

DISPUTES

Does the Public Procurement Act provide for an effective dispute resolution mechanism?

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The National Treasury published the draft General Public Procurement Regulations and draft Public Procurement Tribunal Regulations ("**Draft Regulations**") for public comment as contemplated in section 63 of the Public Procurement Act, 2024 ("**Act**"). The Constitutional Court recently heard a challenge to the Act's validity. Together, that challenge along with the publication of the Draft Regulations have placed ongoing conversations on the operation of the Act back in the forefront. In this article we draw specific focus on the dispute resolution mechanism contemplated in Chapter 6 of the Act.

The Act introduces a two-layered dispute resolution mechanism which allows bidders to challenge the decision of an organ of state to award a bid to another competing bidder.

The **first layer** to the dispute resolution mechanism is the internal remedy contemplated in section 35(1) of the Act. In terms of this provision, a bidder aggrieved by the decision of an organ of state may submit, to that organ of state, an application for reconsideration of the award. The application for reconsideration must be submitted within 10 days from the date on which the aggrieved bidder is informed of the decision to award the bid to another competing bidder. Upon receipt of the application for reconsideration, the organ of state has a choice to either: (a) dismiss the application for reconsideration; or (b) immediately institute an internal investigation and inform the bidder of its findings and decision within 30 days.

From our interpretation of the Act, the internal remedy **must** be complied with if an aggrieved bidder wishes to utilise the dispute resolution mechanism contemplated in the Act. Section 35(1) of the Act must be read together with section 35(2)(a) of the Act. Section 35(2)(a) of the Act expressly provides that a bidder must submit the application for reconsideration before it can approach the Public Procurement Tribunal ("**Tribunal**") or a court to review the decision to award a bid. The only circumstance where this peremptory step need not be taken is if there are exceptional circumstances that are in the interests of justice. A failure to follow the process contemplated in section 35(1) of the Act could result in the Tribunal or court directing the aggrieved bidder to first submit the application for reconsideration.

The **second layer** to the dispute resolution mechanism is found in section 47 of the Act. This section provides that if an aggrieved bidder is not satisfied with the decision on the application for reconsideration, the aggrieved bidder may submit an application for review with the Tribunal. This application for review must be submitted within 10 days from the date on which the aggrieved bidder is informed of the outcome of the application for reconsideration. It is noted that the 10-day period may be extended to 15 days if the application for review raises public interest considerations. Upon receipt of the application for review, the Tribunal has 30 days to make an order (unless an extension has been requested). Once the order has been made, the order of the Tribunal may be judicially reviewed in terms of the Promotion of Administrative Justice Act 3 of 2000 or any applicable law.

At face value, the time periods contemplated in the two-layered dispute resolution mechanism suggest that procurement disputes will be addressed expeditiously. This view is supported by section 51(1)(b) of the Act which states that the Tribunal "*must strive to ensure that proceedings are conducted with **as little formality and technicality, and as expeditiously as possible**...*". While we note that the rules of the Tribunal will only be determined once the Tribunal has been constituted, the framing and operation of the two-layered dispute resolution mechanism and the role of the Tribunal may not presently work as efficiently as contemplated. The unfortunate reality is that procurement law matters in South Africa are rarely matters which can be determined expeditiously or with little formality and technicality, unless the issue is narrow.

Procurement disputes often turn on whether a bid award complied with applicable procurement prescripts. This assessment may include consideration of the information considered by the organ of state at each stage of the procurement cycle and the procedure it followed. Depending on the scale and complexity of the bid, this may also involve reviewing extensive documentation and affidavits either supporting or challenging the impugned decision. This raises questions about whether an aggrieved bidder would have access to all of the documents it requires to support its complaint and whether the matter can be extensively and properly ventilated by the Tribunal within the timelines and format mandated by the Act.

With the above realities in mind, it is our view that the dispute resolution mechanism contemplated in the Act may not achieve its intended objective of expeditious resolution of procurement disputes. Instead, it will add additional, potentially unsatisfactory, steps before final resolution of the dispute by a court. The question is whether the truncated timelines and informal processes of the Tribunal will assist in any way in reducing the number of procurement disputes which find their way to our courts. Furthermore, would it not be more efficient for an aggrieved bidder, after exhausting the internal remedy contemplated in section 35(1) of the Act, to approach the court directly to review the award decision, rather than first approaching the Tribunal and thereafter seeking judicial review of the Tribunal's decision?

Admittedly, an advantage of pursuing the dispute resolution mechanism contemplated in chapter 6 of the Act is the standstill mechanism in section 53 of the Act which by-passes the need for an aggrieved party to obtain an interim court order which prevents the organ of state from taking steps to conclude a contract with the successful bidder until the conclusion of the application for reconsideration and/or the application for review in terms of the Act. Once steps are taken outside of the Act, an interim court order will need to be obtained by the aggrieved bidder unless an agreement is reached with the organ of state.

It may be some time before it becomes clear how the Act's two-layered dispute resolution mechanism will operate, and whether it will frustrate the resolution of procurement disputes or provide an effective and efficient alternative without overburdening the already constrained court system.



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