

# **BALANCING INNOVATION AND REGULATION: A LOOK AT UNSOLICITED BIDS AND PROPOSALS' POTENTIAL TO UNLOCK INNOVATION IN PUBLIC PROCUREMENT IN SOUTH AFRICA**

**Imraan Abdullah & Charles Green**

**(2025) 12 APPLJ 27**

## **ABSTRACT**

Public procurement generally entails that the state approach the private sector for goods and services it requires. However, in the South African context, it is recognised that the private sector can approach the public sector with unsolicited bids or proposals to address challenges that the public sector faces, such as aging infrastructure and poor service delivery. Thus, allowing the private sector to take the initiative to collaborate with the public sector, as opposed to responding to requests for proposals from the public sector, can be viewed as a reactive and restrictive approach to addressing the unique challenges that the public sector faces. This article argues that unsolicited proposals should be encouraged, provided they are regulated and there are clear guidelines to ensure compliance with the Constitution and established public procurement norms and principles. Unfortunately, the regulation of unsolicited proposals differs when it comes to ordinary procurement by the state as opposed to unsolicited offers in public-private partnerships ("PPPs"). As such, this article explores the differential treatment by National Treasury and our courts with respect to unsolicited bids in the context of ordinary procurement versus the treatment of unsolicited proposals in PPPs. It is argued that National Treasury takes a light approach to regulating the process when unsolicited bids are received, evaluated and awarded by the public sector in cases of ordinary procurement but a heavy approach for unsolicited proposals received by organs of state where municipalities and PPPs are concerned. By referring to judgments on the subject-matter, this article considers the danger that the light approach can and has had, and ultimately argues that, going forward, National Treasury must also apply the heavier approach utilized for PPPs in the context of ordinary procurement.

# BALANCING INNOVATION AND REGULATION: A LOOK AT UNSOLICITED BIDS AND PROPOSALS' POTENTIAL TO UNLOCK INNOVATION IN PUBLIC PROCUREMENT IN SOUTH AFRICA

Imraan Abdullah  
*LLB LLM*  
*Director at Cliffe Dekker Hofmeyr*

Charles Green  
*LLB*  
*Associate at Cliffe Dekker Hofmeyr*

## 1 Innovation, public procurement and unsolicited bids or proposals

African countries, particularly South Africa, face infrastructure challenges which result in a lack of basic service delivery such as access to water, electricity and healthcare, to name only a few key areas. The traditional reactive approach to public procurement, where government simply purchases "off-the-shelf" solutions, is insufficient to address the complex, interconnected challenges facing developing nations.

In recent years, the use of public procurement as a tool to drive innovation has received growing attention internationally, with the procurement of innovative products and services considered vital for improving the quality and efficiency of public services and to address important socio-economic challenges.<sup>1</sup> This global trend toward innovation-oriented procurement presents an opportunity for South Africa to leverage its substantial purchasing power to drive technological advancement and address the infrastructure deficits it faces.

This is particularly relevant within the South African context, where service and infrastructure challenges are evident, to the extent that in some sectors, like electricity, rail and water, there is a potential risk for a total collapse of the infrastructure systems. Much of government's efforts to date have been to react to the aging infrastructure. A relevant example is Eskom's constant use of emergency or urgent procurement at Kusile and Medupi to ensure that the respective power stations remain in operation.<sup>2</sup> This article argues that the use of innovation in public

---

<sup>1</sup> Bolton 2016:2. See also, Edquist & Quinot 2025.

<sup>2</sup> See Moodley 2022.

procurement can address these infrastructure deficits. Particularly when one considers that the objective of public procurement for innovation is not only to encourage the development of new, or enhancement of existing products or services, but to target functions that satisfy human needs, solve societal problems or support agency missions or needs.<sup>3</sup>

There are numerous benefits for the use of innovation through public procurement in that it can directly improve service delivery. It can make public services more effective by enhancing delivery or adding new services that create value for the public, and it can also make them more efficient. Although buying innovations often involves purchasing costs, their adoption can lead to overall life-cycle cost savings and long-term benefits.<sup>4</sup> Importantly, the procurement of innovative products and services can provide unique ways to deal with specific challenges such as the maintenance and upgrading of critical infrastructure. In this article, we identify two approaches to procurement for innovation in South Africa.

In South Africa, the traditional approach to procurement for innovation is that the state places an order for the fulfilment of certain functions (that are not met at the moment of the order or call) within a reasonable period of time through a new or improved product or service.<sup>5</sup> In the case of regular procurement, public agencies obtain ready-made products or services "off the shelf", and normally there is very little scope for innovation.<sup>6</sup> With regards to the traditional approach, the procuring entity formulates its requirements in functional terms and not in product terms. In other words, the function to be achieved should be defined, instead of defining the product to achieve it.<sup>7</sup> The latter approach would be a way to develop the creativity and innovativeness of the potential supplier.<sup>8</sup> In South Africa, this approach is sometimes served through the two-stage competitive bidding process or via alternative proposals being issued to the market, which we will touch on in more detail later on in this contribution. Due to the nature of procuring innovative products and/or services it may very well be that the costs will be higher than that of the previous products and/or services used by the state. In such instances, the evaluation of innovative procurement should emphasise total cost over time rather than focusing solely on price.<sup>9</sup>

The non-traditional approach would be where the private sector approaches the state with an unsolicited offering. The potential benefits

---

<sup>3</sup> Edquist et al 2015:6 & 7.

<sup>4</sup> Bolton 2016:5 quoting Angel & Blay 2014 *Eur Procurement & Pub Private Partnership L Rev* 4–5.

<sup>5</sup> Edquist et al 2015:6 & 7.

<sup>6</sup> Edquist et al 2015:6.

<sup>7</sup> Bolton 2016:12.

<sup>8</sup> Bolton 2016: 5.

<sup>9</sup> Edquist et al 2015:37. See also, Bolton 2016:5

of this non-traditional approach have already been recognised in South Africa and instruments have been published to regulate how they are to be received in order to create "an environment where advantage can be taken of the private sector's capacity to conceptualise, package and develop projects whilst ensuring and protecting public policy objectives at the same time".<sup>10</sup> A cumulative examination of the various instruments reveals that organs of state may consider unsolicited proposals if they meet at least two key requirements: first, the goods or service being offered must be unique; and second, the goods or service being offered must be innovative.

Thus, inherent in its design is the requirement that an unsolicited bid or proposal must offer something unique or a unique design that ultimately affects the development and management of goods or services, unlocking added value in service delivery. The case for innovation, in this regard, relies on the public sector's ability to raise funds and resources which would generally be unavailable to the private sector to address long-term issues (such as electricity and water sanitation). Moreover, the private sector tends to excel at responding to market signals for innovative solutions together with having the necessary skills and expertise to fulfil such proposals.<sup>11</sup>

A compelling example of this innovation potential in practice can be seen in South Africa's rail and port sector, where government had received numerous unsolicited proposals from the private sector offering investment, skills, and expertise to support the rehabilitation and reform of struggling rail and port systems. As a result of numerous unsolicited proposals, it prompted the Department of Transport to engage with the private sector in terms of a Request for Information before deciding to issue a Request for Proposals for Private-Sector Participation by rail and port stakeholders.<sup>12</sup>

It would seem that there is some benefit in public procurement being used for innovation. An ensuing question, which is central to this article, is how to achieve it in the South African context. One viable option which presents itself is the traditional route where the public sector calls for solutions from the private sector. Although this solution is attractive it does have some issues. For instance, the traditional approach requires the state to be acutely aware of the solutions it requires from the private

---

<sup>10</sup> See National Treasury Practice Note No 11 of 2008/2009: Unsolicited Proposals. See also Bolton: 2016:16 for a discussion on unsolicited offers.

<sup>11</sup> For how this approach is explained in the context of identification of a social or agency challenge or need, see Edquist et al 2015:10. Also, the Renewable Energy Independent Power Producer ("REIPP") is a useful example of how the private sector has the necessary skills and expertise to provide public services to the public sector.

<sup>12</sup> SA Government Media Statement 2025.

sector, and it also assumes that the state has the necessary skill and information to successfully approach the market in this manner.

Thus, a readily available solution to this seems to present itself in the form of unsolicited bids or proposals, which provides the private sector with a legitimate opportunity to approach government to propose its innovative goods and services to the public sector at large. Unfortunately, that is not the impression one gets when hearing of unsolicited proposals in the public sector. As a consequence of state capture, unsolicited bids or proposals are synonymous with corruption, malfeasance and non-competitive bidding. To assess whether unsolicited proposals can operate as a tool for innovation while complying with constitutional norms, this contribution next compares the ordinary procurement rules governing unsolicited bids with the public-private partnership ("PPP") regime including the specific municipal requirements. It then considers the harms that can arise out of a differential approach, in particular the light versus heavy approach. It finally argues for a unified approach to regulating unsolicited proposals in the current South African context irrespective of whether they occur in the context of ordinary procurement or that of PPPs.

## **2 Differential treatment at a legislative and regulatory level**

Constitutionally, public procurement generally refers to contracting by the state for goods or services.<sup>13</sup> We will resist the temptation to say that this generally refers to the purchasing of goods or services by the state because our courts have already confirmed that public procurement is not limited to purchasing but includes acquisition of services related to the procuring entities mandate,<sup>14</sup> the disposal of assets,<sup>15</sup> and PPPs. If public procurement in South Africa includes various types of transactions, it is reasonable to assume that the regulation of public procurement will also be multifaceted. That would mean that by implication the regulation of public procurement should be multidimensional in that regulation should differ depending on the level of government involved or who the procuring entity is. But is that a correct assumption when one considers the regulation of unsolicited bids and unsolicited proposals which is meant to prevent distinct constitutional harms from occurring? These harms were spelled out very early by National Treasury when it stated that it was not in favour of unsolicited bids because – at least in the

---

<sup>13</sup> See s 217 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

<sup>14</sup> *Agribee Beef Fund (Pty) Ltd v Eastern Cape Development Agency* (CCT 26/22) [2023] ZACC 6 (1 February 2023).

<sup>15</sup> See *Airports Company South Africa SOC Ltd v Imperial Group Ltd* (1306/18) [2020] ZASCA 02 (31 January 2020).

context of PPPs – they “are difficult to manage, threaten to violate constitutional protections of fair administrative process and competitive procurement, and internationally, have not proven to deliver faster or secure better value for money in PPPs”.<sup>16</sup> Despite these strong viewpoints, National Treasury did not completely prohibit unsolicited bids or unsolicited proposals from being received or considered. Instead, it decided to regulate the manner in which they were to be received or considered. But it did not do so uniformly, resulting therein that today we are saddled with a variety of regulations that deal with the same issue and indeed the same fundamental harm that ought to be protected against. Before proceeding further it is useful to set out the regulations as they have emerged.

In 2004, National Treasury published the Implementation of Supply Chain Management Circular (“the Circular”). Clause 2 of the Circular confirms that accounting officers or accounting authorities have no obligation to consider unsolicited bids received outside of normal procurement processes. However, if the accounting officer or accounting authority was to consider an unsolicited bid, it could only do so if the product or service offered is “a unique innovative concept” that would be “exceptionally beneficial to, or have exceptional cost advantages” for the procuring entity. Further, the bidder must be the “sole provider” of the product or service, and that the need for the product or service had been established during the procuring entities strategic planning and budgeting process. The Circular is binding on all national and provincial departments, constitutional institutions, and public entities listed in Schedule 3A and 3C of the Public Finance Management Act 1 of 1999 (“PFMA”). Schedule 2 major public entities, Schedule 3B national government business enterprises and Schedule 3D provincial government business enterprises are, therefore, not obligated to comply with the Circular. These, in particular Schedule 2 major public entities, are those entities that are typically involved in complex procurement arrangements on account of them being infrastructure-focused institutions, such as Eskom and Transnet.

Several year later, in 2009, National Treasury published National Treasury Practice Note No 11 of 2008/2009 (“the Note on Unsolicited Proposals”). The Note on Unsolicited Proposals provides the framework and process that should be undertaken by organs of state in dealing with unsolicited proposals with the objective of creating “an environment where advantage can be taken of the private sector’s capacity to conceptualise, package and develop projects whilst ensuring and protecting public policy objectives at the same time”.

---

<sup>16</sup> National Treasury’s PPP Manual – Module 1: South African Regulations for PPPs 11.

The Note on Unsolicited Proposals seems to draw a distinction between unsolicited bids and unsolicited proposals as it defines an unsolicited proposal as any proposal or concept received by an institution outside its normal procurement process that is not an unsolicited bid (ie, where a submission must be innovative, unique and provided by a sole source supplier in terms of the Circular). From our reading of the two instruments, it appears that an unsolicited bid must be innovative and unique and, importantly, can only be supplied by a sole supplier, whereas an unsolicited proposal is a broader concept open to any proposal, that is one that does not necessarily need to be unique or innovative nor does it need to be provided by a sole source supplier – although it would certainly be advantageous to the proponent if these criteria are met.

In addition to national and provincial departments, constitutional institutions, and public entities listed in Schedule 3A and 3C of the Public Finance Management Act PFMA, the Note on Unsolicited Proposals is also binding on Schedule 3B national government business enterprises and Schedule 3D provincial government business enterprises. However, Schedule 2 major public entities are not obligated to comply with the Note on Unsolicited Proposals; it seems that their procurement of unsolicited bid or proposals will be guided by section 217 of the Constitution and the entities' respective supply chain management ("SCM") policies. To approach a public entity which is listed as a Schedule 3 public entity on an unsolicited basis, the private sector would have to comply with the criteria set out in paragraph 2 of the Note on Unsolicited Proposals

According to paragraph 2.1, institutions are not obligated to consider unsolicited proposals, but may do so if certain general requirements are met. These include the existence of a comprehensive and relevant feasibility study that establishes a clear business case. Specifically, the feasibility study must assess the costs and benefits of procuring the proposed product or service. It should evaluate the uniqueness or innovation of the approach, its scientific, technical, or socio-economic merit, and how well it aligns with the institution's strategic goals. The study must also determine whether the proposed cost is realistic and justified, and may include any other relevant considerations the institution deems important. In addition to the feasibility study, the proposal must demonstrate innovation, either through the design of the product or service, the approach to project development and management, or by offering a new and cost-effective method of service delivery.

Paragraph 2.2 then goes on to outline the specific information that must be provided about the proponent submitting the unsolicited proposal. This includes the proponent's name, address, identification or registration

number (if a corporation), value added tax ("VAT") registration number, and contact details of an authorised representative. The proposal must also identify any confidential or proprietary data, list other South African institutions that have received a similar proposal, and include a current South African Revenue ("SARS") Tax Clearance Certificate for the proponent and each member of a consortium or joint venture, if applicable. Furthermore, the proponent must submit documents typically related to public procurement bids, namely a declaration of interest as per Standard Bid Document ("SBD") 4, a declaration of past supply chain practices as per SBD 8, and a statement confirming that the proposal was not based on non-public information obtained from officials.

Lastly, paragraph 2.3 turns the focus to the specific information of the product or service being proposed that must be included in the unsolicited proposal. This includes a concise title and abstract (approximately 200 words), a statement of objectives, approach, and scope, and a description of how the proposal is demonstrably innovative, supported by evidence that the proponent is the sole provider of the innovation. It must also detail the anticipated benefits or cost advantages to the institution, including pricing or cost estimates sufficient for evaluation. Additionally, the proposal should explain how it aligns with the institution's strategic growth and development plans and specify a validity period for consideration, which must be no less than six months.

Comparatively, the Note on Unsolicited Proposals sets out certain red flags that would exclude a proposal. The most obvious of these is where the proposal relates to known requirements that could within reasonable and practicable limits be acquired through competitive bidding or where the product or services are generally available.

Despite the distinction drawn between an unsolicited bid and an unsolicited proposal in the definition of an unsolicited proposal, the Note on Unsolicited Proposal states that an unsolicited proposal would be considered appropriate if it adheres to the requirements of an unsolicited bid. In addition, the Note on Unsolicited Proposals provides for a mechanism if the unsolicited proposal relates to a PPP and also makes provision for an unsolicited proposal that is not a PPP.

Once all the evaluations are completed, an unsolicited proposal agreement must be entered into. Where the unsolicited proposal relates to a PPP, the institution must still initiate a formal public procurement process. This includes issuing a Request for Qualification ("RFQ") to test market interest, followed by a Request for Proposals ("RFP") if suitable responses are received. A competitive bidding process must then be conducted, involving both the original proponent and other qualified bidders. If the proponent is not awarded the contract, they must be reimbursed for audited costs as agreed. The bid documents must

disclose the proposal's unsolicited origin and outline reimbursement terms.

For a long period of time, the Note on Unsolicited Proposals was the principal reference point for regulating unsolicited proposals in the national sphere of government and amongst Schedule 3 entities. This is evident even in the SCM Policies of certain Schedule 3 entities which typically mirror the Note. For instance, the Rand Water SCM Policy provides that "Rand Water recognises that unsolicited bids may be received from the market especially for the purposes of innovation. Such unsolicited bids will be handled in accordance with applicable legislation". The Government Employees Pension Fund similarly provides that it may only consider an unsolicited bid if the product or service offered is a unique innovation concept with exception benefit and the person who made the bid is the sole provider and, furthermore, there is a need for the product.

The most recent additions came in the form of the Amendments to Treasury Regulations under the Public Finance Management Act 1 of 1999 which were published on 7 February 2025 in the Government Gazette ("the Amendment Regulations"). The Amendment Regulations introduce a structured mechanism for handling unsolicited proposals within the existing PPP framework. These provisions establish clear eligibility criteria, requiring that unsolicited proposals that originate from private entities align with strategic sectors or institutional objectives while demonstrating added value in service delivery. Institutions do, however, retain discretion over acceptance but must follow prescribed procedures upon doing so, including registration with the relevant treasury and the imposition of a validity period during which competing feasibility studies are restricted. Proponents bear all associated costs and may be entitled to a development fee if their compliant bid is unsuccessful but the project reaches financial close. Automatic pre-qualification for bidding is granted to the original proponent, reinforcing procedural fairness. Importantly, entities listed on the restricted suppliers' database or those with relevant criminal convictions are expressly barred from submitting Unique Selling Propositions ("USP"s), ensuring ethical integrity in the procurement process.

Like the Note on Unsolicited Proposals, the Amendment Regulations do not apply to Schedule 2 major public entities. However, the specific inclusion of provisions related to unsolicited proposals under the PPP regulations adds a measure of regulatory weight to the requirements. As regards the stated requirements in particular, there is a shift away from the requirement that the unsolicited proposal needs to be innovative or unique toward strategic alignment and value contribution. The Amendment Regulations seem to prioritise alignment with national priorities and measurable public benefit over novelty or exclusivity.

The Amendment Regulations do not do away with the Note on Unsolicited Proposals as the Note is still relevant for non-public private partnership proposals.

At this point, it is useful to summarise the position in terms of statutory regulation to establish the "lightness" or "heaviness" of the approach. In our view, the Circular represents the lightest form of regulation because it only requires that the goods or services tendered be innovative and unique and supplied by a sole-source supplier. Beyond that there are no further requirements. This approach has its problems: Sole-source supplier approval is obtained by way of a deviation process (recently rebranded as "procurement by other means"). In practice, we see many abuses relating to sole-source suppliers via a deviation process and there are also reported judgments dealing with this.<sup>17</sup> Furthermore, innovation and uniqueness are concepts that have a subjective element about them.

In terms of regulatory weight, the Note on Unsolicited Proposals ranks above the Circular. The Note on Unsolicited Proposals sets out many more requirements than the Circular, two of which are very important: first being the preparation of a feasibility study and, second, the exclusion of goods or services that can be reasonably or practically obtained through a competitive bidding process or where these goods or services are readily available. The likelihood for abuse is therefore mitigated under the Note on Unsolicited Proposals. The heaviest of the three is the Amended Regulations which must be complied with where the unsolicited proposal is a PPP. It is well known in the market that the regulatory process for establishing a formal PPP project is arduous and there is limited scope for abuse of process.

A question may arise as to what regulatory instrument governs how Schedule 2 major public entities receive unsolicited bids or proposals. Regarding unsolicited bids or proposals it would seem that the provisions of section 217 of the Constitution would be applicable as well as the relevant provisions catering for unsolicited bids or proposals in their SCM policies. Thus, Schedule 2 major public entities, which we argue require innovation the most in order to address societal issues or challenges, are not regulated by any specific provisions. The knock-on effect of such a regulatory lacuna is that the private sector does not know how to approach Schedule 2 major public entities with their ideas for innovation.

At local government level, unsolicited bids are regulated by section 113 of the Municipal Finance Management Act 56 of 2003 ("MFMA") which

---

<sup>17</sup> See, eg, *City of Tshwane Metropolitan Municipality v New GX Enviro Solutions and Logistics Holdings (Pty) Ltd* (53694/20) [2021] ZAGPPHC 390.

provides that a municipality or municipal entity is not obliged to consider an unsolicited bid received outside of its normal bidding process, and further provides that when a municipality or municipal entity decides to consider an unsolicited bid, it must do so in accordance with the prescribed framework. Like at national level, there is no absolute prohibition against receiving and evaluating an unsolicited bid provided it complies with the prescribed framework.

The prescribed framework referred to in the MFMA is the Municipal Supply Chain Management Regulations ("SCM Regulations"). Regulation 37 of the SCM Regulations states that municipalities are not obliged to consider unsolicited bids received outside the normal bidding process. If a municipality decides to consider such a bid, it may only do so if: (1) the product or service is a demonstrably or proven unique innovative concept; (2) it will be exceptionally beneficial to, or have exceptional cost advantages for, the municipality; (3) the bidder is the sole provider; and (4) the accounting officer found the reasons for not following the normal bidding process to be sound.

If these conditions are met, the municipality must publicly announce its decision, provide reasons for not opening the bid to competition, explain the potential benefits, and invite public comments for a period of 30 days. All comments, including responses from the bidder, must be submitted to National and Provincial Treasury. The adjudication committee must consider the bid in a public meeting, taking into account public and Treasury comments, and may make an award or recommendation. If Treasury recommendations are not followed, reasons must be submitted to the Auditor-General, National Treasury, and Provincial Treasury within seven days, and no contract may be signed within 30 days of this submission.

Regulation 37 is procedurally more onerous than the Note on Unsolicited Proposals. While both frameworks require that unsolicited proposals be innovative and from a sole provider, Regulation 37 mandates public disclosure, a 30-day comment period, and Treasury review before any contract can be signed. In contrast, the Practice Note allows for more flexible internal evaluation, including direct negotiation in some cases, though it demands more extensive documentation and feasibility analysis upfront. Overall, Regulation 37 imposes stricter transparency and oversight requirements.

If the unsolicited bid relates to a PPP, then the municipality receiving the bid, in addition to first assessing whether the unsolicited bid meets the requirements of Regulation 37 (unique, innovative, sole provider, exceptionally beneficial, etcetera), must comply with the directions contained in Module 5 of the Municipal Service Delivery and PPP Guidelines, published by National Treasury. It requires the unsolicited bid

to be subjected to the full public-private project cycle contained in National Treasury Regulations, which would now also imply compliance with the Amendment Regulations. The local government requirements represent a uniform and heavy regulatory approach to dealing with unsolicited bids and proposals relating to PPPs.

### 3 Discussing the harms

The regulation of unsolicited bids or proposals, irrespective of whether they are in the context of ordinary procurement for goods and services or for PPPs, is put in place to mitigate the occurrence of harm. Harm can be avoided through regulation that prevents the violation of constitutional principles of fair administrative process and competitive procurement and ensures that the state receives value for money. Unfortunately, recent examples in South Africa demonstrate that the regulation, particularly the regulation of non-public private partnership types of unsolicited bids or proposals, has not prevented harm from occurring.

A good starting point is Parts 1 and 4 of the report delivered by the Judicial Commission of Inquiry into State Capture ("the Report"), which flags proposals made to government entities outside of a competitive process as being a major risk area for corruption, fraud and state capture. In particular, the Commission took issue with the use of sole-source suppliers as the legal justification to push through an unsolicited proposal. This is a primary requirement for unsolicited bids in terms of the Circular (along with innovation) and is also a requirement under the Note on Unsolicited Proposals. The Commission found that the requirement for a sole-source supplier can be easily manipulated through a deviation process. An example cited is the commercial relationship that developed between South African Airways Technical ("SAAT") and AAR, where AAR submitted an unsolicited proposal to South African Airways ("SAA") proposing a relationship between AAR and SAAT notwithstanding the fact that there was an open tender process at the time calling for bids relating to the unsolicited bid.<sup>18</sup> Similar examples that were provided during testimony are cited in Part 4 of the Report which deals with Eskom's receipt and treatment of unsolicited proposals by China Huarong, Tegeta and McKinsey.<sup>19</sup>

One might look at the Commission's report and possibly argue that these incidents relate to Schedule 2 entities who are in any event not tightly regulated in the current regulatory framework but are self-regulated in terms of their own policies; hence, the propensity for abuse is stronger. However, that would be untrue as the risks associated with unsolicited

---

<sup>18</sup> Judicial Commission of Inquiry into State Capture Report: Part 1 591–617.

<sup>19</sup> Judicial Commission of Inquiry into State Capture Report: Part 4 Vol 4 155–249, 626–684.

bids or proposals have been highlighted in several judgments delivered by the Special Tribunal whose mandate is to recover public funds syphoned from the fiscus through corruption, fraud and illicit money flows.

In *SIU v Gekkonomics*,<sup>20</sup> ("*Gekkonomics*") the South African Broadcasting Corporation ("SABC") entered into a five-year contract with Infonomix (trading as Gekkonomics) for the commercialisation of its digital media strategy. The contract was initiated through an unsolicited proposal and awarded without a competitive bidding process or a properly justified deviation. The SABC's internal SCM policies required that deviations from competitive bidding be justified on the basis of sole-source procurement or emergency, and that such deviations be approved in accordance with the Delegation of Authority Framework ("DAF"). These requirements mirror those contained in the Circular. The Tribunal found that Infonomix did not meet the criteria for a sole-source provider and that the deviation process had been manipulated to favour the company.<sup>21</sup> The contract was declared void *ab initio* for violating section 217 of the Constitution and the SABC's own procurement policies.<sup>22</sup> Although the Special Investigating Unit ("SIU") sought repayment of R4.5 million paid to Infonomix, the court declined to grant this relief due to insufficient evidence of unjust enrichment.<sup>23</sup>

Similarly, in *SIU v Nkhane Projects*,<sup>24</sup> ("*Nkhane*") the Gauteng Department of Health awarded two high-value contracts to Nkhane Projects for the supply of personal protective equipment ("PPE") during the COVID-19 pandemic. These contracts were also based on an unsolicited proposal and were awarded without a competitive process, deviation approval, or notification to Treasury, in breach of the PFMA and Treasury Instructions.<sup>25</sup> The Treasury Instructions relied on were not the Note on Unsolicited Proposals but other recent instruction notes. The Tribunal found that the Department's chief financial officer and chief operating officer had acted beyond their delegated authority and failed to follow the prescribed procurement procedures. The contracts, valued at R129 million and R257 million respectively, were declared unlawful and invalid. The Tribunal ordered Nkhane to forfeit all profits earned under the contracts but

---

<sup>20</sup> *Special Investigating Unit v Gekkonomics Proprietary Limited t/a Infonomix* (90545/18) [2023] ZAGPPHC 1121 (1 September 2023).

<sup>21</sup> Paras 22-35.

<sup>22</sup> Paras 66-68.

<sup>23</sup> Paras 82-86.

<sup>24</sup> *Special Investigating Unit v Nkhane Projects and Supply (Pty) Ltd* (GP 04/2023) [2024] ZAST 9 (5 August 2024).

<sup>25</sup> Paras 4-5.

allowed compensation for reasonable expenses incurred in delivering the PPE.<sup>26</sup>

These two judgments demonstrate the harm identified by the State Capture Commission, namely the circumvention of competitive procurement processes through the misuse of sole-source supplier justifications and deviations, particularly where unsolicited bids or proposals are concerned. They also highlight the inadequacy of the current regulatory framework, particularly in its application to unsolicited bids or proposals outside the context of PPPs. In both cases, the Tribunal was, of course, only able to intervene after the fact, declaring the contracts invalid and attempting to fashion equitable remedies. However, the fact that such contracts were concluded at all – and in the case of *Gekkonomics*, that public funds were paid out without recovery – underscores the need for a more robust and uniform regulatory approach.

These cases support the argument that the heavier regulatory framework applied to unsolicited proposals in the context of PPPs – where, for example feasibility studies, transparency, and Treasury oversight are mandatory – should be extended to ordinary procurement. Without such convergence, the risks of corruption, wasteful expenditure, and constitutional violations will in all likelihood persist, undermining the integrity of public procurement in South Africa.

Another judgment involving the SIU offers a particularly instructive example of how the misuse of unsolicited proposals can manifest within the context of national government and infrastructure procurement – areas that often resemble PPPs in scale and complexity, but without the accompanying regulatory safeguards. In *SIU v Masetlaoka Scott Wilson*,<sup>27</sup> the Department of Correctional Services (“DCS”) sought to avoid returning R812 million in unspent funds to the National Treasury by fast-tracking a capital works programme for the renovation and replacement of correctional facilities. To do so, DCS purported to “piggyback” on an existing Department of Higher Education and Training (“DHET”) contract with a consortium led by MSW. However, the court found that this was a legal fiction: DCS was not formally joined to the DHET contract, and the agreements it entered into with MSW were materially different in scope, pricing, and the parties involved.<sup>28</sup> Crucially, the Tribunal found that the DCS had no lawful basis to rely on the DHET contract, which was not a transversal contract under Treasury regulations. The DCS’s conduct – motivated by a desire to avoid the return of funds – was found to be a

---

<sup>26</sup> Paras 6-12.

<sup>27</sup> *SIU v Masetlaoka Scott Wilson (Pty) Ltd* ZAGPPHC 23-08-2023 case no 22703/2018 (unreported).

<sup>28</sup> Paras 15-25.

deliberate circumvention of the competitive bidding process, in violation of section 217 of the Constitution and Treasury Regulation 16A6.4.<sup>29</sup> The Tribunal emphasised that the use of an unsolicited offer from MSW to conduct conditional assessments of 221 facilities was unlawful as it lacked a feasibility study, did not demonstrate innovation, and failed to meet the criteria set out in the Note for Unsolicited Proposals.<sup>30</sup>

This judgment is particularly significant in the context of PPP-like arrangements. While the DCS-MSW project was not formally a PPP, it involved large-scale infrastructure development and long-term service delivery – features that typically trigger the more rigorous regulatory framework under Regulation 16 of the MFMA. Yet, because the project was treated as ordinary procurement, it was subject only to the general PFMA and Treasury regulations, which proved insufficient to prevent abuse. The absence of mandatory feasibility studies, Treasury oversight, and public disclosure – hallmarks of the PPP framework – enabled the DCS to proceed with a scheme that was ultimately found to be unconstitutional and unlawful.<sup>31</sup>

Together with the *Gekkonomics* and *Nkhane* judgments, *SIU v Masetlaoka Scott Wilson* underscores the risks posed by the current multifarious regulatory approach to unsolicited proposals. It demonstrates that in high-value, infrastructure-heavy projects – where the stakes are akin to those in PPPs – the absence of a robust, uniform regulatory framework allows for manipulation, circumvention, and ultimately, harm to the public fiscus. Thus, these cases collectively support the view that the regulatory framework currently applied to PPPs should be consistently extended to all unsolicited proposals, irrespective of the procurement context. The central idea is to ensure a more uniform and robust approach to regulating unsolicited bids, promoting clarity and fairness across the board.

#### **4 What does a uniform approach look like?**

Prior to the enactment of the Public Procurement Act 28 of 2024 (“PPA”), it was commonly accepted that the regulation of procurement in South Africa was fragmented. According to Volmink, the regulatory system was “in a state of ‘procurement purgatory’” with “new rules appear[ing] and disappear[ing] with alarming frequency, creating uncertainty for procuring entities”.<sup>32</sup> Despite the enactment of the PPA, the legacy of fragmentation still exists; that is, until new regulations are developed and promulgated under the PPA. Whether these regulations will ever be

---

<sup>29</sup> Paras 21–30.

<sup>30</sup> Paras 27–28.

<sup>31</sup> Paras 30, 53.1 & 53.2.

<sup>32</sup> See Anthony 2020 for commentary on the Act as a bill prior to enactment.

developed and promulgated remains to be seen given the impending judicial challenge to the Act's validity. However, forgetting the impending judicial challenge for a moment, the opportunity to introduce new regulations, including the possibility to develop a uniform approach to dealing with unsolicited bids and proposals, remains an appealing prospect.

A uniform approach does not necessarily mean one set of regulations to govern all scenarios, although that would be ideal, but it does require a uniform set of minimum principles and/or requirements that should be applied. These "foundational elements", as we prefer to call them, allow the private sector to understand what is required of them when preparing an unsolicited bid or proposal. The Amended Regulations provide a fertile ground from which to extract these foundational elements, as it contains a new framework for regulating unsolicited proposals within the context of PPSs.

One such foundational element is the feasibility study requirement. While this requirement is prominently featured in the Note on Unsolicited Proposals, it is absent from the Circular. In our view, the inclusion of a feasibility study in the regulatory framework governing unsolicited bids or proposals – even in the context of the Circular which governs unsolicited bids – is essential. Such a study serves as a safeguard, ensuring that public resources are allocated for goods and services that are technically viable, financially sustainable, and strategically aligned with institutional objectives. Moreover, the feasibility study provides a documented basis for internal evaluation by SCM personnel, which may, at the time of assessment, lack the requisite expertise or capacity to adequately appraise the value of an unsolicited offering to the institution they serve. Thus, this procedural safeguard can enhance efficiency and accountability (by creating an audit trail) in procurement decisions.

With respect to the detail contained in each feasibility study, it will depend on the nature of the goods and services being offered. With respect to the costs of the feasibility study, the Amendment Regulations provide for the procuring institution to cover the costs of the feasibility study in the event that the proponent is unsuccessful or not awarded the tender as part of the PPP process. Covering these costs in this way is aligned with international best practices and this provision should be included where a feasibility study is required as part of the uniform approach to unsolicited bids or proposals. Our view is that the costs should be audited costs, to ensure that the procuring institution is not taken advantage of or to stem the potential for fraud or corruption.

The other foundational element is that all unsolicited bids and proposals should be subject to market testing to assess whether the unsolicited bid

or proposal is as unique and innovative as the proponent says it is, and to assess whether the proponent is actually the sole provider of the goods or services. Market testing also fosters competition and transparency, both of which are constitutional requirements. In the Amendment Regulations, this is done by way of an open competitive bidding process, which is an historic hallmark of public procurement regulation and generally the most constitutionally compliant method of procurement in South Africa. However, competitive bidding can be a cumbersome administrative process which has to comply with many additional requirements, as such it is a process that can easily be challenged in a review process as a consequence for failing to comply with these various requirements. The numerous judicial review challenges clogging up the court roll is indicative of this. In addition, a competitive bidding process may disincentivise the advancement of unsolicited proposals by the private sector.

As a result, numerous approaches have been designed to strike a balance between the need for market testing, fair competition and incentivising the private sector to come to the state with their innovative and unique goods and services. In the Amended Regulations, pre-qualification is used as the sweetener for the proponent, but that may not be appetizing enough because it does not provide substantive advantage to the proponent in the evaluation process. Thus, the Amendment Regulations may not be striking an adequate balance between the need for market testing, fair competition and incentivisation.

In light of the above, it may be useful to consider a different approach to market testing, fair competition and incentivisation, such as the Swiss challenge approach. The Swiss challenge model offers stronger incentives for proponents by granting a right-to-match option to the proponent at the end of the competitive bidding process where the proponent is given a chance to look at the competitive pool of bidders and match the best offer to win the bid. This approach can strongly encourage innovative idea submissions by the private sector. By contrast, as mentioned above, under the Amendment Regulations the only benefit to the original proponent is that they will be automatically pre-qualified but must thereafter compete without any additional advantage, which can discourage innovative idea submissions.

However, there is a problem with the Swiss challenge approach in that it gives the proponent a high advantage as it is essentially given an opportunity at a final bite of the cherry through the right-to-match option. Nwangwu is of the view that the Swiss challenge approach gives the proponent an unfair advantage and cites examples such as the Nigerian case of the Ikere Gorge Dam which illustrates how the method can be misapplied, granting undue advantage to unsolicited proposal

proponents without requiring genuine innovation.<sup>33</sup> As a result, despite the Swiss challenge approach having the potential to result in more innovation in procurement, it also seems to lack the necessary balance.

An alternative approach to the Swiss challenge approach is to consider the provision of bonus points to the proponent of the unsolicited bid or proposal, with the bonus points being allocated at the evaluation stage. This approach is used in some jurisdictions and again provides a strong incentive for the private sector. However, it may not be feasible in South Africa, because in South Africa procurement is founded upon the principles set out in section 217 of the Constitution. In terms thereof preferential treatment may only be used to advance transformation or to promote equity in an inequitable society.<sup>34</sup> Therefore, preferring a proponent of the unsolicited bid in an evaluation process for commercial reasons only with no transformative angle may not be legally feasible.

A modified approach could provide a solution. Nwangwu suggests a modified approach that uses a sliding scale to grant bonus points in the evaluation based on the actual value and novelty of the unsolicited proposal.<sup>35</sup> We agree that such a modified approach would better reconcile the objectives of market testing, fair competition and incentivising the private sector. However, Nwangwu's scaled approach may not work in South Africa either, because of, as we mentioned earlier, section 217's transformation focus. Further, as also mentioned before, there is a skills shortage in SCM expertise which could jeopardise the exercise of assessing actual value and novelty that Nwangwu's modified approach relies on.

We propose the use of another modified approach that shifts the focus away from rewarding the proponent to using the market to ascertain whether the good or service proposal is indeed as unique and/or innovative as the proponent says it is in its feasibility study. The reason for this is because, in South Africa, the state has an obligation to ensure that all expenditure is managed efficiently and effectively.<sup>36</sup> The modified approach that we favour would entail the proponent preparing a concept note as part of the feasibility study (recalling that the feasibility study costs would be covered by the procuring institution in the event that they

---

<sup>33</sup> Nwangwu 2020:213–218.

<sup>34</sup> There is some argument to be made that s 217 of the Constitution provides a basis for procurement to drive innovation even where transformation is not the ultimate agenda. See Bolton 2016:10 wherein she states that s 217(2)(a) speaks of a much broader use of procurement for horizontal purposes, providing simply for "categories of preference in the allocation of contracts", which could be read to include the use of procurement to drive innovation.

<sup>35</sup> Nwangwu 2020:225–226. See also Nduhura et al 2022:102–104, who focuses on aligning unsolicited proposal practices with international benchmarks and transparency standards.

<sup>36</sup> See the long title to the Public Finance Management Act 1 of 1999 ('PFMA').

are ultimately not awarded the tender). The concept note would provide the parameters of the goods or services proposed to be supplied in the context of the problem that the goods or services seeks to solve. The concept note would then be published as an invitation to the public to consider whether they are able to provide the same or similar goods or services. Then, depending on the responses given, if there are others in the market capable of providing the same or similar goods or services, the procuring entity formally conducts a closed tender process with the original proponent and those who responded. This closed process affords the original proponent an opportunity to revise its proposal to formally compete against those entities that responded. But if there are no responses and the market indicates that the goods or services are indeed as unique and innovative as the proponent says they are, then the organ of state proceeds with the proponent as a sole supplier. This hybrid approach could work for both unsolicited bids and proposals that are not PPPs.

We recognise that it may discourage the private sector from approaching government with unsolicited bids. That may be so for those proponents whose goods or services are not necessarily unique or innovative. A proponent who legitimately has a unique or innovative product would not be prejudiced by this process. Further, given the harms identified in the SIU judgments referred to above, it represents an approach with the necessary safeguards in place but one that is also less cumbersome than a traditional open competitive bidding process. Thus, in our view, in the current South African context, it represents an approach that is able to strike a balance between the need for market testing, fair competition, and incentivising the private sector.

For completeness, this hybrid approach may sound similar to the two-stage tender process approach or the functional procurement approach, but it is not, because the Request for Information ("RFI") component in a two-stage tender process approach is an exercise that allows an organ of state to explore the market, define technical requirements, and understand how different solutions might meet the organisation's needs, thereby reducing risk and ensuring a more informed final decision. The hybrid approach we suggest takes an already defined solution and introduces it to the market to ascertain whether the market says that the unsolicited bid or proposal is indeed as unique or innovative as the proponent says it is.

Regarding third party oversight by National Treasury which is a key feature of the Amendment Regulations, we would not argue for mandatory oversight by Treasury for ordinary unsolicited bids, nor for unsolicited proposals, as a foundational element. While there is benefit to oversight by National Treasury, it does not have the capacity to assess

every unsolicited bid or proposal. Arguably, no other organ of state would have the capacity to assess every unsolicited bid or proposal.

## 5 Conclusion

South Africa needs a regulatory response to unsolicited bids and proposals that both safeguards constitutional procurement values and unlocks private-sector innovation to help resolve pressing infrastructure and service delivery deficits. The current fragmented framework, ranging from a light-touch regime for ordinary procurement to a stringent framework for PPPs, and divergent municipal rules, has produced uneven standards, opportunities for manipulation, and unpredictable outcomes. As the State Capture Commission and recent Special Tribunal matters (such as *Gekkonomics*, *Nkhane*, and *Masetlaoka Scott Wilson*) reveal, light regulation, especially when tethered to subjective notions of "uniqueness" and easily abused sole-source justifications, is not sufficient to prevent harm to the fiscus or to protect fair, competitive, and transparent procurement.

A unified approach is, therefore, both necessary and attainable. The PPP amendments provide a sturdy template as they provide for cost-effectiveness, transparency, and market testing. These features should be adapted proportionately to all unsolicited bids and/or proposals, whether arising in ordinary procurement or PPP-like contexts, and extended to Schedule 2 major public entities that currently operate without specific binding rules. Uniformity does not require a one-size-fits-all process but it does require common minimum safeguards across spheres and entities to curb the very risks the Constitution is designed to avoid. At the core of a uniform framework should be foundational elements that travel across entities: A mandatory, fit-for-purpose feasibility study that establishes technical, financial, and strategic merit and creates an auditable record for SCM decision-making, with audited cost reimbursement where the proponent ultimately loses but the project proceeds. In addition, it should provide for structured market testing to verify claims of uniqueness or innovation and to protect competition and promote transparency.

The PPA offers an opportunity to codify this uniform approach through new regulations. If South Africa wishes to harness private initiative to solve acute infrastructure and service challenges without repeating the abuses of the past, it should converge on a uniform approach for all unsolicited bids and proposals. Such balance, rather than prohibition or permissiveness, will promote fair competition, value for money, and public trust, while unlocking the innovative capacity the state needs to meet its service delivery mandates.

## Bibliography

### **Books and articles**

Anthony, A. 2020. South African Infrastructure Procurement under the New Public Procurement Bill. *African Public Procurement Law Journal* 7:25–33.

Bolton, P. 2016. Public Procurement as a Tool to Drive Innovation in South Africa. *Potchefstroom Electronic Law Journal* [e-journal] 19:1–35 <<https://doi.org/10.17159/1727-3781/2016/v19i0a1286>>.

Edquist, C. & Quinot, G. 2025. Functional Public Procurement and Innovation – A Conceptual Framework. *Public Procurement Law Review* 34:33–46

Edquist, C., Vonortas, N.S., Zabala-Iturriagoitia, J.M. & Edler, J. (Eds.) 2015. *Public Procurement for Innovation*. Cheltenham, UK: Edward Elgar Publishing.

Nwangwu, G. 2020. A Comparative Analysis of the Use of Unsolicited Proposal for the Delivery of Public-Private Partnership Projects in Africa.. *Journal of Sustainable Development Law and Policy* 10(2):207–226 <<https://doi.org/10.4314/jsdlp.v10i2>>.

Nduhura, A., Molokwane, T., Lukamba, M. T., Nuwagaba, I., Kadondi, F. & Can, F. 2022. Procuring Unsolicited Bids Without Losing the Innovation Ingredient: Implementation Lessons for Public Private Partnerships for Developing Countries. *International Public Management Review* 22:91–113.

Volmink, P. 2022. Deviations and Variations in South African Public Procurement [A Note on SCM Instruction 3 of 2021/22]. *African Public Procurement Law Journal* 9:52–75.

### **Online sources**

Moodley, P. 2022. Eskom to procure emergency additional energy on Monday to keep lights on. [online] Available at: <<https://www.sabcnews.com/sabcnews/eskom-to-procure-emergency-additional-energy-on-monday-to-keep-lights-on/>> [Accessed 1 September 2025].

SA Government Media Statement 2025. Transport on potential private sector participation rail and port projects. [online] Available at: <<https://www.gov.za/news/media-statements/transport-potential-private-sector-participation-rail-and-port-projects-04>> [Accessed 1 September 2025].

**Legislation, official reports and documents**

Constitution of the Republic of South Africa, 1996.

Judicial Commission of Inquiry into State Capture Report.

Municipal Finance Management Act 56 of 2003.

Municipal Supply Chain Management Regulations.

Municipal Service Delivery and PPP Guidelines.

National Treasury Supply Chain Management Circular, 2004.

National Treasury's PPP Manual – Module 1: South African Regulations for PPPs (issued as National Treasury PPP Practice Note Number 02 of 2004).

National Treasury Practice Note No 11 of 2008/2009: Unsolicited Proposals.

National Treasury Amendments to Treasury Regulation 16 under the Public Finance Management Act 1 of 1999 in GG 5841 of 07-02-2025.

Public Finance Management Act 1 of 1999.

Public Procurement Act 28 of 2024.

**Case law**

*Agribee Beef Fund (Pty) Ltd v Eastern Cape Development Agency* (CCT 26/22) [2023] ZACC 6 (1 February 2023).

*Airports Company South Africa SOC Ltd v Imperial Group Ltd* (1306/18) [2020] ZASCA 02 (31 January 2020).

*City of Tshwane Metropolitan Municipality v New GX Enviro Solutions and Logistics Holdings (Pty) Ltd* (53694/20) [2021] ZAGPPHC 390.

*Special Investigating Unit v Gekkonomics Proprietary Limited t/a Infonomix* (90545/18) [2023] ZAGPPHC 1121 (1 September 2023).

*Special Investigating Unit v Masetlaoka Scott Wilson (Pty) Ltd* ZAGPPHC 23-08-2023 case no 22703/2018 (unreported).

*Special Investigating Unit v Nkhane Projects and Supply (Pty) Ltd* (GP 04/2023) [2024] ZAST 9 (5 August 2024).