

THE POTENTIAL ADDED VALUE OF CoST – THE INFRASTRUCTURE TRANSPARENCY INITIATIVE IN SOUTH AFRICA

Human Sciences Research Council || August 2020



science & innovation

Department:
Science and Innovation
REPUBLIC OF SOUTH AFRICA



Infrastructure
Transparency
Initiative



HSRC
Human Sciences
Research Council

TABLE OF CONTENTS

List of abbreviations	3
Executive summary	6
I. Introduction	11
II. Background to the study	12
1. The cost of corruption, mismanagement and inefficiency in public infrastructure	12
2. The need for greater transparency and accountability in procurement and service delivery	12
3. The CoST model	14
3.1 The four core features of CoST	15
3.2 The added value of CoST	16
III. Aims and objectives of the scoping study	16
IV. Methodology	17
1. Desktop study	17
2. Fieldwork	18
3. Data gathering and analysis	18
V. Findings	19
1. Findings from the desktop study	19
1.1 Infrastructure investment and expenditure	19
1.2 Recent developments in the South African construction industry	23
1.3 Overview of the legal, policy and institutional framework for public participation	25
1.4. Public infrastructure policy in South Africa	36
2. Findings from the fieldwork	36
2.1 Differences in understanding and interpretation of infrastructure regulation, policy and practice	37
2.2 Areas of common understanding regarding infrastructure regulation, policy and practice	38
2.3 Findings relating to the core CoST features	39
VI. Recommendations	53
1. Pilot studies to assess CoST added value	53
2. Including CoST IDS in procurement documents	53
3. Resolution of regulatory misconceptions	54
4. Strengthening access-to-information legislation	54
5. Provincial information-disclosure sessions	54
Annexure A: CoST Infrastructure Data Standard (IDS)	56
Annexure B: CoST IDS spreadsheet	56

LIST OF ABBREVIATIONS

AG	Auditor-General
BBBEEA	Broad-Based Black Economic Empowerment Act
BEE	Black economic empowerment
CIDB	Construction Industry Development Board
CoST IDS	CoST Infrastructure Data Standard
CoST	CoST – the Infrastructure Transparency Initiative
DPME	Department of Planning, Monitoring and Evaluation
GDP	Gross domestic product
HSRC	Human Sciences Research Council
IDPM	Infrastructure Delivery and Procurement Management
MFMA	Municipal Finance Management Act
MSG	Multi-stakeholder group
MTBPS	Medium-Term Budget Policy Statement
MTEF	Medium-Term Expenditure Framework
NDP	National Development Plan
NPC	National Planning Commission
OCPO	Office of the Chief Procurement Officer
ODAC	Open Democracy Advice Centre
OIR	Office of the Information Regulator
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
PFMA	Public Finance and Management Act
POPIA	Protection of Personal Information Act
PPPFA	Preferential Procurement Policy Framework Act
PSC	Public Service Commission
Safcec	South African Forum of Civil Engineering Contractors
SCM	Supply chain management
SIPDM	Standard for Infrastructure Procurement and Delivery Management
SOE	State-owned enterprise



Please address any enquiries to:

Mr John Hawkins
Programme Director
Infrastructure Transparency Initiative
Email: j.hawkins@infrastructuretransparency.org

Adv Gary Pienaar
Senior Research Manager
Developmental, Capable and Ethical State research division
Human Sciences Research Council
Email: gpienaar@hsrc.ac.za





EXECUTIVE SUMMARY

Corruption in public procurement comes at a huge price to government, industry and citizens and leads to large untold costs on the environment, jobs and lives. The infrastructure sector is no exception to this: corruption, alongside mismanagement and inefficiency, has had unprecedented ramifications for the sector's progress.

South Africa was rocked in 2018–19 by revelations made at various commissions of inquiry of alleged large and wide-scale corruption involving organs of state. The appointment of these commissions suggests that fighting corruption is high on the Government's agenda. "State capture" has been especially prevalent in state-owned enterprises (SOE), such as Eskom and Transnet, which have been engaged in huge infrastructure expansion but became a vehicle for patronage and political control of the tender process.

The country's Auditor General has regularly highlighted the "fruitless and wasteful expenditure" not only in SOEs but in provincial and municipal authorities and national entities. In his 2017–18 annual report, the Auditor-General highlighted that unnecessary expenditure increased by 200% to R2.5 billion by national entities, while more than half of auditees engaged in uncompetitive and unfair procurement processes, amounting to R28.4 billion by SOEs. The previous years' report had highlighted the impact of irregularities in procurement arising in the supply-chain-management processes of provincial government, with most provinces not meeting the desired standard.

In addition, black economic empowerment legislation, while vital to address the legacies of Apartheid-era discrimination and enable economic transformation, has had unintended consequences for the transparency and accountability of infrastructure procurement and delivery, including "fronting" speculation and tender abuse. Established interpretations of the local participation requirement under the Preferential Procurement Policy Framework Act of 2000 is increasingly being challenged by 'business forums', some of which resort to the use force or threats of violence against construction companies, which is having an additional negative impact on the sector.

Also evident is the steady decline of the construction industry because of fewer and less-profitable contracts. This has led to several companies, such as Basil Read and Group Five, going into liquidation and others, such as Murray and Roberts, withdrawing from the construction sector.

In recognition of many of these issues, South Africa's National Development Plan (NDP)¹ identified the lack of accountability in public institutions as a leading factor that undermines the country's ability to deliver not only on its development state mandate, but on the creation of a fair and stable society. Fombad notes that a lack of accountability remains a significant challenge in delivering public infrastructure.²

The Government has in recent years recognised the impact of these weaknesses and their knock-on effect on the health of the economy and on the country's lack of progress in reducing unemployment, poverty and inequality. The National Treasury has been among the leaders in efforts to identify and implement improvements in the governance of public procurement, including public infrastructure. To this end, the National Treasury has worked closely with other public-sector stakeholders to develop the Framework for Infrastructure Delivery and Procurement Management of April 2019 FIDPM, which took effect on 1 October 2019.³ Public infrastructure has been identified in the NDP as a priority area for government investment, and the Sixth Administration has begun allocating and raising funding for this priority programme.

The 2018 Medium-Term Budget Policy Statement (MTBPS) provided a full list of key infrastructure projects and promised greater transparency, including publishing on-line expenditure reports of current infrastructure projects. It acknowledged that weak project preparation, planning and execution had led to lengthy delays and to over- and under-spending, and that problems with quality were principally due to a lack of proper planning and design prior to construction.

The MTBPS also made it clear that infrastructure expenditure was a key element of the plan for economic recovery, being able to unlock private investment as well as improve infrastructure efficiency. Thus, a scoping study into the level of transparency, accountability and stakeholder participation in delivering public infrastructure, with a view to considering the value which CoST – the Infrastructure Transparency Initiative (CoST)⁴ could add, is timely, particularly in the light of the Government's commitment to greater infrastructure investment.

¹ National Planning Commission, *National Development Plan 2030. Our future – make it work*, 2012, available at: www.gov.za/sites/default/files/NDP-2030-Our-future-make-it-work_r.pdf (accessed 26 July 2018).

² Fombad M, "Accountability challenges in public-private partnerships from a South African perspective", *African Journal of Business Ethics*, 2013, 7(1): pp.: 11–25.

³ National Treasury, Instruction No. 3 of 2019/20, 26 April 2019, available at: ocpo.treasury.gov.za/resource_centre/legislation/national%20treasury%20instructionResource_Centre/Legislation/National%20Treasury%20Instruction%20note%203%20of%202019-2020%20framework%20Framework%20for%20infrastructure%20delivery%20Infrastructure%20Delivery%20and%20procurement%20management%20Procurement%20Management.pdf and ocpo.treasury.gov.za/resource_centre/legislation/national%20treasury%20instructionResource_Centre/Legislation/National%20Treasury%20Instruction%20note%203%20of%202019-2020%20annexure%20a%20Annexure%20A%20-%20framework%20Framework%20for%20infrastructure%20delivery%20and%20procurement%20mana.pdf.

⁴ Previously known as the Construction Sector Transparency Initiative.

SCOPING STUDY

The Human Sciences Research Council (HSRC) and the Open Democracy Advice Centre (ODAC) were commissioned by CoST to undertake a scoping study in South Africa. The terms of reference of the scoping study included four objectives:

- a. Identify how transparency and accountability within the current systems for delivering and procuring infrastructure need to be improved at a national and sub-national level.
- b. Identify attitudes towards transparency and accountability in general and CoST in particular, among individuals and institutions across government, industry and civil society.
- c. Establish a baseline measure of “transparency” in publicly funded infrastructure projects at a national and sub-national level.
- d. Explain how the CoST approach to transparency and accountability and its core features of disclosure, assurance, multi-stakeholder working and social accountability can add value to the current systems for delivery and procuring infrastructure at a national and sub-national level.

CoST is a registered charitable organisation based in the UK. It is a multi-stakeholder initiative with member and affiliate programmes in 14 countries spanning four continents. Launched in 2012, CoST grew out of the lessons learnt from a three-year pilot programme that tested the viability of a new transparency and accountability process in eight countries. CoST promotes transparency by disclosing, validating and using data from public infrastructure investment. This helps to inform and empower citizens, enabling them to hold decision makers to account. Informed citizens and responsive public institutions can influence the introduction of reforms that reduce mismanagement, inefficiency, corruption and the risks posed to the public from poor infrastructure.

CoST works at a national and international level to facilitate the global exchange of experience and knowledge on transparency and accountability in public infrastructure. In so doing, CoST works closely with other global transparency initiatives like the Open Government Partnership and the Open Contracting Partnership.⁵ CoST has a track record of helping governments to save money, assisting in the delivery of legal and institutional reforms and building the capacity of stakeholders. On this basis, the initiative is ideally placed to support a country’s efforts to increase transparency and improve accountability and cost-effectiveness in the delivery of public infrastructure.⁶

The research methodology entailed the implementation of: 1) a desktop study of key relevant literature and information relating to the construction sector and of the legal and policy frameworks applicable to access to information and public participation and to publicly-funded infrastructure projects disclosed by procuring entities; 2) key informant interviews with selected stakeholders in the public, private and civil society sectors; and 3) focus group interviews with key stakeholder groups, convened in collaboration with the CoST International Secretariat and the project advisory group.

KEY FINDINGS

The research found considerable support for the CoST methodology and for its core features of disclosure, assurance, multi-stakeholder working and social accountability. Many respondents were hopeful that the model could offer a practical and systematic platform through which to increase transparency and accountability, and restore mutual trust and cooperation towards shared objectives that are urgently needed in the country.

The study indicates that significant improvements could be made to promoting transparency in public infrastructure. While the Promotion of Access to Information Act 2000 provides a framework for disclosing information reactively (i.e. upon request), the legal framework and practice in relation to proactive disclosure are more diverse and less explicit.

The research indicates that a high proportion of the 40 CoST Infrastructure Data Standard (CoST IDS) data points has to be legally disclosed. However, this is based on the assumption (without making a formal finding)⁷ that this information is likely to be proactively disclosed in the procuring entities’ required reports to the legislature. It is important to note, however, that while this disclosure is welcome, it is far too late in the infrastructure procurement and delivery process for it to be useful to any stakeholder responsible for, or interested in, enhancing the real-time effectiveness of the infrastructure procurement and delivery process.

The law also requires information related to several stages of the procurement and delivery process to be proactively disclosed by the procuring entity and on the National Treasury’s e-Tender Publication portal. However, it was found that actual disclosure is much more limited than the law stipulates and uneven in practice.

⁵ CoST Factsheet. See also infrastructuretransparency.org/wp-content/uploads/2018/06/cost_programme_summaryCoST_Programme_Summary.pdf

⁶ Adapted from CoST Factsheet.

⁷ The desktop study did not confirm whether in practice this level of detail is included in procuring entities’ reports to the legislature.

While South African law provides for extensive compliance with standards similar to those in the CoST IDS, aspects of both law and practice do not collectively constitute a comprehensive standard for timely disclosure of information. This would enable more efficient and effective management of infrastructure procurement and delivery.

The interviews supported the confusing picture. There is a significant level of lack of awareness, uncertainty and confusion about required information disclosure standards at various stages of the infrastructure procurement cycle. There is also widespread ignorance about what types of information relating to various stages of the procurement cycle can lawfully be proactively disclosed.

Where some procuring entities have begun to disclose more information, whether reactively or proactively, such disclosure is appreciated by private-sector actors and inspires greater confidence in the credibility and integrity of the procurement process. The in-principle adoption of the CoST IDS, its progressive implementation by procuring entities and discussion of its impact through CoST multi-stakeholder working offers the prospect of providing greater clarity and understanding, enhancing mutual trust and delivering more consistent performance.

More broadly, there is significant confusion about the legal requirements for infrastructure procurement, a lack of capacity and experience in some procuring entities, and paralysing fear on the part of many officials regarding the potential legal and personal financial consequences if they get it wrong. This includes the legal requirements for public participation in the planning and delivery of public infrastructure and the definition and requirements for local content. CoST's independent assurance process could be of great assistance in producing evidence from practice that could help bring clarity to several of these issues.

Many respondents expressed the fear that the introduction of CoST would add to the existing bureaucratic burden and further exacerbate delays in the pipeline of construction projects being put out to tender. However, the nature of the assurance process and the way it is applied in other adopting countries indicates that it will neither add a layer of bureaucracy nor compound existing delays. Rather, it seems clear that the CoST assurance process should be a source of reassurance for officials and could help relieve some of their fears about the quality of their colleagues' work and any resulting legal responsibility they might incur.

Several stakeholders acknowledged that experiences of corruption in the private and public sector have contributed to a breakdown in mutual trust. If CoST's multi-stakeholder working and assurance review of both disclosed and non-disclosed information could help facilitate the restoration of trust through careful sharing of information from independent and credible sources, it would be widely welcomed.

Private sector professional and industry associations have publicly offered to share their members' expertise to strengthen the Government's efforts to improve the integrity of the infrastructure procurement processes. At the same time, civil society organisations are currently working on open-contracting-related research projects, providing concrete evidence of both sectors' recognition of the urgency of procurement reform generally. This indicates that it will be possible to form a multi-stakeholder group (MSG) with mutually shared objectives.

The viability of such a forum was a concern raised by several respondents, who noted the existing widespread lack of trust between the Government, the private sector and civil society in South Africa, as well as the difficulties involved where MSG members were aligned to private sector competitors. Multi-stakeholder initiatives (such as South Africa's Open Government Partnerships) have not inspired confidence within civil society about the Government's willingness to work in a collaborative manner. These concerns will need to be addressed, perhaps through the careful selection of members of the MSG, through the provision of training and initial independent facilitation of the MSG, and through an agreed procedural requirement that a substantial conflict of interest will require recusal in a particular instance. Nevertheless, the research showed that stakeholders generally agree that it is essential to change a situation in which stakeholders have grown apart.

Respondents also expressed broad support for the idea that a better way must be found for the Government and citizens to contribute to the country's progress. The CoST model of multi-stakeholder working seemed to most participants to represent an opportunity to explore an approach that seems to have yielded success in several other countries. The multi-stakeholder working approach of CoST could, at the level of key industry role players and stakeholders, prove valuable. Based on the experiences of other countries in which the CoST approach has been implemented, stakeholder tensions could be diminished and efficiencies in infrastructure delivery could be achieved.

RECOMMENDATIONS

Given the research findings, it is recommended that the National Treasury considers further discussions with CoST and key role players in the sector. Specific recommendations are as follows.

1. The National Treasury should, with the support of CoST and stakeholders from the private sector and civil society, pilot the CoST model to see what practical value it can add in ensuring greater transparency, accountability and efficiencies in infrastructure procurement.
2. The National Treasury should include the CoST IDS in the Framework for Infrastructure Delivery and Procurement Management FIDPM (which replaces the Standard for Infrastructure Procurement and Delivery Management); on the Vulekamali website; and in the Draft Public Procurement Bill.
3. The National Treasury should collaborate with CoST and key infrastructure industry bodies to clarify how the features of the CoST model can help resolve the legal, regulatory and policy misconceptions that abound in the infrastructure sector.
4. The Department of Justice & Constitutional Development, through Parliament, should strengthen and enhance the operation of the Promotion of Access to Information Act, especially the obligation on procuring entities to disclose procurement-related information in line with the CoST IDS.
5. The National Treasury should convene provincial information sessions with stakeholders from all relevant sectors to explain information disclosure standards at every stage of the infrastructure procurement cycle, using the CoST IDS as a template.





TAX+

RECALL

TAX-

SET

AC

ON
C.CE

C 41,6

C 41,6

2

I. Introduction

“Analysis of corruption points to key ways to hobble it. An open tender system is a crucial step, requiring decision makers to publish the criteria and reasons for selecting particular bidders.”

Neva Makgetla⁸

South Africa was rocked in 2018–19 by revelations made at various commissions of inquiry of alleged large and wide-scale corruption involving organs of state. The four commissions of inquiry that have heard allegations are the: “Judicial commission of inquiry into allegations of state capture, corruption and fraud in the public sector including organs of state”;⁹ the “Commission of inquiry into tax administration and governance by the South African Revenue Service”;¹⁰ the “Commission of inquiry into allegations of impropriety regarding the Public Investment Corporation”;¹¹ and the “Enquiry under section 12(6) of the National Prosecuting Authority Act 32 of 1998 into the fitness of advocate Nomgcobo Jiba and Adv Lawrence Sithembiso Mrwebi to hold office of Deputy National Director of Public Prosecutions and Special Director of Public Prosecutions”.¹²

The appointment of these commissions suggests that fighting corruption is high on the agenda of the Government. A scoping study into transparency, accountability and stakeholder participation in the construction sector with a view to considering the value which CoST – the Infrastructure Transparency Initiative (CoST)¹³ could add is therefore timely, particularly in the light of the Government’s announcement of greater infrastructure investment. “Infrastructure expansion and maintenance has the potential to create jobs on a large scale, attract investment and lay a foundation for sustainable economic expansion,” President Cyril Ramaphosa told journalists at the South Africa Investment Conference in September 2018.¹⁴ He announced the launch of a South African Infrastructure Fund, which would include a R400 billion contribution from the state over the next three years of the Medium-Term Expenditure Framework.¹⁵

This report begins with an introduction to the potential value added by CoST and a brief description of its core features. This is followed by a presentation of the aims and objectives of the study, and the research methods used. The report then considers the legal and policy environment for infrastructure procurement in South Africa and the practices of the Government (especially the National Treasury, but also state-owned entities), and briefly recounts the Auditor-General’s assessment of public procurement performance, funders, infrastructure sector players, and civil society in relation to transparency, accountability and stakeholder participation. This is followed by an overview of the legal and regulatory environment within which the construction sector in South Africa operates, and discusses recent developments in the construction industry in South Africa. The report proceeds to present the key messages emerging from the fieldwork and then undertakes an assessment of the emerging case for greater transparency and accountability in procurement and service delivery. The findings are then discussed in relation to the aims and objectives of the study, and a set of recommendations is made as part of a concluding section.

⁸ *Business Day*, 5 February 2019.

⁹ See www.sastatecapture.org.za/uploads/government_gazette_vol_632.pdf See https://www.sastatecapture.org.za/uploads/GOVERNMENT_GAZETTE_Vol_632.pdf

¹⁰ See *Government Gazette*, Vol. 635, No. 41622, 24 May 2018.

¹¹ See www.greengazette.co.za/notices/commissions-act-8-1947-commission-of-inquiry-into-allegations-for-impropriety-regarding-public-investment-corporation_20181017-ggn-41979-00030-01 See https://www.greengazette.co.za/notices/commissions-act-8-1947-commission-of-inquiry-into-allegations-for-impropriety-regarding-public-investment-corporation_20181017-GGN-41979-00030-01

¹² See www.justice.gov.za/legislation/notices/2018/20181129-gg42072-gen763-enquiry-mpaEnquiry-NPA.pdf

¹³ Previously known as the Construction Sector Transparency Initiative.

¹⁴ “Infrastructure at the heart of Ramaphosa’s plan to boost the economy”, *Mail & Guardian*, 21 September 2018.

¹⁵ *Ibid.*

II. BACKGROUND TO THE STUDY

1. The cost of corruption, mismanagement and inefficiency in public infrastructure

Corruption in public procurement comes at a huge price to government, industry and citizens and leads to large untold costs on the environment, jobs and lives. The infrastructure sector is no exception to this: corruption, alongside mismanagement and inefficiency, have unprecedented ramifications on the sector's progress.

Significant investment is needed in the world's infrastructure to ensure quality structures can be built to serve communities properly. These structures, such as roads, bridges, ports, schools and hospitals, allow citizens to carry out their daily routines, access essential services and improve their lives.

CoST – the Infrastructure Transparency Initiative (CoST) estimates that the value of global infrastructure output is expected to reach US\$17.5 trillion per annum by 2030, but there is a gap in national budgets, particularly in low- and middle-income countries, to meet growing needs. Recent research from the Global Infrastructure Hub estimates that a US\$97.5 trillion investment is needed to meet the United Nations Sustainable Development Goals by 2030, but investments are likely to fall short of this amount by as much as US\$18 trillion.

In terms of mismanagement and inefficiency, the CoST experience shows that a further 10–30% could be lost. The International Monetary Fund corroborates this, specifying an efficiency gap of approximately 30% between the money that is spent and the coverage and quality of the resulting infrastructure. This means that by 2030, unless measures are introduced that effectively improve this situation, a staggering US\$6 trillion could be lost annually to corruption, mismanagement and inefficiency.

2. The need for greater transparency and accountability in procurement and service delivery

Public procurement in South Africa has constitutional status and is recognised as a means of addressing past discriminatory policies and practices.¹⁶ But such redress depends on procurement being transparent and accountable. Indeed, accountability is a central pillar in public procurement.¹⁷ Without transparent and accountable systems, the vast resources channelled through public procurement systems run the danger of being entangled with increased corruption and misuse of funds.¹⁸

South Africa's National Development Plan published in 2012¹⁹ identified the lack of accountability in public institutions as a leading factor that undermines the country's ability to deliver not only on its developmental state mandate, but on the creation of a fair and stable society. Fombad²⁰ notes that although the South African Government has made some progress in delivering services through a fair and accountable procurement process, lack of accountability remains a grave challenge in delivering public infrastructure.

Globally, construction and real-estate development are the business sectors most exposed to corruption, according to a new report.²¹ In Europe and Africa, while corruption in real estate and development was high, infrastructure was even more exposed to corruption.

The need to improve transparency and accountability of infrastructure procurement is premised on the knowledge that South Africa's public procurement is characterised by:

- Lack of proper knowledge, skills and capacity
- Non-compliance with supply chain management (SCM) policy and regulations
- Inadequate planning and the linking of demand to the budget
- Fraud and corruption
- Inadequate monitoring and evaluation of SCM
- Unethical behaviour
- Too much decentralisation of the procurement system; and
- Ineffectiveness of the Black Economic Empowerment policy.²²

¹⁶ Bolton P, Government procurement as a policy tool in South Africa. *Journal of Public Procurement* 6(3), 2006, pp. 193–217.

¹⁷ Soudry O, "A principal-agent analysis of accountability in public procurement," in Piga G and Thai KV (eds.) *Advancing public procurement: Practices, innovation and knowledge-sharing*, PrAcademics Press, 2007, pp. 432-451.

¹⁸ Jeppesen R, *Accountability in public procurement – Transparency and the role of civil society*, United Nations Procurement Capacity Development Centre, 2010, available at: www.unpcdc.org (accessed 25 July 2018).

¹⁹ National Planning Commission, *National Development Plan 2030. Our future – make it work*, 2012, available at: https://www.gov.za/sites/default/files/NDP-2030-Our-future-make-it-work_r.pdf (accessed 26 July 2018).

²⁰ Fombad M, "Accountability challenges in public-private partnerships from a South African perspective", *African Journal of Business Ethics*, 7(1), 2013, pp.: 11–25.

²¹ Risk Advisory, "Report: Construction and Real Estate Carry Greatest Corruption Risk", OCCRP, 10 April 2019, available at: www.occrp.org/en/27-ccwatch/cc-watch-briefs/9546-report-construction-and-real-estate-carry-greatest-corruption-risk (accessed 11 April 2019).

²² Ambe I and Badenhorst J, "Procurement challenges in South Africa", *Journal of Transport and Supply Chain Management* 6(1), 2012, pp. 242–261.

In its 2018 Medium-Term Budget Policy Statement (MTBPS), the Government published a full list of its infrastructure projects²³ and has promised greater transparency in this regard. The Government says it will publish online expenditure reports of current infrastructure projects to improve transparency and accountability.²⁴

The MTBPS acknowledges that weak project preparation, planning and execution has resulted in lengthy delays, over- and under-spending and problems with quality. This has often been ascribed to lack of proper planning and design before construction commences. In the MTBPS, the Government attributed the planning problems to a lack of technical expertise and institutional capacity.

In response, the Government in 2018 announced the establishment of a project preparation facility,²⁵ with representation from: the National Treasury, the Government Technical Advisory Centre, the Presidential Infrastructure Coordinating Commission, the Development Bank of Southern Africa, the Association for Savings and Investment South Africa, the Banking Association of South Africa, the South Africa Venture Capital and Private Equity Association, and the New Development Bank. This facility will be situated in the National Treasury budget office and R625 million has been allocated over the next three years to support its operations. It is intended to deploy technical experts to sponsoring departments to support development of investment-ready projects, the Government states.

The MTBPS makes it clear that infrastructure expenditure is a key element of the Government's plans for economic recovery. Apart from plans to improve the efficiency of its own infrastructure expenditure, the Government hopes to unlock private sector investment in such projects. The Government adds that it is negotiating access to infrastructure funding from development finance institutions, multilateral development banks and private banks as well as their assistance with technical skills to help plan, approve, manage and implement projects. For example, the Development Bank of Southern Africa already provides project preparation assistance to public entities.²⁶ Work is underway with assistance from the private sector and multilateral development banks to design the infrastructure fund announced by President Ramaphosa as part of his economic stimulus package.

Beyond these impediments, black economic empowerment (BEE) legislation is vital to provide redress for Apartheid-era discriminatory exclusion, and to enable attainment of transformation imperatives. However, it has had an unintended negative impact on transparency and accountability in the procurement and delivery of infrastructure. The South African Government adopted the provisions of BEE to empower all historically disadvantaged people rather than only a small group of black investors. To this end, it adopted the Broad-Based Black Economic Empowerment Act, which calls for expanded opportunities for workers and smaller enterprises as well as more representative ownership and management. Nevertheless, shortcomings that have emerged in the implementation of BEE include "fronting", speculation and tender abuse.

Relatively recently, and mentioned by almost all respondents interviewed during the fieldwork (see below), the laudable empowerment objective of the equally necessary Preferential Procurement Policy Framework Act, 2000 and its regulations is being manipulated for corrupt ends. The legal framework is intended to ensure that public procurement provides opportunities to historically disadvantaged individuals and companies in the provision of goods and services, including infrastructure, purchased by the state. The "local participation" requirement is being abused by a "business forums" that increasingly use force or threats of violence against construction companies, and their staff and equipment, to muscle their way into the financial benefits of infrastructure projects, usually without contributing any value for the public money thereby extracted.²⁷

Another factor influencing accountability and transparency over the years has been the phenomenon of "state capture". Deep-rooted and widespread procurement corruption, both a function and the cause of state capture, became commonplace in the public sector under the leadership of former President Jacob Zuma. An investigation by former Public Protector Thuli Madonsela revealed that state capture had many features and dimensions, but was primarily enabled by President Zuma allowing the three Gupta brothers to take decisions to appoint and remove chosen individuals to key positions in the state, including to the National Executive (Cabinet) and state-owned enterprise (SOE) boards. These individuals then ensured the manipulation of the state's procurement and licensing processes for the benefit of particular politically-connected private companies and individuals, including President Zuma's sons and allies, as well as the Gupta brothers and others. In her report entitled *State of Capture*,²⁸ Advocate Madonsela found, among other things, preliminary evidence of several breaches of the Executive Members' Ethics Act, 1998 (EMEA) and its Code of Conduct, and of the Prevention and Combating of Corrupt Activities Act, 2004 (PRECCA). She also found that there was substance to allegations that the Gupta brothers had attempted to bribe senior public servants to accept appointment to Jacob Zuma's Cabinet at their behest.

²³ National Treasury, Medium-Term Budget Policy Statement, 2018, Annexure C, p. 57.

²⁴ *Ibid.*, p. 3.

²⁵ *Ibid.*, p18.

²⁶ Details of the Development Bank of Southern Africa's Project Preparation Unit are available at: <https://www.dbsa.org/EN/prodserv/FUND%20DESCRIPTION/Pages/default.aspx> (accessed 24 April 2019).

²⁷ See, for example, "Mafia-style BEE 'tenderpreneurs' killing business with economic terrorism" – Kaizer Nyatumba, SEIFSA CEO, *Business Live* 24 April 2019, available at: <https://www.businesslive.co.za/bd/opinion/2019-04-24-mafia-style-bee-tenderpreneurs-killing-business-with-economic-terrorism/> (accessed 24 April 2019).

²⁸ Public Protector Report No. 6 of 2016/17.

As part of his efforts to clean up public procurement, President Cyril Ramaphosa announced in February 2018 that non-executive directors of state-owned companies (SOEs) will be, “removed from any role in procurement”. This clear division of responsibilities between boards and management, which should reduce conflicts of interest at the political-administrative interface, “is expected to have a profound effect on systemic corruption, which has flourished over the past decade”.²⁹ SOEs, particularly Eskom and Transnet, have been engaged in huge infrastructure expansion, over which board members have wielded increasing influence in decision making. At Eskom, the newly appointed chairman Jabu Mabuza said he had been alarmed to discover the existence of a board tender committee established with the authorisation of then-President Zuma’s Public Enterprises Minister, Lynne Brown.

Over the past decade, appointments of board members of SOEs have become a politically negotiated process with the line function minister, the ruling African National Congress’ deployment committee and the President all trying to ensure their preferred candidates are appointed, often regardless of their lack of relevant procurement expertise and despite the conflicts of interest created. Boards have been the central vehicle through which patronage has been dispensed and political control over tenders exercised.

In a significant measure to get to the root of state capture and remove its influence, President Ramaphosa established³⁰ the Judicial Commission of Inquiry into Allegations of State Capture,³¹ chaired by Deputy Chief Justice Raymond Zondo. Testifying before the Commission, the National Treasury’s Acting Chief Procurement Officer, Willie Mathebula, is reported to have said, “tender processes were intentionally not followed in at least 50% of the tenders”, and that, “the first line of the procurement process [is] open to abuse as government officials who sit on the specifications committee can tailor-make the tender bids to suit [preferred] individuals”.³²

A newcomer in South Africa’s infrastructure procurement landscape is China, the involvement of which has already been fraught with challenges. For example, China South Rail won a Transnet tender which has been linked to state capture through the payment of a bribe of over R5 billion to the influential Gupta family. On the sidelines of the 2018 BRICS summit, China’s President Xi Jinping recently pledged US\$14.7 billion to South Africa for infrastructure development, with a focus on Transnet and Eskom.³³ It will be increasingly important to understand what this means in terms of transparency and accountability in South Africa as China uses its own companies to do the work.

3. The CoST model

CoST supports governments in establishing systems that allow the public to access reliable, detailed and easy-to-understand infrastructure project information. CoST assists multi-stakeholder groups in overseeing the validation and interpretation of infrastructure data so that civil society, the media and citizens can understand this information. Empowered with information and understanding, CoST facilitates civil society and media placement of concerns in the public domain and the foregrounding of challenges involving poor performance, perceived mismanagement, and corruption. Such stakeholders can then demand better project outcomes, savings, and more effective and efficient governance systems for delivery.

Governments can then respond to the concerns raised. They can commission audits into specific projects, broader reviews of the performance of a department, entity or agency, or reviews of the sector as a whole. Equipped with such evidence, governments are then able to: introduce changes to improve the outcomes of specific projects; introduce broader sector-wide reforms that will improve the procurement and delivery of infrastructure programmes; investigate alleged mismanagement and corruption; and, where necessary, discipline staff or even prosecute offenders.³⁴

²⁹ “Ramaphosa’s move to cut boards out of tender loop will help stem corruption”, *Business Live* 19 February 2018, available at: www.businesslive.co.za/bd/national/2018-02-19-how-ramaphosas-changes-to-acquisition-process-will-help-curtail-corruption/ (accessed 19 February 2018).

³⁰ Proclamation No. 3 of 2018 in *Government Gazette* No. 41403 of 25 January 2018.

³¹ See <https://www.sastatecapture.org.za/>

³² ‘State Capture Inquiry: Govt tender system in the spotlight’ *News24* 21 August 2018, available at: <https://www.news24.com/SouthAfrica/News/state-capture-inquiry-govt-tender-system-in-the-spotlight-20180821> (accessed 21 August 2018).

³³ Hunter Q, “China to invest \$14.7bn in SA, says Ramaphosa” *EWN*, 24 July 2018, available at: ewn.co.za/2018/07/24/china-to-invest-usd14-7bn-in-sa-says-ramaphosa (accessed 25 July 2018).

³⁴ Adapted from “Why CoST?”, available from: infrastructuretransparency.org/why-cost/ (accessed 13 April 2019).

3.1 The four core features of CoST³⁵

The CoST approach has four core features: disclosure; assurance; multi-stakeholder working; and social accountability. These features provide a global standard for CoST implementation in enhancing infrastructure transparency and accountability. While the standard is universally applied by many CoST members, countries are encouraged to adapt it to their own contexts so that it is appropriately applied in different political, economic and social systems.

How does it do it?



3.1.1 Disclosure

Public infrastructure investment is often characterised by opaque decision making by public officials and delivered via a long supply chain that is governed by formal and informal rules and practices. CoST has tackled this challenge by asking for procuring entities to proactively disclose 40 data points or items of information in accordance with the CoST Infrastructure Data Standard (CoST IDS) at each stage of the project cycle: identification; preparation; procurement; implementation; and completion. The 40 data points also includes data to be disclosed from the principal contracts (typically, design, construction and supervision). The disclosure process ensures that information about the purpose, scope, costs and execution of infrastructure projects is open and accessible to the public, and that it is disclosed timeously.

The CoST IDS, which is now aligned with the Open Contracting Data Standard,³⁶ is designed to present data in a format that is accessible, understandable and applicable for both policy makers and the public. For example, the IDS requires not only publication of numerical data, such as cost and time increases, but also the reasons for these changes. At national level, CoST programmes use the data disclosed in terms of the IDS to meet needs on the ground, promoting achievement of a credible and substantial level of compliance.

3.1.2 Assurance

CoST promotes accountability through the assurance process, which is an independent review of the disclosed data by independent expert assurance teams based within CoST national programmes. The teams highlight the accuracy and completeness, or otherwise, of data disclosed; identify key issues of concern in relation to the items listed in the CoST IDS; and convert technical jargon into plain language, thereby helping stakeholders to understand the data disclosed on specific infrastructure projects and its implications. This helps stakeholders understand the issues and hold decision makers to account, giving them an opportunity to rectify the situation, ultimately ensuring social accountability.

3.1.3 Multi-stakeholder working

Enhancing transparency and accountability in public infrastructure involves working with different stakeholder groups that have different perspectives and backgrounds: government, the private sector and civil society. CoST brings these stakeholders together through multi-stakeholder groups in each national programme.

³⁵ Adapted from "Our Approach" available at: infrastructuretransparency.org/our-approach/ (accessed 14 April 2019).

³⁶ See the Open Contracting Partnership data standard, available at: <https://www.open-contracting.org/data-standard/> (accessed 10 April 2019).

The groups learn to trust one another and collaborate to guide the delivery and application of CoST. They also provide a neutral forum for stakeholders to pursue infrastructure transparency and accountability together.

3.1.4 Social accountability

Social accountability stakeholders, such as the media and civil society, play an important role in holding decision makers to account. CoST helps these stakeholders promote the findings from the assurance process and use the disclosed data, enabling them to engage with decision makers and then place key issues in the public domain. In this way, civil society, the media and citizens can all be aware of issues and hold decision makers to account.³⁷

3.2 The added value of CoST

CoST helps to prevent corruption and create an effective and robust infrastructure sector. It promotes better value from public infrastructure, delivering better quality infrastructure at lower cost, with increased predictability of outcomes. There is value in the CoST approach for governments, the private sector and communities.

For governments, the CoST approach: demonstrates how public money is spent, identifies potential efficiency savings, promotes reforms in the management of public finances and the procurement of infrastructure, and helps increase the flow of direct overseas investment into a country's infrastructure sector.

For the private sector, the CoST approach ensures a level playing field and reduces the costs and risks of doing business; while for communities it ensures cost-effective delivery of improved infrastructure that improves lives – resulting in better access to work and markets through improved roads, safer drinking water, well-built schools and safer hospitals.

III. AIMS AND OBJECTIVES OF THE SCOPING STUDY

The International Secretariat of CoST – the Infrastructure Transparency Initiative (CoST) commissioned the Human Sciences Research Council (HSRC) and the Open Democracy Advice Centre (ODAC) to undertake a scoping study in South Africa. The terms of reference of the scoping study included four objectives.

- a. Identify how transparency and accountability within the current systems for delivering and procuring infrastructure need to be improved at a national and sub-national level.
- b. Identify attitudes towards transparency and accountability in general and CoST in particular, amongst individuals and institutions across government, industry and civil society.
- c. Establish a baseline measure of “transparency” in publicly funded infrastructure projects at a national and sub-national level.
- d. Explain how the CoST approach to transparency and accountability and its core features of disclosure, assurance, multi-stakeholder working and social accountability can add value to the current systems for delivery and procuring infrastructure at a national and sub-national level.

In the context of these objectives, the purpose of the study was to explore and assess the feasibility and possible value that might be added by the adoption, possible adaptation, application and implementation of the CoST methodology in South Africa. More particularly, the study sought to assess the relevance and applicability to the Government's procurement of infrastructure and, more generally, the benefit to the state, the private sector and the general public.

The study's methodology (described in Section IV) was designed to test support for the CoST approach to transparency and accountability through the facilitation of conversations, and through data collection and analysis.

The timing of the feasibility study offered the opportunity to contribute to the ongoing review by the National Treasury of the “Standard for Infrastructure Procurement and Delivery Management” and possible reforms to enhance value for money in public procurement. To this end, the HSRC and ODAC have worked as closely as possible with and through the National Treasury to contribute to the realisation of such reforms.

³⁷ Adapted from “Our Approach”, available at: infrastructuretransparency.org/our-approach/



IV. METHODOLOGY

The nature and extent of activities for the project were agreed upon with the International Secretariat of CoST – the Infrastructure Transparency Initiative (CoST) and the project advisory group established to oversee the project. The project activities are described below.

The research methodology entailed the implementation of: 1) a desktop study of key relevant literature and information relating to publicly-funded infrastructure projects disclosed by procuring entities; 2) key informant interviews with selected stakeholders in the public, private, and civil society sectors; and 3) focus-group interviews with key stakeholder groups, convened in collaboration with the CoST International Secretariat and the advisory group.

1. Desktop study

The desktop component of the CoST feasibility study responded to objectives (a) and (c) of the terms of reference (see Section III).

Objective (a)

- i. Provide a brief overview of the infrastructure needs and plans and the challenges of delivering public infrastructure in South Africa.
- ii. Map the public infrastructure sector including relevant laws, regulations, policies, systems, practice and key stakeholders.
- iii. Identify and assess the role of the institutions responsible for: (a) delivering public infrastructure; (b) public procurement; and (c) conducting technical and financial audits of public infrastructure projects at a national and sub-national level.
- iv. Review information on other on-going transparency and accountability and anti-corruption initiatives in the sector and reports into the delivery of public infrastructure.

Objective (c)

- i. Summarise the laws and regulations governing the procurement and delivery of public infrastructure projects and identify which items of data from the CoST Infrastructure Data Standard (CoST) IDS for “proactive disclosure” are required by law, regulations and policy to be disclosed by procuring entities.
- ii. Identify which items of information from the CoST IDS for “reactive disclosure” are required by law, regulations and policy to be made available to the public upon request.
- iii. Assess, from a sample set of procuring entities, which CoST IDS items are currently being disclosed to the public.
- iv. Assess from a sample set of procuring entities which CoST IDS items are currently made available on request from members of the public.
- v. Assess the barriers (legal, administrative, capacity and technology) to mainstreaming the release of the data and information by the participating procuring entities.
- vi. Identify the appropriate legal, regulatory or policy instrument that could provide a basis for a formal disclosure requirement that provides a mandate for disclosing data in the CoST IDS format.

Sub-objectives v. and vi. above were also explored during the fieldwork phase and the data analysis phase (see next page).

2. Fieldwork

The fieldwork phase of the CoST feasibility study was designed to respond to objective (b) of the terms of reference.

Objective (b)

- i. Identify the attitudes of the Government, industry and civil society towards integrating or adapting the CoST approach to transparency and accountability within current systems.
- ii. Provide an overview of civil society organisations and identify how (if at all) civil society participates in the oversight of public infrastructure projects at a sub-national level and the potential incentives and barriers to their participation.
- iii. Provide an overview of the infrastructure industry and organisations representing the various stakeholders in the industry and the potential incentives and barriers to their participation.

3. Data gathering and analysis

Data gathered during the desktop study and from the interviews was consolidated in accordance with the approach identified in paragraph 3, “Scope”, in the terms of reference. It was analysed from the perspective of assessing: the legal framework; current disclosure practices; understanding the gap between the two; the potential for, and barriers to, improved disclosure; and the most appropriate legal regulatory or policy instrument that provides a basis for a formal disclosure requirement that contains the information identified in the CoST IDS. The assessment also includes an examination of the suitability and viability of the adoption of the CoST approach, including its multi-stakeholder approach to assurance and social accountability.

The data gathering and analysis phase of the feasibility study responds to Objective (d) of the terms of reference.

Objective (d)

- i. Analyse the data generated through objectives (a), (b) and (c) and identify potential barriers and opportunities to introducing the CoST approach.
- ii. Draw conclusions about the potential added value of CoST in South Africa and explain how it could be achieved in practice. This should include recommendations for introducing multi-stakeholder working, disclosure, assurance and social accountability and how, if necessary, they could be adapted to be effective in the South African context.

V. FINDINGS

1. Findings from the desktop study

This Section presents the findings from the secondary (desktop) research and the primary (interview and focus group) research. Desktop research was undertaken into: the legal, policy and institutional framework for public participation; public infrastructure policy; public sector infrastructure expenditure; the present state of the construction industry; and transparency and accountability in procurement and service delivery. The findings pertaining to these topics are presented below.

1.1 Infrastructure investment and expenditure

1.1.1 Public sector infrastructure expenditure

Between 1998–99 and 2016–17, the public sector in South Africa spent more than R2.7 trillion on infrastructure. The amount spent increased from R48 billion in 1998–99 to R249.9 billion in 2016–17, resulting in an average annual increase of 5.2% after discounting inflation. State-owned enterprises were the biggest contributors to public-sector expenditure over this period, spending R1.2 trillion in total. Municipalities and provincial departments also increased their infrastructure spending, contributing R554 billion and R643 billion respectively to build schools, hospitals, clinics and other community-related infrastructure. Investment in infrastructure has continued to grow, with R300 billion invested in the National Infrastructure Plan by both the public and private sector in 2016–17.

From 1998–99 to 2016–17, public-sector infrastructure expenditure as a share of gross domestic product (GDP) averaged 6%. Both government agencies and public corporations have substantially increased their spending on economic infrastructure. However, public-sector infrastructure spending as a share of GDP has been steadily declining. Spending on social infrastructure, which includes schools, hospitals and sanitation, has grown at a slower pace in recent years.³⁸

1.1.2 Projected infrastructure expenditure in the Medium-Term Budget Policy Statement, 2019

Total spending across general government on infrastructure projects in progress or planned for implementation for the 2019–2022 Medium-Term Expenditure Framework (MTEF) is estimated to be R484.9 billion. These projects are financed by the national, provincial and local government spheres, or by public entities and state corporations, as well as by public investment in public–private partnerships.

It is estimated that the national government departments will spend R47.9 billion on infrastructure in the three-year MTEF period. Included here is: R11.27 billion projected to be spent on infrastructure for tertiary institutions; R4.61 billion on infrastructure for Special Economic Zones; R3.58 billion on water supply projects; R2.87 billion on school infrastructure; R2.43 billion on South African Police Service offices, accommodation and stations; and R1.6 billion on infrastructure for hospitals.

Provincial government bodies will spend R171.9 billion in the same period, which is slightly more than three-and-a-half times the projected expenditure by national government departments. The bulk of the infrastructure spending will be on housing (R60.2 billion); education facilities (R33.87 billion); public transport (R19.36 billion); and health facilities (R17.16 billion).³⁹

Local government authorities will spend an estimated R191.24 billion on infrastructure in the same period, or just under four times the projected expenditure by national government departments. Included here is metropolitan local government: R7.4 billion is expected to be spent by the City of Tshwane; R5.77 billion by the Buffalo City Metro; R5.64 billion by the City of Cape Town; R5.36 billion by the City of Johannesburg; R5.3 billion by the Ekurhuleni Metro; and R2.68 billion by the eThekweni Metro. A total of R159.09 billion is expected to be spend by the remaining local government authorities.

³⁸ National Treasury, *Budget Review 2018*, 139–140.

³⁹ Refer to Western Cape Provincial Department of Human Settlements, *Annual Performance Plan: 2018/2019*, Table 5.1, 52; KwaZulu-Natal Provincial Department of Human Settlements, *Annual Performance Plan: 2018/2019*, Table 20, 58; Western Cape Provincial Department of Education, *Annual Performance Plan: 2018/2019*, Table 6.3, 76; KwaZulu-Natal Provincial Department of Education, *Annual Performance Plan: 2018/2019*, Table 6.2, 104; Western Cape Provincial Department of Transport and Public Works, *Annual Performance Plan: 2018/2019*, Table 23, 64; Western Cape Provincial Department of Health, *Annual Performance Plan: 2018/2019*, Table B 74, 102; and KwaZulu-Natal Provincial Department of Health, *Annual Performance Plan: 2018/2019 to 2020/21*, Table 89, 209–210.

Table 1 below provides estimates of expenditure on new infrastructure, renewal of infrastructure, and repair and maintenance of existing infrastructure of selected metropolitan local governments between April 2018 and March 2021.

Table 1. Estimates of infrastructure expenditure of metropolitan local government, 2018–2021: R 000

METROPOLITAN LOCAL GOVERNMENT		ROADS	STORM WATER	ELECTRICAL	WATER SUPPLY	SANITATION	SOLID WASTE	INFORMATION AND COMMUNICATIONS TECHNOLOGY	TOTAL
Johannesburg	New	3 101 645	174 574	1 630 947	2 492 296	60 305	1 282 281	67 480	8 809 528
	Renewal	3 132 493	148 000	1 477 766	1 193 906	592 256	185 377	427 000	7 176 798
	Maintenance	2 632 903	751 170	2 124 202	1 839 624	2 377 926	28 107	59 344	9 813 276
	TOTAL	8 867 041	1 073 744	5 232 915	5 525 826	3 030 487	1 495 765	553 824	25 799 602
Cape Town	New	2 065 441	349 704	1 638 048	5 010 244	2 745 694	875 240	638 813	13 323 184
	Renewal	688 837	76 675	1 768 296	1 469 000	1 557 500	15 280	5 710	5 581 298
	Maintenance	753 498	178 600	520 627	99 075	2 396 857	206 546	351	4 155 554
	TOTAL	3 507 776	604 979	3 926 971	6 578 319	6 700 051	1 097 066	644 874	23 060 036
Nelson Mandela Bay	New	738 823	91 874	145 905	257 885	198 429	0	3 500	1 436 416
	Renewal	174 229	23 500	333 556	347 100	199 200	0	0	1 077 585
	Maintenance	138 504	50 136	105 153	481 898	248 690	0	0	766 495
	TOTAL	1 051 556	165 510	584 614	828 998	646 318	0	3 500	3 280 496
Ekurhuleni	New	863 650	0	1 685 065	876 150	144 600	0	0	3 569 645
	Renewal	1 382 136	16 500	439 000	338 500	259 790	194 000	1 177 658	3 807 584
	Maintenance	124 673	2 423 635	801 769	744 267	186 460	0	6 360 727	10 454 891
	TOTAL	2 370 459	2 440 135	2 925 834	1 958 917	404 390	194 000	7 538 385	17 832 120

Source: Authors from various National Treasury budget documents.

South Africa's public entities will spend R54.6 billion in the 2019 MTEF period. The bulk of this expenditure on infrastructure will be by Transnet (R45.31 billion). An estimated R19.3 billion to be spent on infrastructure in the three years will come from public-private partnerships. The largest projects will be: the Gautrain Rapid Rail Link (R6.79 billion); Department of Correctional Services prisons (R3.28 billion); and the Inkosi Albert Luthuli Hospital (2.72 billion).

The 2018 Budget Review provides estimates of infrastructure expenditure by state-owned enterprises between the 2018-19 and 2020-21 financial years.⁴⁰ An estimated R368.2 billion was projected for the three-year period, making state-owned enterprises the major state investors in infrastructure. Expenditure on infrastructure by Eskom during this period was projected to be in the region of R197.3 billion.⁴¹ Eskom's Integrated Report for 2018 indicates several planned infrastructure projects.⁴² Transnet's infrastructure expenditure in the same three-year period was expected to be R101.4 billion.⁴³

Other major infrastructure expenditure in the medium term is the R118.2 billion to be spent on water and sanitation over the three years, contributing 14% to public-sector infrastructure expenditure.⁴⁴

The 2018 Budget Review estimates state expenditure between 2018-19 and 2020-21 to be R5,416.1 billion.⁴⁵ Of this, it is estimated that R834.1 billion, or 15.4% of the total budget estimate, will be spent on infrastructure.⁴⁶

1.1.3 Auditor-General's reports on irregular expenditure

In view of the significant scale of public expenditure, including public investment in infrastructure projects, it is important to know whether these funds are being spent efficiently, effectively and in the public interest. The Auditor-General (AG) found that irregular state expenditure (national, provincial and local government departments and public entities) in the 2017-2018 financial year was R50 billion, although the expected figure was higher because some government departments and public entities had not submitted reports.

Almost 84% of irregular expenditure was caused by non-compliance with supply-chain-management (SCM) regulations that are spelled out in the Public Finance and Management Act, 1999 (PFMA). The most common SCM offence was the failure to get three written quotations, which accounts for 27% of failure to comply with SCM procedures. Another 23% of procurement cases failed to invite competitive bidding, and in another 19% the use of preferential point scoring was not applied or was applied incorrectly. The other flaw in correctly implementing procurement procedures arose from extensive spending through multi-year contracts.⁴⁷

At the national level, "fruitless and wasteful" expenditure across departments and entities increased by over 200% to R2.5 billion for 2017-2018 compared to the previous financial year. Unauthorised expenditure rose by 38% from the previous year to R2.1 billion, 86% of which was a result of overspending.⁴⁸ The AG found that 56% of auditees engaged in uncompetitive and unfair procurement processes.⁴⁹

Among the main culprits at national level was the Department of Correctional Services, which is a matter of concern because about R3.28 billion of spending on infrastructure by public-private partnerships has been earmarked for projects of this Department in the 2019-2022 period.

Another national department with major challenges in this regard is the Department of Water and Sanitation, which is expected to spend a total of R3.58 billion on water supply projects in the three-year period ending in 2022, to be funded by the national Government. The AG found that irregularities in procurement processes and inadequate contract management were recurring findings on the water and housing infrastructure projects of national and provincial government departments and entities.⁵⁰

⁴⁰ National Treasury, *Budget Review 2018*, Table D.1., 141.

⁴¹ National Treasury, *Budget Review 2018*, Table D.2, 141.

⁴² Eskom, *Integrated Report*, 31 March 2018, 96.

⁴³ National Treasury, *Budget Review 2018*, Table D.5, 143.

⁴⁴ National Treasury, *Budget Review 2018*, 143.

⁴⁵ National Treasury, *Budget Review 2018*, Table 1.2, 8.

⁴⁶ National Treasury, *Budget Review 2018*, Table D.1., 141.

⁴⁷ Levy M, "Seven in 10 government departments and entities flout the law AG". Available at: http://notesfromthehouse.co.za/index.php?option=com_k2&view=item&id=280:a-g-s-report-on-this-year-s-audit-shows-sharp-decline-in-legal-compliance&Itemid=595&utm_source=newsletter_179&utm_medium=email&utm_campaign=parliament-s-untold-stories (accessed 23 Oct 2018).

⁴⁸ Cloete K, "Audit results of government departments show a shocking decline", *Engineering News*, 21 November 2018. Available from: <http://www.engineeringnews.co.za/article/audit-results-of-government-departments-show-a-shocking-decline-2018-11-21> (accessed 25 November 2018).

⁴⁹ Auditor-General of South Africa, *PFMA 2017-18: Consolidated General Report on National and Provincial Audit Outcomes*, p. 3.

⁵⁰ Auditor-General of South Africa, *PFMA 2017-18*, p. 3.

The most common finding was that competitive bidding processes had not been followed as the procurement was deemed an emergency, even though it related to multi-year projects. It was also reported that the lack of processes and systems in the Department of Water and Sanitation to monitor compliance meant that undetected instances of non-compliance could result in even more irregular expenditure. In its 2016–17 report, the AG reported that the Department overpaid contractors or paid for services not rendered. The AG could not determine the full extent of the fruitless and wasteful expenditure and reported that the Department needed to investigate this further. The Department had not investigated these instances by 2017–18 to confirm the value of fruitless and wasteful expenditure, resulting in a repeat qualification in the audit report.⁵¹

At the provincial level, the worst offenders were the KwaZulu-Natal transport and health departments, and Gauteng Province's Departments of Roads and Transport, Health, and Human Settlements.⁵² Although the irregular expenditure in these instances did not relate to infrastructure, the pattern of non-compliance with SCM processes in these departments is a matter of concern. This is evident in other provincial departments. The KwaZulu-Natal Departments of Transport, Health, Education, and Human Settlements incurred R9.1 billion (92%) of the province's total irregular expenditure in the 2017–18 financial year. The Department of Human Settlements continued to assess the contracts and bid documentation for implementing agents being used for municipal construction and detected further irregular expenditure. The AG also identified fraud indicators in the irregular appointment of the developers and contractors on one project of the Department that was audited.⁵³

The AG's media report on the 2016–17 audit outcomes included a focus on the impact of irregularities in procurement arising in SCM processes of provincial governments. It should be noted that there has been a shift towards decentralisation of infrastructure investment to the provinces, which may not have the capacity and governance systems to manage that investment. Perhaps unsurprisingly, most provinces did not perform to required standards. Even the relatively well-performing Western Cape and Gauteng Provinces were placed in a medium-risk category, despite the Gauteng provincial government, for example, having adopted an "open tender" or "open procurement" approach several years ago. The Eastern Cape, Limpopo and KwaZulu-Natal Provinces "move[d] to a high-risk rating", while the Free State, Mpumalanga, Northern Cape and North West Provinces were categorised as "very- high-risk" environments.

Although most provinces had the required policies and processes to ensure that transgressions and fraud were identified and acted upon, they chose not to use them. Of the 99 provincial departments and entities audited where there were allegations of financial and SCM misconduct and fraud, a third did not investigate the allegations. In the case of 32% of these departments and entities, investigations took longer than three months: a clear indication that both prevention and consequence management are inadequate.⁵⁴

Another illustration of the challenges at provincial level is evident in the AG's audit of 44 projects of departments of the Limpopo Province funded by conditional grants included in the 2017–18 report. The AG raised nine material findings in the Departments of: Education; Health; Sport, Arts and Culture; and Public Works, Roads and Infrastructure. Six related to non-compliance with SCM prescripts, including: non-compliance by implementing agents (identified at the three projects tested in the Department of Education); functionality points being awarded unfairly; and a contract amount exceeding the tender amount by R20 million after the grant was fully utilised. The Department of Health did not achieve its planned milestones for the installation and construction of a boiler house at Elim Hospital, as the service provider appointed was not suitably qualified to implement the project.⁵⁵

The AG's report on audit outcomes at the local government level for the period 2016–17 (the most recent available report) noted that, of the 257 municipalities audited, municipalities with material compliance findings on SCM increased from 63% in the previous year to 73%. The AG reported a 75% increase in municipal irregular expenditure, from R16.212 billion in the previous year to R28.376 billion in the year under review. However, he pointed out that municipalities had made a significant effort in 2016–17 to identify and transparently report on irregular expenditure incurred in previous years. This accounted for R15.026 billion of the total being irregular expenditure incurred in prior years but only identified and reported in 2016–17.

The remaining R13.350 billion (4% of the local government expenditure budget) related to payments or expenses incurred in 2016–17 by the new local government administration. It included payments made on contracts irregularly awarded in a previous year. If the non-compliance was not investigated and condoned, the payments on these multi-year contracts continued to be viewed and disclosed as irregular expenditure.⁵⁶

⁵¹ Auditor-General of South Africa, *PFMA 2017-18*, p. 90.

⁵² Levy M, "Seven in 10 government departments and entities flout the law AG".

⁵³ Auditor-General of South Africa, *PFMA 2017-18*, p. 50.

⁵⁴ Auditor-General of South Africa, "Auditor-general reports a slow, but noticeable four-year improvement in national and provincial government audit results", Media Release, 1 November 2017, p. 9.

⁵⁵ Auditor-General of South Africa, *PFMA 2017-18*, p. 53.

⁵⁶ Auditor-General of South Africa, "Auditor-general laments lack of accountability as he releases declining local government audit results", Media Release, 23 May 2018.

The AG's major concern was that municipalities were continuing to pay insufficient attention to his findings on SCM and the indicators of possible fraud or improper conduct that were reported and recommended for investigation. In 2015–16, the AG reported such findings at 148 municipalities, but 47% of these municipalities did not investigate any of the findings and 24% investigated only some of the findings. In 2016–17, they reported these types of findings at 145 of the municipalities, 71% of which also had such findings in 2015–16.

At 61% of the municipalities the council failed to conduct the required investigation into all instances of unauthorised, irregular and fruitless and wasteful expenditure reported in the previous year, a regression from 52% in the previous year. Sufficient steps were also not taken to recover, write off, approve or condone unauthorised, irregular and fruitless and wasteful expenditure as required by legislation.

As a result, the year-end balance of irregular expenditure that had accumulated over many years and had not been dealt with totalled R65.32 billion, while that of unauthorised expenditure was R43.5 billion and that of fruitless and wasteful expenditure was R4.24 billion.⁵⁷ The Nelson Mandela Bay Metro (R8.1 billion) had the highest level of irregular expenditure for 2016–17, followed by the Oliver Tambo District Municipality (R3 billion) and the City of Tshwane (R1.8 billion).⁵⁸

The AG noted in the 2017–18 report that the 16 SOEs it had audited disclosed R1.9 billion in irregular expenditure. The AG added, however, that the amount could be even higher as three SOEs received qualified audits on the completeness of their irregular expenditure disclosure. The irregular expenditure of the SOEs which the AG did not audit amounted to R28.4 billion, which included R19.6 billion at Eskom and R8.1 billion at Transnet.⁵⁹ Infrastructure spending by Transnet for the 2019–2022 period is expected to be about R45.31 billion. Eskom's irregular expenditure in 2017–18 was up from R3 billion in the previous year, after the utility's new board ordered that spending as far back as 2012 be scrutinised. Over R7.5 billion of irregular expenditure was identified in the years prior to 2018. The bulk of the irregular expenditure, R6.5 billion, "came from modifications to contracts in the procurement process."

1.2 Recent developments in the South African construction industry

The construction industry in South Africa is undergoing major changes at present. There was a boom in construction in the early 2000s as a result of national economic growth and preparations for the 2010 FIFA World Cup (mainly football stadiums and transport infrastructure). The 2012 National Development Plan anticipated a further expansion in construction activity as a result of a major increase in infrastructure investment that was expected to occur. The NDP recognised the need to expand, upgrade and maintain the country's ageing infrastructure networks, including: energy, roads, railways (freight and commuter), seaports, dams, sewerage, and storm-water systems.

In reality, however, there has been a steady contraction in the construction sector in recent years. This is associated with the lacklustre performance of the economy as a whole, including diminishing private sector investment in house building, new offices, retail complexes and industrial estates. A few niche areas of growth have included green buildings, logistics and warehousing. Poor market conditions have been compounded by constrained public sector investment in social and economic infrastructure.

The decline has hit the largest construction companies particularly hard, partly because the Government has been deliberately trying to steer procurement budgets towards smaller firms. In 2016 the Government signed an agreement (the Voluntary Rebuilding Programme) with the seven largest contractors, which had been found guilty of collusion and price-fixing in the run up to the 2010 FIFA World Cup, to increase the level of black ownership in their firms.⁶⁰ The deal meant they had to choose to either sell at least 40% of their domestic civil construction and building operations to black empowerment investors, or mentor up to three emerging contractors for seven years.

Meanwhile, procurement procedures have also become more stringent to cut costs and professional fees, resulting in many unprofitable contracts. In 2017, the Department of Trade and Industry introduced the Amended Construction Sector Code, with one of the key features being that the target for black ownership be set at 35%. Large construction firms have also suffered from a shortage of professional skills and technical capacity in all three spheres of government, resulting in major project delays and underspending. As a result, the National Treasury has recently introduced the draft Control Framework for Infrastructure Procurement and Delivery Management (SIPDM).

⁵⁷ Auditor-General of South Africa, "Auditor-general laments lack of accountability".

⁵⁸ Slabbert A, "Municipalities just don't listen - Auditor-General", *MoneyWeb*, 24 May 2018, available at: <https://www.moneyweb.co.za/news/south-africa/municipalities-just-dont-listen-ag/> (accessed 25 May 2018).

⁵⁹ Auditor-General of South Africa, *PFMA 2017-18*, p. 4.

⁶⁰ Roger Jardine, former CEO of the large construction company Aveng, called for more transparency in the construction sector following the investigation by the Competition Commission of South Africa, which uncovered widespread anti-competitive behaviour in the industry, including tender rigging in projects worth more than R47 billion. In June 2013, Aveng paid R307 million in fines after admitting to collusion. Jardine is reported as saying, "This construction cartel investigation has certainly led to further erosion of public trust in private sector institutions and corruption in the public service. I think South Africans are feeling that it's just getting out of control." See "Construction sector needs transparency", *EWN* 9 October 2013, available at: ewn.co.za/2013/10/09/Construction-sector-needs-transparency (accessed 9 October 2013)..

This is a project lifecycle process that has to be adopted by public entities for large projects to mitigate against cost overruns and project delays.

The highest profile casualty of the pressures facing the construction industry has been Basil Read, going bust in June 2018. Group Five is another company in difficulty. Its response has been to sell off part of its business to black empowerment interests and to focus more on market opportunities elsewhere in Africa and Europe. It has recently filed for business rescue.⁶¹ Murray and Roberts has withdrawn from the construction sector completely by selling off its activities to empowerment interests and has diversified into engineering and mining in other countries. It is currently threatened with a hostile takeover by the German company Aton. WBHO has diversified into the house-building sector in the UK. Aveng is slimming down and diversifying into mining and civil engineering in Australia. It tried to sell 51% of its struggling Grinaker-LTA subsidiary, which operates in South Africa and elsewhere in Africa, to a consortium called Singabakhi Holdings. However, the deal fell through because of the current lack of confidence in the construction sector.

The dismal picture painted above underscores the need to turn the construction industry around, particularly given the amounts of money hitherto invested in infrastructure. The Office of the Chief Procurement Officer (OCPO) in National Treasury reports that, "Annually, the South African government is the largest buyer in the country as it spends over R500 billion on goods, services and construction works through over 1000 procuring entities." Between 2009 and the end of 2014, the Government had spent R1 trillion on developing the country's infrastructure. "The expenditure was in areas such as energy, water infrastructure, sanitation, rail, road-based public transport, and hospital revitalisation among others," Minister in the Presidency Jeff Radebe said.⁶² The investments were part of implementing the NDP specifically in infrastructure development.

The NDP is aimed at eliminating poverty and inequality by 2030. Service delivery and infrastructure in these sectors are also vital for the Constitution's requirement for the progressive realisation of socioeconomic rights. However, current realities are not conducive to achieving these socio-economic objectives. For example, the Chief Executive Officer of the South African Forum of Civil Engineering Contractors (Safcec), Webster Mfebe, has been reported as saying that the South African construction industry is in a state of, "accelerated decline".⁶³ He says this is caused mainly by a lack of new contracts flowing from the Government, as well as by increased violence and thuggery on local construction sites. So-called rival "business associations" are effectively operating as a mafia.

Mfebe, who has headed Safcec since 2013, observed that public infrastructure expenditure has been declining. "In the 2017/18 financial year Government's infrastructure budget was R947.2 billion. This was reduced to R834.1 billion in 2018/19. This is a whopping 12% nominal decrease. Also, in 2018 there was a 15.3% decline in the nominal value of contracts awarded, with the building industry hardest hit...all of this is happening in an industry that is historically a big investor in capital expenditure and skills development." Mfebe notes South Africa can ill afford to lose any more depth in its construction industry, after Group Five and Basil Read, among others, have filed for business rescue. "Once we lose that capacity, it will take years to rebuild", he says.

Mfebe says that contractors have repeatedly gained interdicts against violent groupings threatening to disrupt construction sites should they not receive some form of benefit. People are arrested but when released they go back to site, "with a vengeance". "It cannot be that the situation is left in the hands of the contractor. What happened to law enforcement agencies' ability to maintain law and order?"

He notes that construction projects worth around R27.5 billion have been violently disrupted or halted in South Africa in recent times. The unrest often witnessed at construction sites is driven, to a degree, by the desire of the surrounding communities to become involved in and gain economically from projects in their area. "We cannot dismiss that. Those expectations are genuine and have to be met. On the other hand, you see violence driven by gangs operating mafia style. Even worse, they are often alleged to be linked to local, provincial and national political figures."

⁶¹ "SA's construction industry, like Group Five, may be collapsing", *BusinessLive*, 13 March 2019, available at: <https://www.businesslive.co.za/bd/companies/industrials/2019-03-13-sas-construction-industry-like-group-five-may-be-collapsing/> (accessed 15 March 2019).

⁶² "Government spends R1 trillion on infrastructure", *SA News*, 17 June 2015.

⁶³ "Construction industry in rapid decline as work wanes, mafia' takes over, warns Safcec", *Engineering News* 8 April 2019, available at: <http://www.engineeringnews.co.za/article/construction-industry-in-rapid-decline-as-work-wanes-mafia-takes-over-warns-safcec-2019-04-08> (accessed 9 April 2019).

1.3 Overview of the legal, policy and institutional framework for public participation

1.3.1 The Constitution and human rights

“The people of South Africa must be involved. They must be consulted in an organised fashion, on specific issues in order for the new law to be sensitive to and shaped by their realities, and for it to address these realities.”

Baleka Mbete⁶⁴, 1994

The existing legislative and policy framework in South Africa clearly establishes the intention for South Africa to function both as a participatory and representative democracy.⁶⁵ But while there is no enumerated right to public participation in government decision-making and / or policy- and law-making processes in the Bill of Rights of the Constitution of the Republic of South Africa 1996 (because South Africa is both a representative and a participatory democracy), the Constitutional Court has indicated that the right to public and political participation, “is given effect ... through the political rights guaranteed in section 19 of the Bill of Rights”. This guarantees every citizen the right to make political choices as supported by the right to freedom of expression and the duties imposed on the Government to facilitate public participation and promote democratic and accountable government.

In addition, the values of public administration are set out in section 195 of the Constitution. The relevant principles include that: (e) the public must be encouraged to participate in policy-making; (f) public administration must be accountable; and (g) transparency in decision making must be fostered by providing the public with timely, accessible and accurate information.

1.3.2 Procurement

The legislative framework for public procurement in South Africa aims to ensure the fair acquisition of goods for the state, and also includes several policy imperatives within its remit. Ultimately, public procurement is governed by section 217 of the Constitution, which provides that:

1. When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
2. Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –
 - categories of preference in the allocation of contracts; and
 - the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.⁶⁶

The PFMA delegates the authority for procurement decisions to each accounting officer or authority in national and provincial institutions.⁶⁷ Vitally, the PFMA also requires that the National Treasury issues guidelines for the development of a framework for an appropriate procurement and provisioning system which is fair, equitable, competitive, cost effective and, significantly, transparent.⁶⁸

The entire legislative framework for procurement is complex. In its own review of the SCM process in South Africa, the National Treasury noted that there are more than 80 different legal instruments regulating public sector procurement.⁶⁹

The SCM process necessarily has relevance to investigations into South African procurement, though it is broader: “[SCM] includes the movement and storage of raw materials, work-in-process inventory and finished goods from source to consumption with the objective of creating value, building a competitive infrastructure, leveraging worldwide logistics, synchronising supply with demand and measuring performance.”⁷⁰

In contrast, public procurement, “refers to the process through which the state acquires goods, works and services needed to fulfill its public functions”.⁷¹

⁶⁴ South African History Online, 2017.

⁶⁵ See amongst others *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 121 and *Matatiele Municipality and Others v President of the RSA and Others (No 2)* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) at para 40.

⁶⁶ Constitution of the Republic of South Africa, 1996.

⁶⁷ Comparatively, the Local Government: Municipal Financial Management Act, 2003 is more prescriptive in its authority delegations.

⁶⁸ PFMA s.76(4)(c).

⁶⁹ National Treasury (2015) *Public Sector Supply Chain Management Review*, available at: <http://www.governmentpublications.lib.uct.ac.za/news/2015-public-sector-supply-chain-management-review> (accessed 9 January 2018).

⁷⁰ Chartered Institute of Purchasing and Supply.

⁷¹ Quinot G and Arrowsmith S (Eds.), *Public Procurement Regulation in Africa*, Cambridge University Press, 2013, pp. 178–199.

Increasingly, through decentralisation, the devolution of procurement functions has included the devolution of service-delivery functions, which makes the coherence provided by the overarching constitutional and policy imperatives all the more relevant. Procurement increasingly reflects the state's duty to fulfil fundamental human needs, many of which are enshrined as rights in the Constitution. From a human-rights perspective, procurement decisions should be informed not only by financial or economic considerations but also by social and political imperatives if just outcomes are to be ensured.

The SCM Regulations issued in terms of the PFMA and Municipal Finance Management Act (MFMA) require accounting officers (AOs) to put in place an SCM system that consists at least of: demand management, acquisition management, logistics management, disposal management, risk management and regular assessment of supply chain performance.⁷² Procurement intersects with SCM at two primary levels: project level (related to contracting) and portfolio level (which links decisions to mandates, priorities and budgets).⁷³

In South Africa, how a government department or public entity procures goods or services depends on the size and value of the contract under consideration. High-value contracts see detailed formal procedures prescribed, including greater planning, public participation and transparency, as well as oversight. Low-value contracts require less formalisation.⁷⁴ In any event, it is the AO within procuring entities who ultimately remains responsible for developing their own procurement policies in line with the law and regulations, which results in some fragmentation, but also significant variance in implementation practices: "The regulatory framework that governs public procurement in South Africa is loose, and this provides room for the proliferation of informal practices".⁷⁵

In addition to generalised guidance on procurement resulting from the type of contract (for example, a fixed-term contract for a particular bridge as opposed to a long-term transversal contract for lower-value goods and services to many different public bodies), different types of procurement have applicable rules and regulations prescribed by the National Treasury. Infrastructure procurement is currently guided by the SIPDM. However, this will soon be replaced by the Control Framework for Infrastructure Delivery and Procurement Management (IDPM, currently in draft), which will establish an infrastructure delivery management control system and minimum requirements for infrastructure procurement.

Outside of guidance for both design of procedures and implementation methods that relate to SCM as well as different forms of procurement, several laws also provide recourse to challenge procurement decisions. Administrative decisions may be reviewed under the Promotion of Administrative Justice Act, 2000 (PAJA). In addition, the Auditor-General Act, 1995, requires that the AG reasonably satisfy himself that "satisfactory" management measures have been taken to ensure that resources are procured economically and utilised efficiently and effectively. The recent Public Audit Amendment Act, 2018 has extended the powers of the AG within the procurement environment to refer material audit irregularities for further investigation if necessary. In certain cases, the AG can issue a certificate of debt and demand the recovery of money lost from accounting officers and authorities, such as an SOE board. The Act came into effect on 1 April 2019.⁷⁶

The draft Public Procurement Bill, which will formalise the powers of the Office of the Chief Procurement Officer, will become of exceptional relevance to the environment once finalised, as the Office currently only has powers as prescribed by the National Treasury. The opportunity within the Bill to drive open contracting standards is under discussion and offers an exceptional opportunity to enhance transparency. The inclusion of the CoST IDS in the Bill would constitute a major step forward in the fight for greater transparency.

The Promotion of Access to Information Act, 2000 (PAIA) provides the framework for access to information in South Africa. At its most simple, the law creates a presumption of openness in relation to all public records, and to all private records if required for the exercise or protection of any other right. This presumption is an important starting point in considering what legal facilitators, or impediments, there may be to accessing records of relevance to the open procurement and contracting environment.

In spite of this presumption, procurement information has by default usually been treated as "confidential" by procuring entities,⁷⁷ although this is changing. PAIA provides the grounds for refusals for access, which include protections for "commercially sensitive information". Section 36(1) on mandatory protection provides that a request *must* be refused if the record contains:

⁷² Naidoo L, Naidoo V and Ambe M. "Open Contracting: a new frontier for information disclosure in public procurement", *Public and Municipal Finance*, 6(1), 2017, pp. 24–36, doi:[10.21511/pmf.06\(1\).2017.03](https://doi.org/10.21511/pmf.06(1).2017.03)

⁷³ *Ibid.*

⁷⁴ Bolton P, "The regulatory framework for public procurement in South Africa", in Quinot G and Arrowsmith S, *Public Procurement Regulation in Africa*, Cambridge University Press, 2013.

⁷⁵ Brunette R et al. *The Contract State: Outsourcing and decentralization in contemporary South Africa*, PARI, 2014.

⁷⁶ See Proc. No. R.19 in Government Gazette 42338 dated 29 March 2019 and Proc. No. 13 in Government Gazette 42317 dated 18 March 2019.

⁷⁷ Naidoo L, above p. 113.

- a. trade secrets of a third party;
- b. financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or
- c. information supplied in confidence by a third party the disclosure of which could reasonably be expected:
 - i. to put that third party at a disadvantage in contractual or other negotiations; or
 - ii. to prejudice that third party in commercial competition.

However, subsection (2) provides that access to a record *may not* be refused in terms of subsection (1) insofar as it consists of information:

- a. already publicly available;
- b. about a third party who has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned; or
- c. about the results of any product or environmental testing or other investigation supplied by a third party or the result of any such testing or investigation carried out by or on behalf of a third party and its disclosure would reveal a serious public safety or environmental risk.

In addition, section 37(1) of PAIA provides for *mandatory* protection of confidential information, and protection of certain other confidential information of a third party:

- a. if the disclosure of the record would constitute a breach of a duty of confidence owed to a third party in terms of an agreement. The disclosure of information may be refused
- b. if the record consists of information that was supplied in confidence by a third party:
 - i. the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source; and
 - ii. if it is in the public interest that similar information, or information from the same source, should continue to be supplied.

However, subsection (2) provides that a record *may not* be refused in terms of subsection (1) insofar as it consists of information:

- a. already publicly available; or
- c. about the third party concerned that has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned.

These provisions do not constitute a blanket prohibition on access to procurement information that the general conduct of procuring entities often seems to imply. The courts, when called upon to test these provisions, have instead made it very clear that those circumstances in which it is legitimate for public bodies to refuse disclosure of records relating to public procurement are limited, by a “harm” test.

An information holder is under an obligation to show that the harm envisaged in section 36 would both likely and reasonably occur, which cannot be established merely by stating that such information would not ordinarily be available to competitors.⁷⁸ Further, suggesting that such information is “supplied in confidence by a third party” merely by suggesting reciprocal duties of trust between a procuring entity and a bidder will be insufficient to establish the refusal ground under section 37.⁷⁹ Reliance on specific confidentiality clauses within contracts has also been directly addressed, when entities have sought to use them to circumvent requests submitted in terms of PAIA. In the *Transnet*⁸⁰ case, the court noted: “Accordingly even if ‘tender price’ in the notice included the schedule, the parties’ intention could never have been to maintain confidentiality in respect of the rates *after the award*. Parties cannot circumvent the terms of the Act [PAIA] by resorting to a confidentiality clause (emphasis added).

In other words, merely because a confidentiality clause exists does not mean the refusal grounds under section 36 automatically apply. Instead, bidders must be aware when participating in public processes that their information may be subject to public scrutiny, at least after a decision has been made to award the contract.

Even within the context of existing refusal grounds, section 46⁸¹ of PAIA creates a *public interest override* that may still be relevant in the face of the existence of otherwise commercially sensitive information or confidentiality claims.

⁷⁸ *BHP Billiton PLC Inc and Another v De Lange and Others* 2013 (3) SA 571 (SCA), para 56.

⁷⁹ See above, note 40.

⁸⁰ *Transnet Ltd and Another v SA Metal Machinery Co. (PTY) Ltd* 2006 (6) SA 285 (SCA).

⁸¹ Section 70 creates a similarly drafted provision for private sector requests.

Mandatory disclosure in the public interest is required if, “(a) the disclosure of the record would reveal evidence of (i) a substantial contravention of, or failure to comply with, the law; or (ii) an imminent and serious public safety or environmental risk; and (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.”

The prevention and combating of corruption, ensuring a level playing field for bidders and prospective bidders, and promoting accountability are all clearly in the public interest.

Another law that allows for access to records is PAJA. It includes provisions for affected persons to access written reasons for administrative decision that can include procurement decisions.⁸² Unlike PAIA, it creates an obligation to generate such reasons and records even when they might not yet exist. However, establishing *locus standi* (the legal right justifying one’s request) requires that more specific criteria are met.

The transparency laws of relevance in relation to proactive disclosure are diversified and less explicit. Proactive disclosure means that a procuring entity discloses the data routinely and periodically. A formal request is not required. PAIA does not provide significant detail on proactive disclosure, though it does not expressly preclude or override it. Sections 15 and 16 expressly recognise that there are forms of information and data that an entity should not require be subject to a request, but should instead proactively disclose. However, that information is not prescribed. In other words, each entity has full discretion (subject of course to existing statutory or common law requirements) to determine which records it will, or will not, voluntarily disclose.⁸³ In addition, section 86 of PAIA provides that any mechanism in a law which provides for access to records in a manner that, “is not materially more onerous than the manner in which access may be obtained in terms of [PAIA]” could be used to gain access.

The presumption of openness and relevant clauses of PAIA seem then to encourage the proactive disclosure of more information / the provision of open data. However, South Africa does not have a specific open data policy or law, with access to state data being determined by the several laws, depending on contextual circumstances. Section 195(1) of the Constitution does, however, provide additional support for proactive disclosure: “Public administration must be governed by the democratic values and principles enshrined in the Constitution, including... g. Transparency must be fostered by providing the public with timely, accessible and accurate information”.

In accordance with the SCM Regulations promulgated by the National Treasury, only tender advertisements and award decisions require proactive disclosure. It has been noted that the legal obligations extend only to requiring that:

- bid notices are advertised for 30 days
- bid notices are advertised in newspapers, the Government and provincial tender bulletins on the National Treasury’s and procuring entities’ websites
- bid reference numbers are included in procurement notices
- closing dates and times are included in procurement notices
- details of any compulsory briefing session are contained in the procurement notice
- list of all bids received are available for public viewing
- the information relating to the successful bidder must be published: contract number and description; name/s of the successful bidder(s) and preferences claimed; the contract price(s); and, if possible, the brand names and dates for completion of contracts.⁸⁴

Entities subject to the PFMA must publish notice of a contract award on National Treasury’s e-Tender Publication portal within seven working days of making an award.⁸⁵ In practice, however, only very limited information is published on the portal. For example, in respect of tender number 122Q/2017/18, the name of the successful bidder appears, as does their B-BBEE points and overall points score, but other relevant information is not posted, such as the names of directors, the contract amount and contract end date.⁸⁶ In South Africa, then, transparency is still largely driven through reactive information request mechanisms, which is why the low levels of compliance with PAIA are so highly problematic.⁸⁷

⁸² Promotion of Administrative Justice Act, 2000 at s. 5.

⁸³ It is this broad discretion that resulted in the Model Law on Access to Information for Africa (2013), in its own sections describing proactive disclosure, seeking to be more prescriptive, and thus under section 7(1) requiring publication of information produced by or in relation to that body within 30 days of the information being generated or received by that body...(f) detailed information on the design and execution of any subsidy programmes implemented with public funds, including the amounts allocated and expended, the criteria for accessing the subsidy, and the beneficiaries; (g) all contracts, licences, permits, authorisations and public-private partnerships granted by the public body or relevant private body...And annually under section 7(2): (i) the detailed actual budget, revenue, expenditure and indebtedness for the current financial year, including all related estimates, plans, projections and reports, including audit reports, and for any previous financial years from the date of the commencement of this Act.

⁸⁴ Naidoo L, *Application of Open Contracting Principles in South African Public Sector Procurement*, thesis completed in pursuit of Magister Technologiae: Organisational Leadership, Tshwane University of Technology, 2016.).

⁸⁵ National Treasury Instruction Note 1 of 2015/2016, see <http://www.etenders.gov.za/>.

⁸⁶ See, for example, <http://www.etenders.gov.za/field-collection/field-etender-awarded-to/73382> (accessed 16 February 2019).

⁸⁷ See, for example, the *Access to Information (ATI) Network Shadow Report 2016*. The report found (at p.2) that, “Alarming, 46% of information requests to public bodies were denied in full, either actively or as a result of the request being ignored (‘deemed refusal’).” A total of 34 % of responses provided full disclosure of the information requested, while in 12% of instances part of the information was released (see p. 3).

Importantly, PAIA has recently been amended by the Protection of Personal Information Act, 2013 (POPIA) to create an Office of the Information Regulator (OIR), an office that will act as a form of ombudsman on both privacy and access to information issues.

This administrative recourse is vital, as recourse in access to information cases has traditionally been through the courts, making access often prohibitively expensive and slow.

As noted below, at the time of writing, the OIR is not yet fully operational. Even when it is allocated the necessary resources, it remains to be seen whether the OIR will acquire the necessary institutional strength and whether its leadership will muster the requisite political will to transform the transparency landscape, as intended and designed.

The relevance of POPIA in turn extends to the obligations it creates on both public and private sector actors to manage and protect personal data, which may form part of procurement-related data. It should be noted that, at the time of writing, POPIA is not yet fully operational. The obligations created by the Act require that entities conduct themselves in a responsible manner when collecting, processing, storing and sharing another person's personal information by holding them liable should they misuse or compromise it, but these obligations to manage such data will not preclude the application of PAIA. PAIA remains the primary law regarding accessing information. While POPIA provides individuals with the rights to access their personal information in terms of section 23, the mandatory and discretionary refusal grounds within PAIA remain applicable to such requests.

As entities consider moving toward proactive disclosure of data, however, the standards POPIA creates will be relevant to issues, such as re-identification, as databases are uploaded to public access platforms. In other words, when a formal request for information is made, Information Officers will remain guided by PAIA as the primary reference point.

Table 2 sets out the key legislation governing public procurement in South Africa.

Table 2: Key laws (non-exhaustive)

Transparency law	Procurement law	Sectoral law
Constitution, s. 32	Constitution, s. 217	Construction Industry Development Board Act
Promotion of Access to Information Act (PAIA)	Promotion of Administrative Justice Act	Competition Act
Promotion of Administrative Justice Act (PAJA)	Preferential Procurement Policy Framework Act	Procuring entity specific e.g. the State Information Technology Agency Act
Protection of Personal Information Act (POPIA)	Public Finance Management Act	
National Environmental Management Act	Municipal Finance Management Act	
Prevention and Combating of Corrupt Activities Act	Municipal Systems Act	
	Broad-Based Black Economic Empowerment Act	
	Competition Act	

Source: Authors

However, when proactively disclosing information, Information Officers and other persons who have obligations will need to ascertain first if such information contains personal or otherwise confidential information and, once that is established, whether the obligations and standards created by POPIA have been maintained in collecting, processing and *sharing* that information.

1.3.3 The National Development Plan

Chapter 15 of the NDP is aligned to the Government's Programme of Action in terms of Outcome 14 ("Nation Building and Social Cohesion") and defines active citizenship as equalising opportunities and enhancing human capabilities. The NDP identifies the very purpose of an active citizenry as being, "to strengthen development, democracy and accountability".⁸⁸

South Africa, in its 25th year of democracy, needs to move beyond superficial engagement and involvement. People will feel that public participation is real only when they see their influence on decisions and actions taken by the Government. Public participation is therefore a process, not an event, and it requires giving feedback to the public in response to, for example, inputs, suggestions and complaints, which supports transparent and accountable government.

Public participation requires active engagement by citizens and the state before, during and after the decision-making process.⁸⁹ Civil society can play a pivotal role in encouraging public participation and in entrenching electoral democracy and indeed, in the South African context, constitutional democracy.

The ways in which this is happening are explored below.

The Reconstruction and Development White Paper (1995) set out a context for participatory governance with the understanding that, "development is not about the delivery of goods to a passive citizenry...it is about involvement and growing empowerment".⁹⁰ The NDP continued with this understanding that public participation paves the way for human development, as development should be human-centred and people-driven, and that democracy is about liberating people to meaningfully participate in their own development. Public participation is based on the fundamental democratic principle that those who are affected by a decision have a right to be involved in the decision-making process. Public participation is two-way communication and collaborative problem-solving with the goal of achieving better and more acceptable decisions.⁹¹

1.3.4 United Nations Sustainable Development Goal 16

Although it is important to interpret holistically, the United Nations Sustainable Development Goal (SDG) most applicable to the strengthening of public participation is SDG 16, which seeks to, "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and *build effective, accountable and inclusive institutions at all levels*" (emphasis added). The SDGs are intended to be implemented by 2030, and progress towards the global goals and targets is intended to be tracked through nationally-relevant indicators.

Target 16.6: Develop effective, accountable and transparent institutions at all levels

Indicators:

- 16.6.1 Primary government expenditures as a proportion of original approved budget, by sector (or by budget codes or similar).
- 16.6.2 Proportion of the population satisfied with their last experience of public services.

Target 16.7: Ensure responsive, inclusive, participatory and representative decision-making at all levels

Indicators:

- 16.7.1 Proportions of positions (by sex, age, persons with disabilities and population groups) in public institutions (national and local legislatures, public service, and judiciary) compared to national distributions.
- 16.7.2 Proportion of population who believe decision-making is inclusive and responsive, by sex, age, disability and population group.

In the case of South Africa, SDG 16 and the associated targets underline the importance of addressing the inclusion of marginalised and vulnerable groups in decision-making processes and positions, and also of improving the overall levels of confidence and trust in the Government. As a signatory to the SDGs, SDG 16 underlines the existing commitment in South African law and policy to participatory democracy.

⁸⁸ National Planning Commission, 2012, pp 26, 37.

⁸⁹ Adapted from the Strategic Framework for Public Participation in the South African Legislative Sector, 2009.

⁹⁰ Republic of South Africa, "Reconstruction and Development Plan", 1995 at p. 8.

⁹¹ "The Spectrum of Public Participation". International Association for Public Participation, 2007, available at: http://www.iap2.org/associations/4748/files/IAP2%20Spectrum_vertical.pdf (accessed July 2018).

1.3.5 Public participation in planning, budgeting, policymaking, law-making and monitoring

Batho Pele White Paper of 1997

In its introduction, the Batho Pele White Paper⁹² states that, “A guiding principle of the public service in South Africa will be that of service to the people.” The White Paper emphasises the centrality of people in service delivery. The public ought to be consulted at all times to ensure that government services are indeed of the type and standards that, “meet the basic needs of all South African citizens.”

Treating citizens as “customers” implies the following:

- listening to and considering their views in making decisions about what services should be provided
- treating them with consideration and respect
- making sure that the commitment level and quality of service is always of the highest standard
- responding swiftly and sympathetically when standards of service fall below the promised standard.

The White Paper outlines eight principles that can objectively guide public service institutions, not only on service delivery standards, but also on public participation. Notably, the very first principle is “Consultation”, which emphatically states that, “Citizens should be consulted...” about services rendered to them. In essence, the White Paper sets standards for enabling and facilitating public participation in service delivery.

A particular example of public participation in public sector planning is set out in Treasury Regulations⁹³ read with the Public Service Regulations. These provisions outline the requirement for participatory budgeting and planning procedures prior to introducing the annual budget in the National Assembly (NA). In terms of the Public Service Regulations, the accounting officer of a public institution must prepare a strategic plan for the Medium-Term Expenditure Framework for approval by the relevant executive authority.

The accounting officer is obliged to consult with the department’s actual and potential customers (i.e. including the public) to establish service delivery needs in order to inform the department’s Strategic Plans and Annual Performance Plans, which, in turn, inform their budget proposals to the National Treasury. There is thus a formal legal requirement for the executive branch, acting through its administration, to engage *directly* with the public during the budget formulation phase regarding service delivery needs and service standards.

Citizen-based monitoring

The Department of Planning, Monitoring and Evaluation’s (DPME’s) Framework for strengthening citizen-government partnerships for frontline service delivery monitoring, which recognises this legal foundation, was approved by Cabinet in August 2013.⁹⁴ DPME’s citizen-based monitoring focus area has improvement in services as its core objective. It emphasises building partnerships between citizens and government for effective and results-focused monitoring of service delivery at the frontline. In approving this framework, the Cabinet resolved that, “government departments involved in service delivery to the public adjust their monitoring and evaluation frameworks to include mechanisms for incorporating the views and experiences of citizens on service delivery.”

The approaches identified in the citizen-based monitoring framework are of application in, for example, processes contributing to local government integrated development plans (see below for a discussion of participation in the local government sphere.)

PAJA

The preamble to PAJA⁹⁵ indicates that it was enacted to give effect to the right to administrative action that is lawful, reasonable and procedurally fair, and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa 1996, in order to:

- promote an efficient administration and good governance
- create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action (emphasis added).

⁹² Department of Public Service and Administration, “White Paper on Transforming Public Service Delivery” (Batho Pele White Paper), 1997.

⁹³ Chapter Five “Strategic Planning” in Regulation Gazette No. 29644, 20 February 2007 issued pursuant to the Public Finance Management Act 1999 (PFMA), read with sub-regulation C.1 (g) of the Public Service Regulations (2001, as amended).

⁹⁴ Department of Planning, Monitoring and Evaluation, “Framework for strengthening citizen-government partnerships for frontline service delivery monitoring”, August 2013.

⁹⁵ The Promotion of Administrative Justice Act 3 of 2000.

PAJA embraces the Batho Pele principles and aims to ensure that decisions are carefully considered and that the public is involved in decision making that affects them. Administrative procedures must be fair and transparent, which includes giving people reasonable notice that a decision is being considered and a reasonable opportunity to: have their views heard and taken into account; be informed of a decision when it is taken; and request written reasons for decisions. It also provides a right to appeal against a decision and have administrative action reviewed by the courts. In general, PAJA makes sure that the administration works in a way that is fair and transparent, and it holds the administration accountable for its actions.

Notably, section 4 on “Administrative action affecting public” requires an administrator to decide whether to hold a public inquiry, to follow a notice and comment procedure, or to combine the two. If authorised by any other empowering provision to follow a different procedure, the administrator may do so, provided it is fair. Further requirements for fair processes are prescribed in PAJA and its Regulations. Thus, for example, the PAJA Regulations require a government administrator who intends to take action that, “may materially and adversely affect the rights of members of a specific community who cannot read or write or who otherwise need special assistance” to “take special steps” to solicit their views. These special steps can include, “public or group meetings where the matter to be investigated and the possible consequences are explained, questions are answered and views from the audience are minuted.”⁹⁶

Public participation in local government

The Preamble to the Local Government: Municipal Systems Act 32 of 2000⁹⁷ recognises among other things that the Constitution enjoins local government not just to seek to provide services to meet the basic needs of all our people but, “to be fundamentally developmental in orientation”. This orientation includes enabling and empowering people to develop the skills necessary to participate in their own development and in their governance.

The Preamble therefore also recognises that: “a *fundamental* aspect of the new local government system is the *active engagement of communities* in the affairs of municipalities of which they are an integral part, *and in particular in planning, service delivery and performance management*”; [and that] the new system of local government requires an *efficient, effective and transparent* local public administration that conforms to constitutional principles, [and therefore that] there is a need to create a more harmonious relationship between municipal councils, municipal administrations and the local communities through the acknowledgement of *reciprocal rights and duties*” (emphasis added).

Accordingly, section 4(2), “Rights and duties of municipal councils”, provides among other things that the “council of a municipality, within the municipality’s financial and administrative capacity and having regard to practical considerations, has the *duty* to: ... (c) encourage the involvement of the local community; [and to] (e) consult the local community about (i) the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider; and (ii) the available options for service delivery.”

In accordance with the partnership model of constitutional local governance, section 5(1) (a), “Rights and duties of members of local community, provides that members of the local community have the right: ... through mechanisms and in accordance with processes and procedures provided for in terms of this Act or other applicable legislation to (i) contribute to the decision-making processes of the municipality; and (ii) submit written or oral recommendations, representations and complaints to the municipal council or to another political structure or a political office bearer or the administration of the municipality.”

In terms of section 5(1), community members also have a number of other particular rights to transparency and participation. These rights include: “to prompt responses to their written or oral communications, including complaints”; to be “informed of decisions” of the municipal council, or another political structure or office bearer “affecting their rights, property and reasonable expectations”; to “regular disclosure” of the state of affairs of the municipality, including its finances; and to “demand” that the proceedings of the municipal council and those of its committees must be (among other things) “open to the public”.

Chapter 4, “Community Participation”, provides in some detail for the duty on the local authority to develop a “culture of community participation”, and to that end provides for a range of mechanisms, processes and procedures for community participation; and for the communication of information concerning community participation, including public notice of meetings of municipal councils, public admission to meetings, and documents to be made public including via an official website.

In the South African local government system, public participation platforms that are often used include: *izimbizo/lekgotla*, citizen satisfaction surveys, ward committees, community development workers, integrated development planning forums, traditional council meetings and media-related initiatives such as radio talk shows, television programmes and the use of social media platforms such as Twitter and Facebook.

⁹⁶ Regulation 5(1) and (2)(a) of the Regulations on Fair Administrative Procedures GN R1022 (GG 23764 of 31 July 2002).

⁹⁷ Local Government: Municipal Systems Act 32 of 2000.

The most visible participation mechanisms in municipalities are *izimbizo* and the ward committee system. According to Twala,⁹⁸ *izimbizo* is a practice which, though seemingly unique to the Zulu people, is widespread in African cultures; certainly (in South Africa) among the Sotho, Tswana and Pedi, the practice has been adopted in the modern governance system to refer to presidential, ministerial and mayoral meetings with groups of citizens. Thus, *izimbizo* is used to refer to those public meetings held with communities by political leadership at national, provincial and local levels, potentially including the President, ministers, premiers, members of executive councils (provincial ministers), mayors, and councillors, accompanied by senior officials.

An *imbizo* has a clear overarching strategic or structural objective, which is to promote interaction between citizens and government at different levels. However, if not meticulously planned and designed to reflect constitutional values, *izimbizo* can become more of a public relations exercise than a genuine effort to solve problems. It often degenerates into platforms for demands and complaints to government officials on well-known issues such as unemployment, housing, electricity, water supply and sanitation, thereby making them mere listening campaigns allowing citizens to vent their anger.

Accountability

The National Treasury, in its 2015 Public Sector Supply Chain Management Review,⁹⁹ argued that although the public sector SCM system was highly decentralised to allow managers to manage, as per the PFMA and MFMA, “SCM across South Africa [was] highly fragmented ... [making it] difficult for government to obtain maximum value when buying, and making use of, goods and services.”¹⁰⁰ Its proposal was to centralise procurement through “accelerated transversal contracting”, the benefits of which would be that:

- unnecessary duplication is eliminated, procurement activity is rationalised, leakages are reduced and scarce procurement skills are better utilised
- transversal contracting reduces the administrative burden for suppliers as they interact with government at one central point
- long-term supplier relationships are established and there is greater certainty in the market place
- market intelligence can be shared across the public sector
- there is consistency in policy application, and improved contract management.¹⁰¹

There is no mention here of the greater levels of transparency and accountability which the centralisation of national procurement might be expected to achieve. Though the National Treasury recognises elsewhere in the same document that, “Good governance ensures transparency, accountability, efficiency and upholding of the rule of law in economic, political and administrative processes”, there is an acknowledgement that, “The public SCM system in South Africa has clear rules but [that] these are often poorly enforced.”¹⁰²

The National Treasury maintains that a number of measures, “will enhance transparency in the SCM system”, as follows:

- Developing and prescribing a public disclosure framework which governs transparency within the SCM process. This should result in institutionalising disclosure.
- Prescribing that all information in the bid process be disclosed publicly. This includes bid committee reports, minutes and contracts.
- Improving the accessibility of information. All information will be housed on the OCPO’s website. All government entities will be required to publish information on their respective websites in line with a public disclosure framework prescribed by the OCPO.
- Improving the quality of information and encouraging its strategic use.
- Creating an environment conducive to stakeholder participation in the different stages of the SCM process.
- Building the capacity of the private sector, civil society and relevant stakeholders to take part effectively in enhancing transparent public SCM.¹⁰³

Whether there is a standard guiding the information to be published, however, is the critical point here.

⁹⁸ Twala, C “The Historical Significance of the African National Congress (ANC) Election Campaigns 1994-2014: A Genuine Process of Political Liberalisation?” *Mediterranean Journal of Social Sciences*, 5:7 2014, 562-568 at p. 565.

⁹⁹ National Treasury *Public Sector Supply Chain Management Review*, 2015, available at: <http://www.treasury.gov.za/publications/other/SCMR%20REPORT%202015.pdf> (accessed 27 July 2018).

¹⁰⁰ *Ibid.*, p. 3.

¹⁰¹ See above, note 60, p. 45.

¹⁰² *Ibid.*, p. 15.

¹⁰³ *Ibid.*, p. 23.

In order to promote the integrity of public procurement, National Treasury has established an e-Tender Publication portal. The portal provides a single point of free public access to information on all tenders undertaken by all public sector organisations at all spheres of government. This includes tenders of, amongst others: all national and provincial departments, metropolitan governments, district municipalities, local municipalities, municipal entities, all public entities, SOEs and constitutional bodies. The portal enables all government institutions to publish their tenders, corrections and amendments, and award notices on a single platform.¹⁰⁴

The National Treasury established the OCPO¹⁰⁵ to exercise oversight in respect of all large and/or significant procurement activities (that is, in amounts over R500,000). Its objectives include to, “modernise and oversee the South African public procurement system to ensure that the procurement of goods, services and construction works is conducted in a fair, equitable, transparent, competitive and cost effective in line with the Constitution and all relevant legislation. The Office is not directly involved in procurement, but manages procurement reforms, maintains the procurement system and oversees the way in which government does business with the private sector.”

In regard to infrastructure procurement, OCPO has developed and oversees implementation of a detailed framework of legislation, instructions, and system of verification.¹⁰⁶ These include the following.

- The PFMA and “Instructions” in terms of this Act (Instruction no 4 of 2015/16: Standard for Infrastructure Procurement and Delivery Management; Instruction no 2 of 2015/16: Cost control measures for the construction of new primary and secondary schools and the provision of additional buildings at existing schools).
- The Municipal Finance Management Act, and Circular no 77: Model SCM Policy for Infrastructure Procurement and Delivery Management in terms of this Act.
- Control frameworks (for the planning, design and execution of infrastructure projects; and for infrastructure procurement).
- Templates for gates associated with the control frameworks:
 - briefing documents: templates for the implementation of the control framework for the planning, design and execution of infrastructure projects; and templates for the implementation of the control framework for infrastructure procurement
 - templates for procurement gates and approvals
 - templates for framework agreement gates
 - template for financial system gate
 - templates for evaluation reports
 - templates for gates for delivery management.
- Guidance documents: National Treasury / Civilisation [sic] – Focus on: National Treasury Standards for Infrastructure Procurement and Delivery Management
- Individual articles, on:
 - an overview of the Standard for Infrastructure Procurement and Delivery Management
 - the separation of the supply chains for general goods and services from those for infrastructure
 - value for money in infrastructure delivery
 - control framework for the planning, design and execution of infrastructure projects
 - guidance for client and delivery teams
 - guidance on portfolio, programme and project management
 - promoting social and economic objectives through procurement
 - procurement strategy
 - framework agreements
 - infrastructure procurement system
 - infrastructure contracts and contract management
 - procurement documents for infrastructure projects
 - approaches to dealing with “functionality” and “quality” in the evaluation of tender offers
- Sample procurement documentation.
 - Expressions of Interest and Tender Templates (Pro forma Call for Expression of Interest based on SANS 10845-4; and Pro forma Tender Document based on SANS 10845-3)
 - SIPDM returnables procurement documents; and
 - SIPDM verification.

¹⁰⁴ See ‘e-Tender Publication’, available from: <http://www.etenders.gov.za/> (accessed 23 July 2018).

¹⁰⁵ See <http://ocpo.treasury.gov.za/Pages/default.aspx> (accessed 23 July 2018).

¹⁰⁶ See “Infrastructure Procurement”, available at: http://ocpo.treasury.gov.za/About_Us/Strategic_Areas/Pages/Infrastructure-Procurement.aspx (accessed 23 July 2018).

As the overview statement puts it, this comprehensive suite of documents, “Aims to provide regulatory instruments issued through the PFMA and MFMA to support infrastructure procurement and improve the outcomes of infrastructure projects. This will be achieved through the *standardisation* of procuring methods for identical or similar infrastructure projects.”¹⁰⁷ Whether standardisation is a sufficient condition for transparency is, however, debatable.

Notwithstanding the comprehensiveness of this set of documents, the OCPO is regarded as underfunded,¹⁰⁸ which negatively impacts on its ability to function optimally. This weakness, and the legal status and authority of the OCPO, may be effectively addressed in the envisaged Public Procurement Bill. These preventative measures have proven inadequate, however, as the AG’s reports over the past several years have shown. The AG’s repeated calls for heads of department to act more diligently to remedy systemic weaknesses in compliance with procurement regulations and to more speedily institute disciplinary proceedings against officials involved have not received a positive response in most instances.

One result is that the AG has sought new powers to recover misappropriated funds through civil recovery procedures and powers to refer criminal matters directly to the Directorate for Priority Crimes Investigation (DPCI, or “Hawks”) for investigation. Parliament has agreed, and recently adopted the Public Audit Amendment Bill 2018, which has been assented by the President and promulgated as the Public Audit Amendment Act 5 of 2018.

Accountability at provincial level (and elsewhere)

In his media statement on his report on the audit outcomes for the 2016–17 financial year,¹⁰⁹ AG Kimi Makwetu singled out “lack of accountability and commitment towards clean administration” as the key factors that influenced the poor showing of the North West and the Free State Provinces. He noted that, “progress was hampered by factors such as poor compliance with laws and regulations, *especially in the area of supply chain management*, inappropriate monitoring of key project deliverables and an inability to manage the finances of departments and entities properly” (emphasis added).¹¹⁰ Similar concerns arose in regard to the audit outcomes of SOEs, which continued to regress, “most often as a result of *inadequate controls, monitoring and oversight*” (emphasis added).¹¹¹

The AG’s report further revealed that there had been, “no improvement in addressing the concerns his office ha[d] raised year after year about contracts being awarded to employees and their families without the necessary declarations of interest.” This was despite the amended Public Service Regulations, which prohibited employees of departments from doing business with the state with effect from 1 August 2016.¹¹²

The Public Service Commission (PSC) has made similar findings regarding the uneven implementation of the 2016 Public Service Regulations on annual and transactional disclosure of financial interests intended to prevent conflicts of interest, which thereby also enables the manipulation of public procurement processes to favour private or sectional interests. The PSC reported that in 2016–17, 721 (37%) of senior managers in the public service had failed to disclose their financial interests in companies, many of which could do business with the state, thereby contravening the Regulations and risking conflicts of interest.¹¹³

The AG then went on to caution that, “As long as the political leadership, senior management and officials do not make accountability for transgressions a priority, irregular, unauthorised and fruitless and wasteful expenditure as well as fraud and misconduct will continue. An environment that is weak on consequence management is prone to corruption and fraud, and the country cannot allow money intended to serve the people to be lost.”¹¹⁴

In a clear indication of the public interest in urgent and significant improvements to public accountability for governance improvements, he concluded that, “Accountability and good governance are central to building an efficient, effective and developmental-oriented public service. Accountability means that the leadership is answerable to the public and takes responsibility for their actions, decisions and policies. These concepts of public interest and accountability are entrenched in the country’s constitution and the legislation that governs national and provincial government.”¹¹⁵

¹⁰⁷ See above, note 69.

¹⁰⁸ Eberhard A and Godinho C, *Eskom inquiry reference book: A resource for Parliament’s Public Enterprises Inquiry, civil society, journalists & engaged citizens Version 3*, University of Cape Town Graduate School of Business, 2017, p. 2.

¹⁰⁹ AGSA “Media release”, 1 November 2017.

¹¹⁰ *Ibid.*, pp. 2–3.

¹¹¹ *Ibid.*, p. 4.

¹¹² *Ibid.*, p. 9.

¹¹³ Public Service Commission, *Pulse of the public service: Public Service Commission Quarterly Bulletin*, 4, 2018, pp. 11–12.

¹¹⁴ *Ibid.*, p. 10.

¹¹⁵ *Ibid.*, p. 11.

1.4 Public infrastructure policy in South Africa

1.4.1 Infrastructure priorities in the National Development Plan

The National Planning Commission (NPC) stipulated in its 2011 Diagnostic Report¹¹⁶ that, “infrastructure is poorly located, inadequate and under-maintained.” It identified one critical action in the NDP to be public investment in infrastructure at a level of 10% of GDP that is focused on funding infrastructure in transport, energy and water. According to NPC, “Infrastructure is not just essential for faster economic growth and higher employment. It also promotes inclusive growth, providing citizens with the means to improve their own lives and boost their incomes. Infrastructure is essential to development.”¹¹⁷

The NPC noted that public infrastructure spending is at low levels by historical standards, and that South Africa has missed a generation of capital investment in: roads, rail, ports, electricity, water, sanitation, public transport and housing. The country needs a higher level of capital spending to increase economic growth. Gross fixed capital formation needs to reach about 30% of GDP by 2030, with public sector investment reaching 10% of GDP, to realise a sustained impact on growth and household services.¹¹⁸

The NPC further identified a key requirement of greater economic growth to be a more efficient and competitive infrastructure that is conducive to growth and job creation. There was a need to strengthen key services such as: commercial transport, energy, telecommunications and water.

The Commission also noted, in its subsequent NDP, the need to increase competitiveness and invest in new infrastructure in areas that directly affect the poor, such as: the food value chain, public transport, education and health, and telecommunications.

1.4.2 Infrastructure priorities in other government documents

The DPME underscored the importance of infrastructure in its Mandate Paper for Budget 2018 as follows: “Infrastructure investments open up economic opportunities and foster the competitiveness of both large and small businesses, while ensuring service delivery to our citizens. The key investments in network infrastructure such as energy and water must therefore continue, but other critical areas such as rural access roads, township infrastructure, as well as hospitals and schools should also receive attention. Maintenance of infrastructure, particularly local government infrastructure, is critical.”¹¹⁹

Other infrastructure priorities identified in the Paper include: the revitalisation of local industrial parks, township technology and innovation hubs, and the expansion of agri-parks. Rural roads, broadband infrastructure, and water and sanitation infrastructure were also seen as critical.¹²⁰

2. Findings from the fieldwork

This section presents the findings from the fieldwork relevant to attitudes to transparency and accountability, in particular, and to the core features of the CoST methodology. Annexure C contains the standardised fieldwork questionnaire that served as the basic guide for open discussions with fieldwork participants.

Focus group interviews were held with the following sets of stakeholders.

1. National government, in the form of the National Treasury. This focus group interview was held early in the study to help delineate the factual and policy context, and to help frame the most appropriate approach to the study (approximately 10 participants).
2. An SOE: a focus group interview was held with the senior executives of the Passenger Rail Agency of South Africa (approximately 15 participants).
3. Stakeholders at sub-national government level: a forum convened by the National Treasury of senior provincial officials responsible for infrastructure planning and procurement (34 participants).
4. Stakeholders at sub-national government level: a focus group interview was held with representatives of four metropolitan local governments (City of Cape Town, City of Tshwane, Nelson Mandela Bay Metropolitan Municipality, and City of eThekweni).
5. Civil society: representatives from non-government organisations based in Gauteng and Cape Town, connected via HSRC’s video conference facility (15 participants)

¹¹⁶ National Planning Commission, *Diagnostic Report*, 2011.

¹¹⁷ National Treasury, *Budget Review 2018*, p. 44, available at: www.treasury.gov.za/documents/national%20budget/2018/review/FullBR.pdf (accessed on 11 February 2019).

¹¹⁸ *Ibid.*, p. 44.

¹¹⁹ Department of Planning, Monitoring and Evaluation, *Mandate Paper for Budget 2018*, p. 20.

¹²⁰ *Ibid.*, pp. 26–27.

Identification of participants was undertaken in consultation with the CoST International Secretariat and the project reference group, as well as through the various focus group interviews themselves. Individual interviews were scheduled with “key informants” and respondents, who had either participated in the interviews or were recommended by those who had participated. This approach assisted the research team in deepening insights gained during the interviews and in identifying significant trends and strong views.

Twenty-one qualitative key informant interviews were held with key stakeholders in the public, private and civil society sectors. Interviews with public sector stakeholders included senior executives or managers at: the Office of the Auditor-General, Eskom, Transnet, the South African National Roads Agency Limited (Sanral), Petro-SA and the construction sector regulatory body, the Construction Industry Development Board (CIDB). Interviews were conducted face-to-face wherever possible, but practicalities required a few telephone interviews.

Most government and private sector stakeholders were based in the Gauteng Province, but one or two in each sector were based in the Western Cape, the Eastern Cape and KwaZulu-Natal. The interview structure was developed by the research team in consultation with the CoST International Secretariat and the project reference group, and was approved by the HSRC’s Research Ethics Committee. It was sent to identified respondents prior to the interview to enable them to prepare for it. It has been learned from previous projects that this approach yields higher quality data. The interview included questions based on the data points in Tables 1 and 2 in Annexure A of the research terms of reference.

The findings presented here are synthesised from a much more detailed set of findings gathered in the course of focus group and key informant interviews. Those detailed findings are presented in Annexure E of this report.

The findings of the study reveal both significant overlap in the views of the different stakeholders interviewed (the National Treasury, professional bodies, metropolitan local governments, construction companies, developers, senior public servants, state-owned enterprises, civil society, participants in the Provincial Infrastructure Coordinating Forum, development finance institution, and information technology professionals) and significant differences in opinion and interpretation between them. Part of the difference of opinion is attributable to a lack of knowledge and understanding among some of the respondents, which calls into question the reliability of some of the data. This is an undeniable limitation but an inevitable consequence of the inclusion of many different and varied stakeholder groupings in the study.

This synthesis begins with a summation of the differences in opinion, lack of clarity, lack of awareness and confusion surrounding different aspects of infrastructure regulation, policy and processes in South Africa. It suggests ways in which the CoST model might address this issue, before going on to consider the significant areas of overlap and how the CoST model might address the issues raised. The final part of this synthesis and discussion section relates the findings to the core CoST features outlined in the background section of the report.

Key findings with implications for action are highlighted in bold typeface in the following sections.

2.1 Differences in understanding and interpretation of infrastructure regulation, policy and practice

There is significant confusion about the **legal requirements for infrastructure procurement**, a lack of capacity and experience in some procuring entities and paralysing fear on the part of many officials regarding the potential legal and personal financial consequences if they get it wrong. This combination of factors is slowing down the pipeline of projects being put out to tender, which affects the sustainability of a construction sector that is under severe pressure because of the country’s struggling economy. The slow pace of infrastructure development also severely impacts on service delivery, undermining the Government’s overall developmental objectives and its presidential infrastructure initiative to spur economic and social development.

There is widespread confusion among even senior infrastructure procurement and SCM officials over what the law expects of them. There is a plethora of legal prescripts that officials cannot keep track of, or clearly understand and implement, and there is an expressed need for clear and simple guidelines. This confusion is apparently aggravated by a perception among some stakeholders that the National Treasury’s draft Control Framework for IDPM of November 2018 ignores the CIDB’s authority to set standards in the construction sector. Moreover, a perception is shared by several respondents that the National Treasury and the AG do not fully understand the dynamics of infrastructure procurement and implementation (i.e. construction). **Several respondents indicated that the construction sector needs to be treated differently from other less dynamic and fluid procurement processes, and that the draft IDPM of November 2018 does not reflect such a recognition.**

It is unclear at this stage whether a final version of the infrastructure procurement Control Framework will rectify the perceived confusion over the roles, responsibilities and authority between the CIDB and the National Treasury, and help clarify the applicable prescripts.

Against this backdrop, **CoST's independent assurance process could be of great assistance in producing evidence from practice that could help bring clarity regarding several of these issues.** In addition, the assurance process could provide much-needed support and reassurance to officials responsible for infrastructure procurement. It would give evidence for a forum to debate the issues and either find clear consensus or channel an inter-mediation with the regulatory authorities.

There is a significant level of lack of awareness, uncertainty and confusion about required **information disclosure standards** at various stages of the infrastructure procurement cycle, and widespread ignorance about what types of information relating to various stages of the procurement cycle can lawfully be proactively disclosed. Although some procuring entities appear to be aware of the option of proactive disclosure, practice is very uneven, although there is some recognition of the saving in labour, time and other costs were more information to be proactively disclosed.

Where some procuring entities have begun to disclose more information, whether reactively or proactively, this is appreciated by private sector actors and inspires greater confidence in the credibility and integrity of the procurement process. Where procuring entities have introduced the "open tender" system, for example, even when a contractor, member of the public or civil society is not present at a bid adjudication committee (BAC) feedback meeting, the fact that it happens is a source of comfort and reassurance for contractors and civil society alike.

There is widespread difference of opinion about what constitutes legitimately confidential or sensitive commercial information that should not therefore be disclosed by procuring entities. There is a need for a shared understanding of the law, and for existing disclosure good practice to be shared more widely.

More consistent and predictable decision-making and conduct regarding disclosure practices by procuring entities would help restore trust and improve efficiency by reducing the potential for disputes and conflict between procuring entities, bidders and communities. In this regard, **adoption in principle and progressive implementation by procuring entities of the CoST IDS, and discussion of its impact through a CoST MSG, offers the prospect of helping to develop clarity, understanding, more consistent practice and enhanced mutual trust.**

There seems to be significant ignorance about constitutional and legal requirements, including in the National Treasury prescripts, for public participation in planning and prioritising infrastructure plans and projects, and about the value of this in preventing discontent or disruption when implementation construction commences. Further, there seems to be extensive confusion among officials and community members regarding the content and implications of the Preferential Procurement Policy Framework Act (PPPFA) and its Regulations concerning the definition of and the requirement for "local content", especially regarding sub-contracted labour on a construction site. Some procuring entities seem to understand and manage this process better than others. **The CoST assurance process could help provide evidence of the circumstances, experiences and approaches of different procuring entities, and of their more or less desirable results. CoST's multi-stakeholder process could prove invaluable here by providing a representative forum where a mutually agreed understanding of what is required can be developed, progressively entrenching good practice.**

2.2 Areas of common understanding regarding infrastructure regulation, policy and practice

It should be noted at the outset that several important issues that arose in the course of the research do not have a direct bearing on the focus of this present scoping study. The CoST model and whatever variant may be used in South Africa is not designed directly to address some of the issues of widespread concern raised by many respondents across all sectors.

A prominent example is the very real and growing problem, alluded to earlier, of "business associations" (sometimes connected to, aligned with or protected by political leaders) that use "mafia-style" tactics to forcibly secure participation in infrastructure construction projects using the 30% "local participation" requirement of empowerment legislation. Exploiting the different possible interpretations of "local" (i.e. either sourced from or located within South Africa as a whole, or physically located within the immediate area surrounding a particular infrastructure project), these groupings use violence or threats of violence to secure some form of participation in a project to the value of at least 30%, without necessarily being able or willing to contribute substantive value in the form of skills or materials towards delivery of the project.

This said, there was a significant degree of consensus among professional bodies, consulting bodies and contractors about the key issues undermining efficient and effective infrastructure procurement processes in the public sector. The large majority of these issues are of equivalent concern among public sector stakeholders. The key issues emerging from the individual and group interviews are summarised on the next page.

1. Should the adoption or adaptation of the CoST model be considered in South Africa, it would need to take account of a number of current challenges in the local environment. These include:
 - widespread ignorance of the law, or different interpretations of it
 - perceptions of over-regulation, albeit sometimes recognised as necessary because of widespread abuses
 - a fluid regulatory environment still under development, with a balance of power apparently needed between CIDB and the National Treasury
 - an uneven spread of skills and experience
 - a severe lack of trust between sectors
 - widespread poverty and an increase in corrupt and criminal activity aggravating competition over access to job opportunities in construction.

2. As a result of these concerns, many respondents expressed the fear that the introduction of CoST would add to the existing bureaucratic burden and further exacerbate delays in the pipeline of construction projects being put out to tender. The nature of the assurance process and the way it is applied in other adopting countries means it will neither add a layer of bureaucracy nor compound existing delays. Rather, it seems clear that **the CoST assurance process should be a source of reassurance for officials and could help relieve some of their fears about the quality of their colleagues' work and any resulting legal responsibility that they might incur.** As the assurance process is designed and implemented as a "light touch" review in other adopting countries, it operates either in parallel to existing processes or is undertaken sufficiently rapidly as to provide the intended support without disruption or interruption.

3. Several stakeholders acknowledged that experiences of corruption in the private and public sector have contributed to a breakdown in mutual trust. **If CoST's multi-stakeholder process and assurance review of both disclosed and non-disclosed information could help facilitate the restoration of trust through the careful sharing of information from independent and credible sources, it would be welcome.**

4. Several respondents from the private sector said that they and their members were often left to deal with the fallout (community dissatisfaction, resistance, and sometimes violent disruption of construction projects) of imprecise terms of reference in tender documentation. Almost all public sector respondents are concerned about this serious challenge to effective infrastructure delivery. However, it seems likely that law enforcement authorities also have an irreplaceable role to play in ending these illegal activities that delay projects and lead to cost overruns for procuring entities. **More thorough consultations with and skills needs and availability analysis among affected communities in the early planning stages of a particular project may help ensure that invitations to tender contain more clearly defined requirements and criteria that limit the scope for disputes over the interpretation of the local participation requirement.**

5. A number of government departments and public entities are considering or experimenting with various open contracting or open tender systems, or have recently undertaken governance reviews and have put in place procurement-related reforms. **Private sector professional and industry associations have publicly offered to share their members' expertise to strengthen the Government's efforts to improve the quality of infrastructure procurement processes.** At the same time, civil society organisations are currently working on open contracting-related research projects, providing concrete evidence of both sectors' recognition of the urgency of procurement reform generally. This indicates that these sectors are preparing themselves to provide a strong partnership role to complement the state's recent efforts to clean up public procurement. In addition, civil society has been working with the National Treasury for some time on a project to provide greater public access to regularly updated public expenditure information to complement South Africa's top global status in open budgeting. The website concerned, Vulekamali,¹²¹ has already been established, and the 2019 Budget Review included a detailed list of large infrastructure projects. The Vulekamali portal appears to offer a convenient platform to host information included in the CoST IDS, disaggregated by project.

2.3 Findings relating to the core CoST features

2.3.1 Findings relating to data disclosure and information transparency

In accordance with paragraph (c) of the terms of reference, procuring entities interviewed were requested to provide information regarding their current practices regarding information disclosure. The terms of references, read with the 40 data points of the CoST IDS (attached as Annexure A), seek to establish a baseline of current data disclosure practice by procuring entities concerning project and contract data, and whether that information is disclosed proactively or reactively (i.e. in response to requests). A blank data disclosure spreadsheet is attached for reference as Annexure B.

¹²¹ See <https://vulekamali.gov.za/infrastructure-projects>

Of the five procuring entities interviewed and requested to provide this information, only two responded, and then provided responses only in respect of some of the data points. This is an inadequate sample upon which to determine definitively any clear trends in disclosure practice, but the results are indicative of the widely different practices adopted by these two procuring entities. The unevenness of these two procuring entities' practice is indicative of the absence of clear and comprehensive regulatory or policy guidance on these matters, although, as set out above, the Constitution and the law both provide a clear basis in favour of greater proactive openness and transparency. A comparative tabulation and analysis is provided in Annexure D.

Despite the limited response, it is evident from the responses received that there is a substantial overlap between the CoST IDS and the information and data points reportedly disclosed in most instances by at least one SOE, and information disclosed by other public sector procuring entities. The accompanying explanations provided by the one particular SOE indicate that where information is "never" disclosed, it is not apparently on the basis that it is prohibited by law, but rather because of established practice or because it is disclosed only to registered bidders on a restricted-access web platform. In addition, a significant number of data points in the CoST IDS either in principle should be or are in practice already proactively disclosed by the National Treasury in terms of existing law.¹²²

In this regard, several respondents interviewed referred to their default position concerning disclosure, which is that they provide the information required by the National Treasury for uploading onto its public e-Tender Publication portal and the website of the Office of the Chief Procurement Officer.¹²³ The information proactively posted there (although much of it is in PDF format and therefore difficult or more costly for many to access) includes details of upcoming tenders (which in the analysis contains many gaps), and contract deviations and expansions.

The PDF documents on deviations include the following data points:

- entity or department (name)
- project description (name)
- supplier (name)
- contract value
- reason for deviation (very brief)
- award recommended by the Accounting Officer or delegate (date)
- conditional support or support refused (no reasons provided)
- contract start date
- contract expiry date.

However, the latter two data points were frequently found to be blank ("not stated").

Moreover, in relation to transversal contracts, an additional data point is published on the National Treasury's e-Tender Procurement portal: the names of bidders.¹²⁴ This is consistent with growing practice among public sector entities. Several private and public sector respondents interviewed indicated that those public entities that have already adopted or are considering the adoption of some form of "open tender" system (for example, the Gauteng provincial government, and a few SOEs and metropolitan municipalities) proactively disclose several items of information that are among the data points contained in the CoST IDS, plus additional information.

An open tender system can take several different forms, and some can be more open than others. The common data points disclosed at the stage when bids are opened include the various bidders' names, their quoted overall price and their claimed scores in terms of Broad-Based Black Economic Empowerment Act (BBBEE) and PPPFA legislation. Information disclosed that goes beyond the scope of the CoST IDS includes the disclosure, immediately after a decision by a BAC, of the following information:

- names of all compliant ("responsive") bidders considered
- all bidders' quoted prices
- all bidders' points scored in terms of various points systems utilised (e.g. BBBEE, PPPFA, functionality, price)
- reasons for scores.

In general, most respondents interviewed recognised that existing levels of non-disclosure are unnecessary and appear to be based largely on established practice rather than on law or principle. Those who have begun to adopt forms of open contracting are showing that past practice has been defective in several respects and based on misunderstanding or misinterpretations of existing law.

¹²² National Treasury Instruction No.1 of 2015/16 "Advertisement of Bids and Publication of Awards on the e-Tender Publication Portal"; and National Treasury SCM Instruction No.2 of 2016/17 "Procurement Plans - Submission and Reporting".

¹²³ See <https://etenders.treasury.gov.za/> and <http://ocpo.treasury.gov.za/Pages/default.aspx>

¹²⁴ See http://ocpo.treasury.gov.za/Suppliers_Area/TTC/Pages/Publication-of-Bidders.aspx.

There is a widespread recognition that the resulting secrecy has enabled the dramatic spread and destructive scale of corruption, especially in procurement processes. This recognition is accompanied by an equally widespread determination among public officials interviewed to start doing things differently and better as a matter of urgency. Significant changes in disclosure practice and greater openness and transparency in general are essential both to prevent and expose continuation of the corruption that has been so costly for South Africa. This is especially the case for poor and disadvantaged communities reliant on the state to deliver infrastructure and services that help improve their quality of lives and enable them to apply their energies to lift their families out of poverty.

While officials recognise the need to rebuild public trust in the Government, and that greater openness and transparency is one important way to achieve this objective, private sector participants indicated their appreciation of the growing number of pockets of greater openness. These enable them to satisfy themselves that their tender bids have been given fair consideration, even if they have been unsuccessful. If a company's representatives are not able to be present at the opening of every tender bid, or at the announcement of every tender award, they said the trend towards greater openness, though uneven at the moment, provides them with reassurance that dishonest manipulation and corruption are consequently less likely.

The research identified two other notable trends: (a) a fairly widespread lack of awareness of disclosure practice; and (b) overlapping with the first trend, quite divergent impressions of whether there is a trend towards greater openness and disclosure of procurement-related information. Ultimately, the research concluded that while there is a noticeable movement towards greater transparency, it is in its early stages and it is uneven across the public sector.

Some contractors interviewed also stated that they no longer submit bids to certain public entities that remain non-transparent because of the distrust that has grown, as well as the difficulty in securing any cooperation or positive response to requests for access to information that would help them establish whether the procurement process was fair.

If this practice is representative of a growing trend, it can mean that only less honest and less capable bidders are likely to continue to do business with such entities. The result will be less value for money and poorer quality infrastructure for the state and the citizens, whose wellbeing should be its paramount concern.

Disclosure of information identified in the CoST IDS, at a time in the project cycle and to the extent appropriate in law and in practice (for example, partially redacted to protect legitimately commercially sensitive information), can provide significant support for the task of rebuilding public trust in the Government. It is necessary to emphasise, for example, that the commercial confidentiality and sensitivity of information changes during the course of the project cycle. Thus, there is no reason why all bidders' names, total aggregate price and various points claimed cannot be disclosed when bids are initially opened. Indeed, this is reportedly already the practice adopted by a several public bodies, whether or not they have formally adopted some form of "open tender" system.

Similarly, there is no legitimate reason why information that may be commercially sensitive at the start of a project should remain so even after the project has been completed. Likewise, there are good reasons for both procuring entities and the public to know, for example, whether a particular contractor's performance on a particular infrastructure project has been evaluated as good or deficient, or whether and when a particular procuring entity has signed off on a certain stage of the works on a site.

Tabulated below are the findings on procurement disclosure based on a combination of fieldwork and desktop research, and in the context of existing law. The findings are set out in two separate tables for proactive and reactive disclosure. The tables compare South African law and practice to the CoST IDS.

It is necessary to make a few preliminary observations concerning the data presented below. Firstly, a significant proportion of the information included in the CoST IDS data points is proactively disclosed in terms of South African law and policy. Secondly, and more specifically, the MTBPS and the Budget Review, both published annually, include an annexure that lists large infrastructure projects and their respective indicative cost estimates for all national and provincial departments, local governments, municipalities and public entities. Thus, although, for obvious reasons, the particular project budget is not disclosed before the procurement is finalised, information concerning estimated costs is disclosed, thereby rendering moot many arguments in favour of high levels of broad confidentiality throughout the procurement and delivery process.

Thirdly, although the law requires information related to several stages of the procurement and delivery process to be proactively disclosed by the procuring entity and on the National Treasury's e-Tender Publication portal, it was found that such disclosure is uneven in practice.

In view of the oversight powers of the legislature, it is assumed (without finding)¹²⁵ that this information is likely to be proactively disclosed in the procuring entities' required reports to the legislature. It is important to note, however, that while this disclosure is welcome, it is far too late in the infrastructure procurement and delivery process for it to be useful to any stakeholder responsible for or interested in enhancing the real-time effectiveness of the infrastructure procurement and delivery process.

Fourthly, the law also requires that actual start dates, extensions, deviations and variations must be reported to the legislature at national or provincial level. Much of the information in this category of "Project Implementation" was found on the National Treasury's e-Tender Publication portal. In terms of the oversight powers of the legislature, it seems likely (and is assumed, again without finding) that this information will be disclosed also to the legislature. In essence, therefore, while South African law provides for extensive compliance with standards similar to those in the CoST IDS, the point of distinction is that aspects of both law and practice do not, collectively, constitute a comprehensive standard for the timely disclosure of information that would enable more efficient and effective management of infrastructure procurement and delivery.



¹²⁵ The desktop study didn't confirm whether in practice this level of detail is included in procuring entities' reports to the legislature.

Table 3. Data disclosure in South Africa¹²⁶ mapped to the CoST IDS: proactive disclosure

CoST IDS – proactive disclosure	Legal requirement to disclose	Commonly disclosed	Accessible using PAIA ¹²⁷	Location of data
PROJECT PHASE				
<i>Project identification</i>				
Project reference number	No	No	Yes	Procuring entity; National or Provincial Treasury
Project owner	Yes	No	Yes	Procuring entity; National or Provincial Treasury
Sector, subsector	Yes	No	Yes	Procuring entity; National or Provincial Treasury
Project name	Yes	No	Yes	Procuring entity; National or Provincial Treasury
Project Location	Yes	No	Yes	Procuring entity; National or Provincial Treasury
Purpose	Yes	No	Yes	Procuring entity; National or Provincial Treasury
Project description	Yes	No	Yes	Procuring entity; National or Provincial Treasury
<i>Project preparation</i>				
Project scope (main output)	No	No	Unclear	Procuring entity
Environmental Impact	No	No	Unclear	Procuring entity
Land and settlement impact	No	No	Unclear	Procuring entity
Contact Details	Yes	Yes	Yes	Procuring entity; National or Provincial Treasury
Funding sources	Yes	Yes	Yes	Procuring entity; National or Provincial Treasury

¹²⁶ The law and practice set out here is that applicable to constitutional institutions, national and provincial departments and public entities, but not to municipal or local government and associated public entities.
¹²⁷ Promotion of Access to Information Act 2 of 2000.

Project budget	Yes*	No	Probably only after project completion, in order to prevent overpricing or unnecessary price escalations*	Procuring entity; National or Provincial Treasury; Medium-Term Budget Policy Statement ^{*128}
Project budget approval date	Yes	No	Probably, but only after project completion	Procuring entity; National or Provincial Treasury
Project completion				
Project status (current)	Yes	Yes	Yes	Procuring entity; National or Provincial Treasury; and national or provincial legislature (quarterly)
Completion cost (projected)	Yes	Yes	Yes	Procuring entity; National or Provincial Treasury; national or provincial legislature (quarterly); Medium-Term Budget Policy Statement
Completion date (projected)	Yes	Yes	Yes	Procuring entity; National or Provincial Treasury; and national or provincial legislature (quarterly)
Completion scope (projected)	Yes	Yes	Yes	Procuring entity; National or Provincial Treasury; and national or provincial legislature (quarterly)
Reasons for project changes	Yes	Yes	Yes	Procuring entity; National or Provincial Treasury; and national or provincial legislature (quarterly)
Reference to audit and evaluation reports	No	No	Possibly – subject to third party interests / consent	Procuring entity; National or Provincial Treasury; and national or provincial legislature
CONTRACT PHASE				
Procurement				
Procuring entity	Yes	Yes	Yes	Procuring entity; National Treasury e-Tender Publication portal
Procuring entity contact details	Yes	Yes	Yes	Procuring entity; National Treasury e-Tender Publication portal

¹²⁸ An indicative budget for large infrastructure projects is published annually in the Medium-Term Budget Policy Statement.

Procurement process	Yes	Yes ¹²⁹	Yes	Procuring entity; National Treasury e-Tender Publication portal; and national or provincial legislature (quarterly)
Contract type	Yes	Yes	Yes	Procuring entity; National Treasury e-Tender Publication portal; and national or provincial legislature (quarterly)
Contract status (current)	Yes	Yes	Yes	Procuring entity; National or Provincial Treasury; and national or provincial legislature (quarterly)
Number of firms tendering	Yes	No	Yes	Procuring entity; National or Provincial Treasury; National Treasury e-Tender Publication portal
Cost estimate	No	Uncertain*	Yes	Procuring entity; National Treasury e-Tender Publication portal; and Medium-Term Budget Policy Statement? ¹³⁰
Contract administration entity	Yes	Yes	Yes	Procuring entity; National Treasury e-Tender Publication portal; national or provincial legislature (quarterly)
Contract title	Yes	Yes	Yes	Procuring entity; National Treasury e-Tender Publication portal; national or provincial legislature (quarterly)
Contract firm(s)	Yes	Yes	Yes	Procuring entity; National Treasury e-Tender Publication portal;
Contract price	Yes	Yes	Yes	Procuring entity; National Treasury e-Tender Publication portal
Contract scope of work	No	No	Yes	Procuring entity; National or Provincial Treasury
Contract start date	Yes	Yes	Yes	Procuring entity; National or Provincial Treasury; National Treasury e-Tender Publication portal; national or provincial legislature (quarterly)
Contract duration	Yes	Yes	Yes	Procuring entity; National or Provincial Treasury; and National Treasury e-Tender Publication portal; national or provincial legislature (quarterly)
Contract implementation				
Variation to contract price	Yes	Yes	Yes	Procuring entity; National Treasury e-Tender Publication portal; National or Provincial Treasury; and national or provincial legislature (quarterly) ¹³¹

¹²⁹ Although the law requires this and related information in this “Procurement” sub-category to be proactively disclosed by the PE and on National Treasury’s e-Tender Publication portal, such disclosure is uneven in practice. In view of the oversight powers of legislatures, it is assumed (without finding) that these types of information are likely to be proactively disclosed in the required reports to legislatures.

¹³⁰ The Medium-Term Budget Policy Statement, and the Budget Review, both published annually, include an Annexure that lists large infrastructure project cost estimates for all national and provincial departments, local governments / municipalities and public entities.

¹³¹ Although this information should be published on National Treasury’s e-Tender Publication portal, the law also requires that actual start dates, extensions, deviations and variations must be reported to the national or provincial legislatures. Much of the information in this category was found on the e-Tender Publication portal. In terms of the oversight powers of these legislatures, it seems likely (and is assumed, without finding) that this information will be disclosed also to legislatures.

Escalation of contract price	Yes	Yes	Yes	Procuring entity; National Treasury e-Tender Publication portal; National or Provincial Treasury; and national or provincial legislature (quarterly)
Variation to contract duration	Yes	Yes	Yes	Procuring entity; National Treasury e-Tender Publication portal; National or Provincial Treasury; and national or provincial legislature (quarterly)
Variation to contract scope	Yes	Yes	Yes	Procuring entity; National Treasury e-Tender Publication portal; National or Provincial Treasury; and national or provincial legislature (quarterly)
Reasons for price changes	Yes	Yes	Yes	Procuring entity; National Treasury e-Tender Publication portal; National or Provincial Treasury; and national or provincial legislature (quarterly)

Table 4. Data disclosure in South Africa¹³² mapped to the CoST IDS: reactive disclosure

CoST IDS – reactive disclosure	Legal requirement to disclose	Commonly disclosed	Accessible using PAIA133	Location of data
PROJECT PHASE				
<i>Project identification and preparation</i>				
Multi-year programme and budget	Yes	Yes*	Yes	Procuring entity; National or provincial treasury; annual Budget Review and Medium-Term Budget Policy Statement* ¹³⁴
Project brief or feasibility study	Yes	No	Yes	Procuring entity
Environmental and social impact assessment	Yes	No	Yes	Procuring entity
Resettlement & compensation plan	Yes	No	Yes	Procuring entity
Project officials and roles	No	No	Possibly – not settled law	Procuring entity

¹³² The law and practice set out here is that applicable to constitutional institutions, national and provincial departments and public entities, but not to municipal or local government and associated public entities.

¹³³ Promotion of Access to Information Act 2 of 2000. It is important to note that while this information should be accessible in terms of PAIA, in practice there are very low levels of compliance with PAIA, that is very low rates of any response, let alone positive responses. See, for example, the *Access to Information (ATI) Network Shadow Report, 2016*.

¹³⁴ Tabled annually in the National Assembly of Parliament.

Financial agreement	Yes	No	Yes	Procuring entity
Procurement plan	Yes	No	Yes	Procuring entity; National or provincial treasury; national or provincial legislatures
Project approval decision	Yes	No	Yes	Procuring entity; National or provincial treasury
Completion				
Implementation progress reports	Yes	Yes	Yes	Procuring entity; National or provincial treasury; national or provincial legislatures
Budget amendment decision	Yes	Yes	Yes	Procuring entity; National or provincial treasury; national or provincial legislatures
Project completion report	Yes	No	Yes, subject to protecting legitimate interests of any third party, e.g. the contractor	Procuring entity; CIDB; National or provincial treasury; national or provincial legislatures
Project evaluation report	Yes	No	Yes, subject to protecting legitimate interests of any third party, e.g. the contractor	Procuring entity; CIDB;
Technical audit reports	Yes	No	Yes, subject to protecting legitimate interests of any third party, eg the contractor	Procuring entity; CIDB
CONTRACT PHASE				
Procurement				
Contract officials and roles	Yes	No	Yes	Procuring entity
Procurement method	Yes	Yes	Yes	Procuring entity; National Treasury e-Tender Publication portal
Tender documents	Yes	Yes, increasingly	Yes	Procuring entity; National Treasury e-Tender Publication portal
Tender evaluation results	Yes	Yes, increasingly	Yes	Procuring entity; National Treasury e-Tender Publication portal

Project design report	Yes	No	Yes	Procuring entity
<i>Contract</i>				
Contract agreement and conditions	Yes	No	Yes, subject to protecting legitimate interests of any third party, e.g. the contractor	Procuring entity
Registration and ownership of firms	Yes	Yes, increasingly	Yes	Procuring entity; Companies and Intellectual Property Commission
Specifications and drawings	Yes	No	Yes, subject to protecting legitimate interests of any third party, eg the contractor	Procuring entity
<i>Implementation</i>				
List of variations, changes and amendments	Yes	Yes	Yes	Procuring entity; National or provincial treasury; national or provincial legislatures
List of escalation approvals	Yes	Yes	Yes	Procuring entity; National or provincial treasury; national or provincial legislatures
Quality assurance reports	Yes	No	Yes, subject to protecting legitimate interests of any third party, e.g. the contractor	Procuring entity; CIDB
Disbursement records or payment certificates	Yes	No	Yes, subject to protecting legitimate interests of any third party, e.g. the contractor	Procuring entity
Contract amendments	Yes	No	Yes, subject to protecting legitimate interests of any third party, e.g. the contractor	Procuring entity



2.3.2 Findings relating to assurance

Public officials welcomed the idea that the CoST model's assurance feature offers an independent real time "light touch" review. They also welcomed the reassurance that it does not introduce an additional bureaucratic hurdle and that it will not contribute to delays already being experienced in preparing invitations to bid and tender awards. It is important to recognise that the assurance review is not time-consuming and operates essentially in parallel to existing procedures and processes in the project cycle. The information and evidence provided through an assurance review would enable responsible officials to take prompt action to interdict misconduct and correct the consequences of irregularities before it becomes too late.

Private sector and civil society respondents also recognised the significant potential added value of this feature. The CoST assurance process generally focuses primarily on reviewing the data disclosed in terms of the CoST IDS. However, where, as in South Africa currently, not all data identified in the CoST IDS is disclosed in practice, the assurance team can be authorised to request information related to the outstanding CoST IDS data points. The team can also be tasked with the responsibility to go a little further if necessary in particular circumstances, including undertaking a site visit and interviewing relevant project participants.

There is probably almost universal appreciation for the AG's work over the past 25 years in reporting in growing detail and with an increased sense of urgency on non-compliance with procurement procedures and on the resulting massive wastage in public money. However, the AG's work is undertaken after the fact and after public money has been misappropriated and often irrecoverably lost. Responsible and diligent officials in public entities need real-time information in order to prevent matters reaching this hopeless point where they are powerless to effectively undertake their fiduciary duties and correct the course of an infrastructure project.

Lack of transparency, inadequate capacity and skills, and poor governance by dishonest or careless officials have all contributed to extensive weaknesses in infrastructure procurement. Respondents from all sectors indicated that **the lack of necessary capacity led to poor planning that then heightened maladministration and corruption risks throughout the procurement cycle.** Sometimes, collusion with dishonest private sector actors has enabled these weaknesses to be hidden until it is too late. Many respondents interviewed acknowledged that **the state has lost a significant amount of its technical expertise and capacity in recent years.** Unhealthy political dynamics and other factors have led to the hollowing out of capable professionals with integrity from many public institutions, which has undermined these institutions' ability and will to perform their essential tasks accurately and reliably. Problems tend to arise at the start of the project cycle, during early planning stages and persist through the procurement phase as well as in the monitoring and maintenance phases.

Several examples were given, including that in one SOE it no longer had experienced professionals capable of conceptualising and developing comprehensive designs for infrastructure projects. This meant that, after a basic design had been prepared internally, a private consultant had to be hired to develop a complete design. The difficulty then arose that the SOE lacked the expertise to adequately evaluate the design, including its assumptions and quantities. This weakness fed through into the development of inappropriate specifications, which, in turn, undermined the quality and responsiveness of bids submitted, as some bidders would try to critically interrogate the specifications, leading to widely divergent bids that were then extremely difficult to evaluate and adjudicate in a fair manner.

On the other hand, if the procuring entity had the opportunity, through the CoST MSG (see below), to request an assurance review at any point during these stages, it would be able to identify and rectify flawed assumptions, incorrect information, or misconduct or maladministration. Moreover, the MSG can choose projects randomly, which at least in theory can have a deterrent effect.

Several procuring entities interviewed acknowledged that their procurement processes were largely run by SCM officials who lacked the engineering and financial skills to assess the functionality of a bid and bidders' capacity to perform the tasks required by a particular contract. The result was that the qualitative aspects of a bid were usually inadequately evaluated and adjudicated, and excessive reliance was placed on the "price" component of the scoring system. There was appreciation of the fact that the cheapest bid does not necessarily mean that the best quality service and product will be provided by the successful bidder. **The availability of engineering skills through CoST's assurance process would help to ensure that a proper quality check of the bids takes place.**

Another SOE, with a stronger record of good governance in recent years, also appreciated the potential value of CoST assurance. In its recent experience, the time taken get an invitation to bid to the market has increased dramatically from three months to 18 months. A private sector respondent confirmed this experience with this SOE, and explained the negative effect of this pattern of delays on its ability to retain staff, which undermined its ability to stay in business.

The officials interviewed explained that the reason for these recent delays was not a lack of the necessary internal expertise, but fear of the possible personal consequences of "getting something wrong" during the procurement process.

In view of the AG's new powers to hold officials individually responsible to reimburse the state for value lost or monies misspent, and given recent experiences of increasingly strict audit procedures, even senior officials with many years of experience are afraid to take decisions. The consequence has been that work done by some officials is checked and rechecked by others in order to ensure that errors are prevented and that the entity receives a highly prized clean audit from the AG. In practice, the procurement process has slowed dramatically while the work done by a bid specifications committee (BSC) (previously trusted and regarded as competent) is checked by the bid evaluation committee (BEC) before a decision is taken. The process is repeated by the BAC when it checks the work of the BEC and sometimes also the work of the BSC before it will sign off on an invitation to tender.

In this situation, the independent assurance team could provide invaluable assistance by undertaking a quick intervention that provides evidence to reassure the various SCM forums that the necessary work has been properly undertaken by their colleagues in the supply chain. This could contribute to more efficient and effective consideration and award of bids, which would be welcomed by stakeholders from all sectors. In this regard, it is important to mention that **professional engineering associations have publicly and during this scoping study expressed their preparedness to support the state with relevant expertise where needed.** A collaborative approach of this kind holds great promise for the contribution that the CoST assurance process can make to improving the efficacy and value for money of infrastructure procurement and development.

2.3.3 Findings relating to multi-stakeholder working

In most countries that are full members of CoST, the programme is directed by a MSG that comprises representatives of government, the private sector and civil society. By providing a neutral forum, CoST helps these key stakeholders pursue shared objectives to improve the value, efficiency and effectiveness of investment in public infrastructure.¹³⁵ As sensitive information often tends to be shared in this forum, it is necessary that stakeholders build mutual trust based on their shared objectives of better value for money from public investment in infrastructure. The viability of this forum was a concern raised by several respondents, who noted the existing widespread lack of trust between government, the private sector and civil society in South Africa, as well as the difficulties involved where MSG members were aligned to private sector competitors.

Multi-stakeholder initiatives (such as with South Africa's Open Government Partnership experiences) have not inspired confidence within civil society about government's willingness to work in a collaborative manner. **These concerns will need to be addressed, perhaps through the careful selection of members of the MSG and the provision of training and initial independent facilitation of the MSG, and through an agreed procedural requirement that a substantial conflict of interest will require recusal in a particular instance.**

The law on public sector planning and budgeting is clear: public participation is essential. This means that **the potential beneficiaries of service delivery must be consulted when multi-year planning is undertaken and the actual beneficiaries must be consulted about their satisfaction with services rendered.** These legal requirements apply equally to planned and completed infrastructure projects. Public and private sector and civil society stakeholders who participated in this scoping study all recognised that the quality and extent of public participation currently enabled by the Government is poor, in part because of the weak "soft" or "people" skills among the technocrats who tend to populate state bureaucracies that work with public finance, procurement and provision of basic services. Despite public service programmes such as Batho Pele ("People First"), a lack of mutual respect and mistrust also tends to characterise the relationship between the public, on the one hand, and public servants on the other.

One result of this situation, according to both contractors and officials interviewed, is that **procuring entities increasingly undertake feasibility studies themselves during the planning phase, instead passing on this task to the successful bidder.** This growing practice has several implications. Firstly, the procuring entity is seen to be distant from rather than engaged and interested in the community it supposedly serves. Secondly, bid specifications are vague and inadequate, notably in regard to what is a reasonable local participation percentage to require of tenderers.

If the procuring entity has done no fieldwork to determine whether the skills necessary for the project are available near the construction site, the successful contractor has to undertake this assessment itself. If adequate appropriate skills are not available in the "local area" (however that is defined), the contractor has two main options: to train local community members who are desperate for an income but do not necessarily have the aptitude, which adds to project delays; or source skilled workers from outside the area, leading to community dissatisfaction and, increasingly, violent unrest. Again, the result is practices that contribute to project delays and cost overruns.

Nevertheless, stakeholders were in broad agreement that it is essential urgently to change this situation in which stakeholders have grown apart. Several procuring entities and contractors spoke of their positive experiences with successfully operated project community forums run effectively by skilled community liaison officers. Information is shared and explained, concerns raised, discussed and addressed, and stakeholder relationships strengthened.

¹³⁵ CoST Factsheet.

Other officials and contractors, however, spoke of their less successful experiences. For example, poor planning, weak management and resulting mistrust has apparently contributed to the widespread emergence of local “mafia tenderpreneurs”, highlighting the need to identify more effective ways to manage and build the various sets of stakeholder relationships.

The general sentiment among respondents was that the success of South African society, the construction sector and the South African economy depends on renewed and determined efforts to revitalise the country’s proud history of mutually respectful collaboration and consultation. While some respondents expressed scepticism, and some hesitancy remains, a substantial willingness does exist to try again to work together in order to resolve intractable problems, such as corruption, and the slow and uneven quality of service delivery. The worsening crisis of poverty and inequality, due partly to maladministration and corruption despite a laudatory Bill of Rights entrenched in a globally respected Constitution, signifies the fundamental necessity that governance needs to be undertaken differently.

Respondents expressed broad support for the idea that a better way must be found for government and citizens to contribute to the country’s progress. **The CoST model of multi-stakeholder working seemed to most participants to represent an opportunity to explore an approach that apparently has yielded success in several other countries. The multi-stakeholder working approach of CoST could, at the level of key industry role players and stakeholders, prove valuable by modelling, from the experience of other countries in which the CoST approach has been implemented, the ways in which stakeholder tensions could be diminished and efficiencies in infrastructure delivery achieved.**

2.3.4 Findings relating to social accountability

Much of what has already been stated above has implications for social accountability too. Social accountability, or accountability to the public, is inherent in participatory democracy, and for this reason the Constitution and various legal frameworks consistently valorise public participation in policy- and law-making. The Constitution sets the tone by recognising how participatory governance, firstly, is based on the will of the people, secondly, contributes to the realisation of the potential of each person, including by recognising their dignity, and thirdly, contributes to the values of “accountability, responsiveness and openness”.

In the present context of more effective and efficient infrastructure procurement, social accountability can be achieved through multiple avenues, including by **improved and expanded disclosure of relevant programme- and project-related information in a timely manner; by consulting and involving communities and beneficiaries before, during and after construction; by working together with other stakeholders to achieve better outcomes that serve shared objectives; and by giving stakeholders greater confidence in the professionalism, propriety and integrity of governance processes by reporting to them the results of assurance reviews.**

One procuring entity added that the democratisation of information technology through greater access to smartphones and feature phones could be harnessed as another means for communities and the broader public to share their observations and experiences concerning project developments and progress. **Text and WhatsApp messages, sometimes with photographs attached, can be a valuable source of information for procuring entities, site supervisors and community liaison officers alike.**

Civil society’s desire for greater social accountability and the demand by both private sector and civil society respondents for stronger accountability in general was echoed in the general recognition among officials interviewed that conduct in all parts of government needs to evidence greater social accountability. While acknowledging this necessity, public and private sector respondents expressed reservations about what types of information should be disclosed, and at what stage(s), to respect the social accountability imperative without compromising governance coherence and private commercial competitiveness.

Respondents indicated that they felt reassured and satisfied when it was explained that the CoST model permits the MSG, which commissions any assurance review and is the first to consider the report, to decide to give the procuring entity and / or the contractor concerned the opportunity to consider it and take corrective action before the MSG decides to share the results publicly. This approach enables the MSG to exert a form of social accountability by offering any government and private sector stakeholders implicated in an assurance report to “get out in front” of a situation by demonstrating the extent of their responsiveness and their respect for the principle and practice of social accountability. Doing so enables the MSG to disseminate publicly both the findings of the CoST assurance review and either the commitment to, or the results of, corrective action.

VI. RECOMMENDATIONS

Based on responses from key participants in the fieldwork, and notwithstanding the current contested and febrile infrastructure context within South Africa, an impartial external role-player like CoST could add value if it:

- facilitated processes that include credible local representatives
- helped bring a measure of clarity, certainty and shared understanding to an industry sector fraught with misconceptions and misunderstandings
- contributed to the restoration of a shared trust in governance processes.

Given these findings, it is recommended that the National Treasury considers further discussions with CoST and key role players in the sector. Specific recommendations are as follows.

1. The National Treasury should, with the support of CoST and stakeholders from the private sector and civil society, pilot the CoST model to ascertain the true value which the approach adds in practice in ensuring greater transparency, accountability, and efficiencies in infrastructure procurement.
2. National Treasury should include the CoST Infrastructure Data Standard (CoST IDS) in the Control Framework for Infrastructure Delivery and Procurement Management (IDPM) (which replaces the Standard for Infrastructure Procurement and Delivery Management, or SIPDM); on the Vulekamali website; and in the Draft Public Procurement Bill.
3. The National Treasury should collaborate with CoST and key infrastructure industry bodies to clarify how the features of the CoST model can help resolve the legal, regulatory and policy misconceptions that abound in the infrastructure sector.
4. The Department of Justice & Constitutional Development, through Parliament, should strengthen and enhance the operation of the Promotion of Access to Information Act, especially the obligation on procuring entities to disclose procurement-related information in line with the CoST IDS.
5. The National Treasury should convene provincial information sessions with stakeholders from all relevant sectors to explain information disclosure standards at every stage of the infrastructure procurement cycle, using the CoST IDS as a template.

These recommendations are elaborated upon below.

1. Pilot studies to assess CoST added value

One large and one smaller SOE, a construction company, an engineering professional association and participants in the civil society focus group all expressed degrees of openness to collaboration in a pilot study that could demonstrate in practice the value of the CoST model.

The timing for one or more project-based pilot projects is appropriate. South Africans have been shocked at recent evidence of severe governance failures. President Ramaphosa's administration is undertaking a range of integrity-related initiatives under the umbrella of the "New Dawn". The National Treasury has been working on significant procurement reform measures, as set out in the IDPM framework and draft Public Procurement Act, that will strengthen the Office of the Chief Procurement Officer.

The National Treasury should therefore engage further with CoST representatives to consider the feasibility of conducting one or more pilot studies. These would explore in practice the extent and form of the CoST model and its core features that might best address stakeholders' needs in the current dynamic governance reform environment.

2. Including CoST IDS in procurement documents

IDPM, the revised version of the SIPDM, will allow the National Treasury to monitor the quality of expenditure and the Construction Industry Development Board to monitor the technical engineering quality (the functionality of a project), instead of both these functions residing within the SIPDM. The inclusion of the CoST IDS within the IDPM would lay a strong foundation for the new framework.

As outlined in this report, civil society has been working with the National Treasury on a project to provide greater public access to regularly updated public expenditure information to complement South Africa's top global status in open budgeting. The Vulekamali website has already been established, and the 2019 Budget Review included a detailed list of large infrastructure projects. The Vulekamali portal offers a convenient platform to host information included in the CoST IDS, disaggregated by project.

Beyond this, the draft Public Procurement Act will constitute a major piece of legislation. As the Government is the largest procurer of goods and services, it and the South African people need to know that such goods and services are procured in the fairest, most efficient and most transparent way possible. As indicated earlier, the Act will formalise the powers of the Office of the Chief Procurement Office, which currently only has powers as prescribed by the National Treasury. Under discussion is how to promote open contracting standards, which offers a unique opportunity to enhance transparency. As the inclusion of the CoST IDS in the Act would constitute a major step forward for greater transparency in procurement, the National Treasury should consider such an inclusion in the current Bill.

3. Resolution of regulatory misconceptions

As the findings of the fieldwork have shown, misconceptions about the regulatory environment for infrastructure development and delivery abound.

One such misconception concerns the IDPM framework. If adopted in the form in which it appears in the draft we have seen, the infrastructure procurement procedure will include, at the instance of the procuring entity, at least one “gateway review”¹³⁶ at the end of phase two (the planning phase) of each project cycle. The responsible treasury (whether national, provincial or municipal) may at any stage initiate a further gateway review of end-of-stage deliverables.¹³⁷ The design of these gateway reviews might usefully be informed by CoST’s assurance process.

4. Strengthening access-to-information legislation

While the Promotion of Access to Information Act (PAIA) provides an essential first step in requiring information “held by the State ... [and by] another person that is required for the exercise or protection of any rights” (sec 32 of the Constitution) to be made available to everyone, the fact that almost half (46%) of information requests to public bodies are denied in full is cause for concern. This makes the case for the proactive release of information all the more compelling.

The Department of Justice & Constitutional Development should therefore prioritise the amendment of PAIA to include proactive information disclosure as mandatory, in the context of procurement generally, and particularly in the context of infrastructure procurement. Proper functioning of the PAIA through the Office of the Information Regulator is critical in infrastructure procurement, ensuring prevention and combating of corruption, creating a level playing field for bidders and promoting accountability, all of which are firmly in the public interest.

5. Provincial information-disclosure sessions

As the fieldwork component of this study has shown, there are significant levels of lack of awareness, uncertainty and confusion about the required information disclosure standards at various stages of the infrastructure procurement cycle. There is also widespread ignorance about what types of information relating to various stages of the procurement cycle can lawfully be proactively disclosed.

The National Treasury should convene provincial information-disclosure sessions to provide clarity on these standards and the kinds of evidence needed to meet them. Either the CoST IDS or a variation thereof would be useful as an organising framework for such sessions.

¹³⁶ Para 4.10(a) of the draft Control Framework November 2018.

¹³⁷ Para 4.10(b), *ibid*.



ANNEXURE A: COST INFRASTRUCTURE DATA STANDARD (IDS)

COST INFRASTRUCTURE DATA STANDARD

Table 1: Project and Contract Data for proactive disclosure

Project phase	Project data	Contract phase	Contract data
Last updated		Procurement	Procuring entity Procuring entity contact details Procurement process Contract type Contract status (current) Number of firms tendering Cost estimate Contract administration entity Contract title Contract firm(s) Contract price Contract scope of work Contract start date Contract duration
Project Identification	Project reference number Project owner Sector, subsector Project name Project Location Purpose Project description		
Project Preparation	Project Scope (main output) Environmental impact Land and settlement impact Contact details Funding sources Project Budget		
Project Completion	Project status (current) Completion cost (projected) Completion date (projected) Scope at completion (projected) Reasons for project changes Reference to audit and evaluation reports	Implementation	Variation to contract price Escalation of contract price Variation to contract duration Variation to contract scope Reasons for price changes Reasons for scope and duration changes

Table 2: Project and Contract Information for disclosure upon request

Project information	Contract information
Identification and Preparation Multi-year programme & Budget Project brief or Feasibility study Environmental and social impact assessment Resettlement and compensation plan Project officials and roles Financial agreement Procurement plan Project approval decision	Procurement Contract officials and roles Procurement method Tender documents Tender evaluation results Project design report
	Contract Contract agreement and conditions Registration and ownership of firms Specifications and drawings
Completion Implementation progress reports Budget amendment decision Project completion report Project evaluation report Technical audit reports Financial audit reports	Implementation List of variations, changes, amendments List of escalation approvals Quality assurance reports Disbursement records or payment certificates Contract amendments

ANNEXURE B: COST IDS SPREADSHEET

			Prevented by other factors from being made available to the public (explain)	Name the law or public policy	Comments
PROJECT	Project Identification	Project name			
		Project location			
		Purpose			
	Project Preparation	Project scope (main output)			
		Environmental impact			
		Land and settlement impact			
		Funding sources			
		Project budget			
		Project budget approval date			
	Project Completion	Completion cost			
		Completion date			
		Scope at completion			
		Reasons for project changes			
		Reference to audit and evaluation reports			
	CONTRACT FOR DESIGN	Procurement	Contract title		
Procurement process					
Number of firms tendering					
Contracted firm(s)					
Cost estimate					
Contract price					
Contract scope of work					
Contract start date					
Contract duration					
Implementation		Variation to contract price			
		Variation to duration			
		Variation to contract scope			
		Reasons for price changes			
		Reasons for scope and duration changes			

CONTRACT FOR SUPERVISION	Procurement	Contract title			
		Procurement process			
		Number of firms tendering			
		Contracted firm(s)			
		Cost estimate			
		Contract price			
		Contract scope of work			
		Contract start date			
		Contract duration			
	Implementation	Variation to contract price			
		Variation to duration			
		Variation to contract scope			
		Reasons for price changes			
		Reasons for scope and duration changes			
CONTRACT FOR CONSTRUCTION	Procurement	Contract title			
		Procurement process			
		Number of firms tendering			
		Contracted firm(s)			
		Cost estimate			
		Contract price			
		Contract scope of work			
		Contract start date			
	Implementation	Contract duration			
		Variation to contract price			
		Variation to duration			
		Variation to contract scope			
		Reasons for price changes			
		Reasons for scope and duration changes			



www.hsrc.ac.za

<http://www.facebook.com/HumanSciencesResearchCouncil>

<https://twitter.com/HSRCza>



science & innovation

Department:
Science and Innovation
REPUBLIC OF SOUTH AFRICA



**Infrastructure
Transparency
Initiative**



HSRC
Human Sciences
Research Council