

The Public Procurement Act is Invalid: A Second Chance for Infrastructure and PPP Regulation

What the Constitutional Court's judgment means for how South Africa regulates infrastructure procurement and public-private partnerships — and why the redraft cannot afford to repeat the mistakes of the last one.

The Constitutional Court did not strike down the Public Procurement Act on the merits of what it said. It struck it down because of how Parliament arrived at it. Last Thursday, the Court found that the public participation process behind the Act fell short of what the Constitution requires. A day later, Finance Minister Enoch Godongwana confirmed the implication plainly - “We are going to go back to the drawing board for a new procurement act. We have got to do so.” Government will continue operating under the existing fragmented procurement framework in the meantime - the new Act, signed by the President in July 2024, had not even commenced.

This gives Treasury a real opportunity to reconsider its approach. Nowhere is that reconsideration more overdue than in how the Act deals with strategic infrastructure procurement and public-private partnerships.

A framework that barely addresses the thing it is meant to enable

One of the most persistent criticisms of the Act, raised repeatedly during the public participation process, was its decision to leave procurement methods, including infrastructure and PPP procurement, almost entirely to ministerial regulations rather than dealing with them in the primary legislation itself.

The Act does define “strategic procurement,” and section 24(1)(a) lists infrastructure, capital assets and innovation as contexts for it. However, the substantive content — procurement methods, evaluation frameworks, and the PPP approval architecture — is left to regulations still to be written (ss 24(1)(b)–(c), 63(1)(a)(x)). The Act contains no definition of “innovation” or “strategic sourcing” to anchor those future regulations.

This represents a significant retreat from where the Bill started. Earlier drafts, dating to 2020, contained a full PPP part (sections 44 to 45) covering the Treasury Approval I/IIA/IIB/III gateway process, mandatory feasibility studies, rules governing the amendment of PPP agreements, and the principle that a PPP only binds an institution once the required approvals are in place. That draft also included a dedicated Infrastructure Delivery chapter, with feasibility and gateway-review requirements for major capital projects, and a section 71 setting out strategic sourcing principles. None of this survived into the enacted version. Treasury’s stated justification was flexibility: different procurement categories, including PPPs and infrastructure, were said to need their own tailored regulations rather than a single statutory regime.

Industry was largely unconvinced. Engineering and built-environment bodies criticised a framework still oriented around lowest-price bidding rather than lifecycle cost. Legal commentators took the opposite view to Treasury's flexibility argument, contending that it is precisely because these are complex, high-value, long-duration arrangements that the governing principles and definitions need to sit in the Act itself, with regulations filling in operational detail rather than the reverse. Others raised a more concrete commercial concern: a Minister with largely unfettered discretion to make and amend procurement regulations at will creates real bankability risk for privately financed infrastructure, where lenders and investors require durable legal certainty over a 20–25 year concession term, not a framework that can be rewritten by regulation.

How this compares elsewhere

Measured against comparable jurisdictions, the gap is notable. Kenya and Ghana, like most Anglophone African states, regulate PPPs through standalone statutes with their own governance architecture: dedicated PPP units or committees, fiscal-commitment oversight bodies, project preparation funding, and rules for unsolicited proposals. General procurement legislation deals with procurement methods, while PPPs (recognised as a fundamentally different instrument requiring their own balance of attracting private capital while maintaining public financial oversight) are governed by their own Act.

The EU is moving in the same direction, albeit from a different starting point. Its 2014 Concessions and Public Procurement Directives already afford PPP-style arrangements distinct legal treatment from ordinary procurement, and the European Commission's newly proposed regulation, intended to consolidate the existing framework, moves further toward negotiated procedures and quality-weighted award criteria rather than price-only evaluation.

South Africa's Public Procurement Act, by contrast, folded PPPs into a single regulation-making power and said almost nothing about infrastructure procurement in the primary legislation at all, despite government's own stated position on the central role private capital plays in infrastructure delivery.

What to watch for in the rewrite

One point worth stating is that the most pointed Chapter 4 objections at the NCOP hearings, including concerns about inadequate consultation on late changes and the centralisation of procurement power at the expense of provinces, came from the DA while it was still in opposition, months before the May 2024 election and the Government of National Unity that followed. The significance is that the party which rose these concerns from the opposition benches now sits inside the executive tasked with redrafting the Act, which changes the political dynamics considerably. As procurement law academic Professor Geo Quinot observed in the aftermath of the judgment, given how different Parliament's composition now is, "it is highly unlikely that we will see this same version emerge."

The invalidation of the Public Procurement Act presents both an opportunity and a risk for infrastructure and PPPs. It creates an opening to finally give strategic infrastructure procurement and PPPs proper legislative grounding through clear principles, definitions and approval architecture in the Act itself, with



regulations performing their proper, more limited function. That opportunity is reinforced by government's own stated policy shift, since the Act was signed in 2024, toward greater reliance on private-sector partnership to deliver infrastructure - a commitment that may finally compel Treasury to give infrastructure and PPP procurement the legislative attention it was denied the first time around.

The bottom line

The Constitutional Court's judgment is at its core a procedural correction rather than a policy verdict. But it hands Treasury a genuine opportunity to fix a substantive gap in how the framework treats infrastructure and PPPs. Whether the redraft treats that opportunity seriously, with real public participation this time, will say a great deal about whether government's stated commitment to private-sector partnership in infrastructure delivery amounts to more than rhetoric.

Claire Barclay advises on infrastructure, energy and public-private partnership transactions at Infra Law.