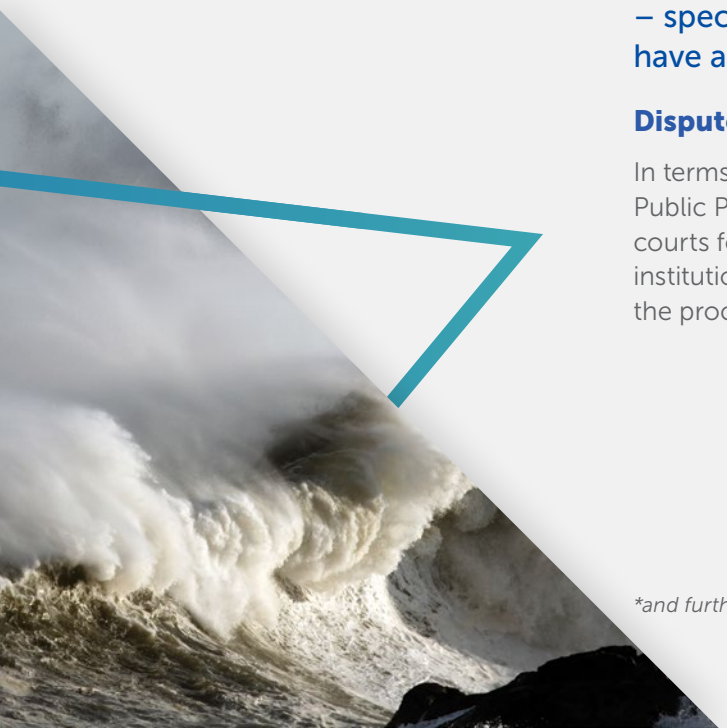
DISPUTE RESOLUTION
ALERT

Reflections on the Public Procurement Act ahead of the Constitutional Court challenge to its validity



It has been more than a year since the Public Procurement Act 28 of 2024 (Act) was passed by Parliament (16 May 2024) and almost a year since it received the assent of the President (18 July 2024). However, it has not yet come into operation as the President has not proclaimed a commencement date. Recently, the City of Cape Town **applied** to the Constitutional Court to declare the manner in which the Act was adopted as being inconsistent with the Constitution and as such, invalid. This article does not get into that application, but the application has made the Act newsworthy again. Riding the wave, we take a brief moment to look at the dispute resolution provisions under the Act – specifically how information disclosure could have an impact on judicial review proceedings.

Dispute resolution under the Act

In terms of the Act, a disgruntled bidder may approach the Public Procurement Tribunal (Tribunal) for a review or the courts for a judicial review of decisions taken by a procuring institution (but only after applying for a reconsideration to the procuring institution within the stipulated timeframe).

Tribunal hearings will take place before specific panels. Section 50 of the Act states that a panel must determine the procedure for proceedings, subject to the Act and any Tribunal Rules (which are still to be determined), and that the panel must: *"strive to ensure that proceedings are conducted with as little formality and technicality, and as expeditiously, as the requirements of this Act and a proper consideration of the matter permit"**.

Obtaining a record of the decision

What is meant by "*little formality and technicality*" remains to be seen, as is the case with the Tribunal Rules. But what must at least be present before the Tribunal is a record of the decision of the procuring institution – including the decision and application for reconsideration. Without this, it would be impossible for the Tribunal to deliver an order using the wide powers available to it under section 51.

A few questions arise at this stage:

- Does the applicant need to be provided with the record of the decision of the procuring institution at the application for reconsideration stage?
- Or does the applicant need to be provided with the record of the decision at the application for review before the Tribunal/Panel?
- What should the record of the decision comprise of?

**and further that "any party may be represented by a legal representative during the proceedings" . . . Yay!*

Reflections on the Public Procurement Act ahead of the Constitutional Court challenge to its validity

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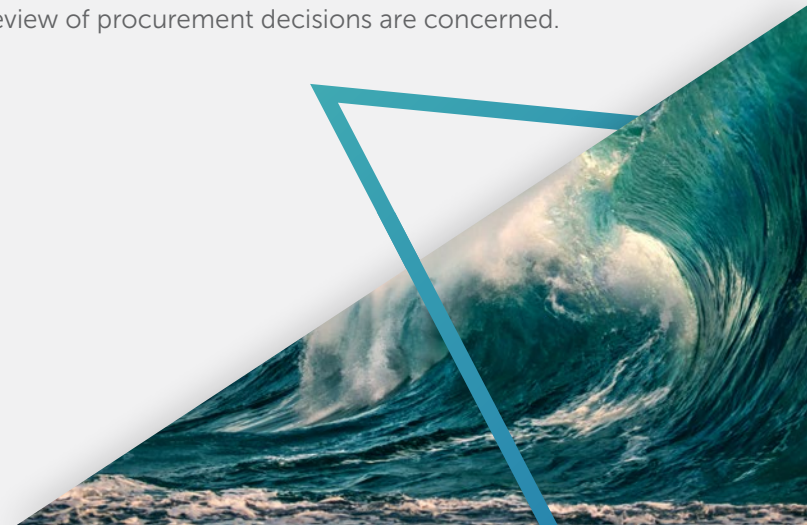
Experience tells us that it should ideally happen at the stage of an application for reconsideration, but that at the very least it must happen at the application for review before the Tribunal/Panel, so that the applicant is able to formulate a cogent case for review. However, section 31 may be an indication that no record will be necessary at either stage (i.e. the application for reconsideration or at the application for review before the Tribunal/Panel). That section obliges the Minister of Finance (Minister) to prescribe the requirements for procuring institutions to disclose information regarding procurement including, all information regarding bids as well as the date, reasons for and value of an award to a bidder, among other things. The Act states that the information must be published *"as quickly as possible on an easily accessible central online portal that is publicly available free of charge"*. *What "as quickly as possible"* actually means will need to be fleshed out by the Minister, but if it means that the information must be published on the date of the award, then in respect of the questions above, it could mean that no record needs to be provided at the reconsideration stage because an applicant would have enough information to enable it to be able to put forward an application for reconsideration.

However, that's as far as it goes because in review proceedings both the applicant and the review body would need to be provided with a more comprehensive record by the procuring institution. What should that record include? Again, experience tells us that it would need to comprise of all the bids submitted as well as the internal evaluation processes taken by the procuring institution, including the reports and minutes of meetings by the bid evaluation committee, the bid adjudication committee, the audit and risk committee (if it exists), and the evaluation records relating to the ultimate decision-maker of the procuring institution. Ideally the Tribunal Rules will provide a standardised checklist of documents to be provided so that the spirit of "*little formality and technicality*" and "*expeditiously*" can be upheld.

Approaching the court for a judicial review

Assuming that the application for review is unsuccessful, or for some or other reason the applicant remains "*disgruntled*", then in terms of the Act, the applicant would be able to approach a court for a judicial review.

Now this is where it becomes interesting because traditionally, judicial review proceedings proceed by way of a Rule 53 application. Rule 53 of the Uniform Rules of Court provides for the mandatory disclosure of the record of the decision and an opportunity for an applicant to supplement its application upon receipt and consideration of the record. If the applicant already has the record at the Tribunal/Panel stage, then it could make Rule 53 redundant in so far as judicial review of procurement decisions are concerned.



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Applicants may find themselves using Rule 6 of the Uniform Rules of Court as the standard route to judicial review. Rule 6 provides for the process for ordinary applications. That may have a neat side effect of making judicial review applications move expeditiously through the courts. However, there are other reasons why an applicant may still want to use Rule 53. For example, if the applicant believes that there were things missing in the record before the Tribunal/Panel and wants to use the provisions in Rule 53 to extract the missing information, and potentially many other reasons that crafty lawyers will think of. Either way, it may or not matter – depending on the outcome of the City of Cape Town's Constitutional Court challenge. For now, these reflections on the Act serve as useful reminders that as much as the Act is needed, it does raise a lot of questions about how procurement by the state will end up being done and how disputes relating to procurement decisions will be conducted.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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