REGULATION OF PUBLIC PROCUREMENT IN ZIMBABWE: AN ANALYSIS OF ITS INTERNATIONAL OBLIGATIONS

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I declare that the above dissertation is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references. I further declare that I submitted the dissertation to originality checking software and that it falls within the accepted requirements for originality. I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

Freedom Panganayi

Signature Date 6 June 2024

Dedication

To my lovely wife, Nomakholwa and sons, Anenyasha and Matikudza.

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PUBLICATIONS EMANATING FROM THIS STUDY

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ABSTRACT

The adoption of the new constitution in 2013 led to the constitutionalisation of public procurement in Zimbabwe. The Constitution is the principal source of law in Zimbabwe. This set in motion a series of legislative reforms to realign public procurement with constitutional prescriptions. The principal objective of the study was to establish whether Zimbabwe's procurement regulatory framework complies with what is set out in section 315(1) as read together with section 195(2) of the Constitution. The preceding constitutional provisions outline the six constitutional principles anchoring public procurement. These principles are mentioned hereunder as follows:

a. Openness;
b. Honesty;
c. Cost-effectiveness;
d. Fairness;
e. Competitiveness; and
f. Transparency

To pass constitutional muster, public procurement legislation must crisply flesh out the aforementioned principles. Public procurement legislative framework is extensively codified in the Public Procurement and Disposal of Public Assets Act 5 of 2017. This Act is integrated with the Public Finance Management Act 11 of 2009. Noticeably, some of segments of Public Procurement and Disposal of Public Assets Act are bent on using public procurement to achieve socio-economic ends. Though the public procurement regulatory legislation is far from being perfect, this study has shown that the procurement regulatory legislation conforms to constitutional dictates. However, the operationalisation of this policy still remains haphazard. The legislative hindrance to the realisation of the procurement regime articulated in the Constitution is discussed in this thesis.

The secondary objective of this research is to measure the degree to which Zimbabwe's public procurement regime conforms to COMESA Public Procurement Regulations. Simply, this entails comparing Zimbabwe's public procurement regulatory framework with the COMESA Public Procurement Regulations. In crafting this segment of the study, the researcher was guided by the fact that Public Procurement Regulations are binding on member states. Public Procurement Regulations are guided by the following principles:

a. competition and openness in public procurement proceedings;
b. fairness;
c. transparency, including disclosure of all relevant information for participation in, and oversight over, public procurement;
d. accountability; and
e. value for money.

To operationalise Public Procurement Regulations, member states are required to ensure that the public procurement laws incorporate the aforementioned principles. In addition, it is also necessary for member states to designate financial thresholds for regional competitive bidding for suppliers operating in COMESA region. The thesis reveals that Zimbabwe's public procurement regulatory framework compares favourably to COMESA Public Procurement Regulations.

The study concludes the discussion on the comparative analysis by recommending legislative changes to public procurement law in Zimbabwe. These amendments will facilitate the participation of suppliers from within the COMESA region. At present, Zimbabwean public procurement law does not distinguish between suppliers from a non-COMESA member state and COMESA member states. The domestication of the missing components of the Public Procurement Regulations will permit Zimbabwe to meet its international law obligations as enshrined in the COMESA Treaty.

Key words: Public procurement, transparency, cost-effectiveness, open, honest, fair, value for money, competitive, corruption, good governance, sustainable procurement, Zimbabwe, international law, COMESA.

Abbreviations

AfDB	African Development Bank
APLU	African Procurement Law Unit
AMU/UMA	Arab Maghreb Union
CEN-SAD	Community of Sahel-Saharan States
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EAC	East African Community
IGAD	Intergovernmental Authority on Development
AJA	Administrative Justice Act 2004
art	Article
arts	articles
COMESA	Common Market for Eastern and Southern Africa
CSR	Corporate Social Responsibility
COVID 19	Corona Virus Disease
GDP	Gross Domestic Product
GoZ	Government of Zimbabwe
GPA	Government Procurement Agreement
IEEA	Indigenisation and Economic Empowerment Act
JV	Joint Ventures
LIC	Low Income Countries
MIF	Mutapa Investment Fund
NSSA	National Social Security Authority
OAGZ	Office of Auditor-General of Zimbabwe
OPC	Office of the President and Cabinet
PA	Procurement Act 1999
PAC	Public Accounts Committee
PSC	Public Service Commission
PECG	Public Entities Corporate Governance Act 2018
PMFA	Public Finance Management Act 2009
PMU	Procurement Management Unit
PPDPA	Public Procurement and Disposal of Public Assets Act 2017
PPP	Public Private Partnerships
RTA	Regional Trade Agreements

regs	regulation(s)
s	section
ss	sections
SACU	Special Anti-Corruption Unit
SADC	Southern African Development Community
SAZ	Standards Association of Zimbabwe
SEPs	State-Owned Enterprises and Parastatals
SI	Statutory Instrument
SPB	State Procurement Board
SPOC	Special Procurement Oversight Committee
SWF	Sovereign Wealth Fund
PTA	Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States
UNCAC	United National Convention on Against Corruption
UNCITRAL	United Nations Commission on Trade Law
UNECA	United Nations Economic Commission for Africa
USD	United States of America Dollars
VfM	Value for Money
WBG	World Bank Group
ZACC	Zimbabwe Anti-Corruption Commission
ZHRC	Zimbabwe Human Rights Commission
ZIDA	Zimbabwe Investment and Development Agency Act 2019

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CHAPTER 1: INTRODUCTION

1.1. Background

The expression public procurement generally refers to the purchase of goods and services by the government or public entities to fulfil their public functions.[1] Public procurement activities are funded from monies collected by governments from taxes and levies, otherwise known as public funds. Bureaucratic functionaries exercising public power in terms of enabling constitutional and legislative rules expend public funds in procuring goods and services as well as construction works for the wellbeing of the general public.[2] Furthermore, the notion of the social contract[3] between the government and citizens dictates that public officials exercise public power for and on behalf of society.[4] The social contract theory has its genesis in the liberal philosophy in terms of which cooperation is hinged on individuals' consent and the symbiotic relationships and reciprocal obligations between the state and its citizens.[5] In other words, public officials owe a fiduciary duty to the general public who are the beneficiaries of goods and services.

The acquisition of the utilities by public entities and government is funded by public revenue.[6] Procuring entities contract with natural and juristic persons for the purpose of purchasing goods and services for the general public in accordance with principles of rivate law and public law.[7] Thus, government owned entities fulfil their public function.[8] Conversely, it must be borne in mind that state owned entities are also crucial players[9] in

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1 Phoebe Bolton, *The Law of Government Procurement in South Africa* (LexisNexis Butterworths 2007) 2.

2 Allen Schick, 'Repairing the Budget Contract between Citizens and the State' (2011) 11 (3) OECD Journal on Budgeting 3-4 <https://www.oecd.org/gov/budgeting/Repairing%20the%20Budget%20citizens%20and%20state.pdf> accessed 20 July 2020.

3 The notion of social contract legitimises social rules and institutions on their being freely and publicly acceptable to all individuals bound by them.

4 Helen Walker and Steven Brammer, *Sustainable procurement in the United Kingdom Public Sector* (2009) 14(2) Supply Chain Management 233.

5 Samuel Freeman, *Justice and Social Contract Essays on Rawlsian Political Philosophy* (Oxford University Press, 2009) 17.

6 Bolton (n 1) 4.

7 Phoebe Bolton, 'Overview of the Government Procurement System in South Africa' in Khi V Thai (ed), *International Handbook of Public Procurement* (Florida Atlantic University 2009) 359.

8 These are known as State Owned Entities (SOEs) or State-Owned Enterprises and Parastatals (SEPs).

9 In services and sectors including, but not limited to, transportation, electricity, water purification and reticulation, extractives, power generation, transmission and distribution, telecommunications as well as banking and finance.

manufacturing of goods and provision of services.[10] Hence, state owned entities have a dual function in the procurement ecosystem, as both suppliers and contracting authorities.

To meet the socio-economic goals of people, progressive states have always sought to improve the welfare of their own people. [11] This is done through the provision of affordable services such as clean water, healthcare, electricity, efficient public transportation and education.[12] Public procurement, therefore, is used as a vehicle by governments[13] to deliver quality and affordable services to their people.[14] According to empirical evidence, public procurement expenditure accounts for around fourteen and a half percent (14.5%) of the Gross Domestic Product (GDP) in low income countries.[15] There is no official statistical information available on total public procurement expenditure. Aggregation of data from the 2021 Fiscal Year by a Swedish international development agency indicates that public procurement accounts for twenty-five percent (25) of the national budget in Zimbabwe.[16]

The growth of the field of public procurement is a result of concerted efforts on the international front to increase international trade as one of the facets of accelerating the process of regional integration.[17] In line with the above, many African countries have

[10] Approach Paper World Bank Group Support for the Reform of State-Owned Enterprises, 2007-2018: An IEG Evaluation <http://ieg.worldbank.org/sites/default/files/Data/reports/ap_soereform.pdf> accessed 13 November 2020.

[11] World Bank, 'The Public Sector' (2014) <http://data.worldbank.org/topic/public-sector> accessed 23 April 2020.

[12] ibid.

[13] Governments of developing countries and countries with economies in transition enthusiastically have adopted such an economic model. The transition entails adopting liberal economic policies characterised by minimum government regulatory powers in the functioning of the economy and privatisation of business operations. This leads to increased competition and emergence of market based institutions. A substantial number of states with economies in transition were part of the Soviet Union Empire and countries that had wholly and partially embraced socialism as their political and economic ideology in the 20th century. As a result of this socio-economic model, the economies of these states endured long periods of stagnation. The net effect was sluggish development of infrastructure to meet the burgeoning populations and the infrastructure was also antiquated.

[14] Mohan Veluppillai, 'Public procurement for Sustainable Development' (2010) Research paper on Sustainable Public Procurement, Ministry of Highways, Sri Lanka 3. <<http://www.ippa.org/IPPC4/Proceedings/07GreenProcurement/Paper7-11.pdf> accessed 20 July 2020.

[15] World Bank Report on Benchmarking Public Procurement (2017): Assessing Public Procurement Regulatory System <http://documents1.worldbank.org/curated/en/121001523554026106/Benchmarking-Public-Procurement-2017-Assessing-Public-Procurement-Regulatory-Systems-in-180-Economies.pdf> accessed 14 January 2020.

[16] Paradzai Munyede, "Public procurement reforms in rural local authorities in Zimbabwe", Public pro curement reforms in rural local authorities in Zimbabwe | Policy Brief No 21 Swedish International Centre for Local Democracy < https://icld.se/wp-content/uploads/2021/12/ICLD_Policy-Brief_21_WEB.pdf> accessed 5 January 2022.

[17] ibid.

reformed their procurement legislation to promote accountability and transparency.[18] Zimbabwe has naturally followed this trend. Corruption has been singled out as the major huddle in the achievement of sustainable economic growth in Zimbabwe.[19] Clearly, corruption is one of the fundamental factors attributable to the socio-economic challenges Zimbabwe has faced since independence.[20] An effective public procurement regulatory framework is essential for the social and financial upliftment of the Zimbabwean people. Generally, a weak and convoluted procurement regime is ineffective and prone to abuse. The abuse occurs when public officials engage in public procurement corruption, which negates its primary objective of obtaining value for money.[21]

1.2. Regulation of Public Procurement in Zimbabwe

The passage of the new Constitution in 2013 ushered in a new procurement dispensation in Zimbabwe. Public procurement is now constitutionalised. The Constitution of Zimbabwe (Amendment No. 19), 2013, (hereafter referred to as Constitution) outlines the cardinal constitutional principles underpinning the public procurement processes. Section 315(1) of the Constitution reads as follows:

'An Act of Parliament must prescribe procedures for the procurement of goods and services by the State and all institutions and agencies of government at every level, so that procurement is effected in a manner that is transparent, fair, honest, cost-effective and competitive'

Government ministries and state-owned entities and parastatals are collectively referred to as "procuring entities".[22] The wording of the foregoing constitutional provision clearly

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[18] Steven R Karangizi, 'Framework Arrangements in Public Procurement: A Perspective from Africa' in Sue Arrowsmith (ed), *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century* (Eagan West 2009) 243.

[19] Point 94 to the TRANSITIONAL STABILISATION PROGRAMME REFORMS AGENDA October 2018 – December 2020 "Towards a Prosperous & Empowered Upper Middle Income Society by 2030" 05 October 2018 Harare accessed 30 March 2024.

[20] Point 863 to the TRANSITIONAL STABILISATION PROGRAMME REFORMS AGENDA October 2018 – December 2020 "Towards a Prosperous & Empowered Upper Middle Income Society by 2030" 05 October 2018 Harare accessed 30 March 2024.

[21] Guide to Enactment of the UNCITRAL Model Law on Public Procurement Paragraph 3 <https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/Guide-Enactment-Model-Law-Public-Procurement-e.pdf> accessed 20 July 2020.

[22] In terms of section 2 of Public Procurement and Disposal of Public Assets Act procuring entities means—

(a) a Ministry, department or other division of the Government; or
(b) a corporate body established by or in terms of any Act for special purposes laid down in that Act, or (c) any company in which the State has a controlling interest, whether by virtue of holding or controlling its shares or by virtue of a right of appointment of members to its controlling body or otherwise, and includes any company which is a subsidiary, as determined in accordance with section 183 of the Companies and Other Business Entities Act 2019, of such a company; or
(d) a provincial or metropolitan council or a local authority; or

identifies key fundamental principles which are transparency, fairness, honesty, cost-effectiveness, completion and openness. The presence of the word 'must' in section 315(1) makes the provision peremptory. It follows therefore, that any public procurement enactment which is an offspring of the afore-stated provision must absolutely achieve the key constitutional fundamentals mentioned above.

The Constitution is the supreme law of the Zimbabwe and any law, practice, custom and conduct is invalid to the extent of the inconsistency.[23] Stated differently, the Constitution is the grundnorm. The Constitutional Court of Zimbabwe has emphatically reinforced this notion as was succinctly put by Justice Hlatshwayo: [24]

> 'One of the crucial elements of the new constitutional dispensation ushered in by the 2013 Constitution is to make a decisive break from turning a blind eye to constitutional obligations. To achieve this goal, the drafters of the Constitution adopted the rule of law and the supremacy of the Constitution as some of the core founding values and principles of our constitutional democracy. For this reason, public office bearers ignore their constitutional obligations at their own peril'

It therefore follows that procurement legislation must give effect to constitutional provisions. In simple terms, public procurement legislation must the pass constitutional muster. It is a fundamental principle of constitutionalism that legislation is subordinate to the provisions of a constitution.[25] Justice Mogoeng Mogoeng, the Chief Justice of the Republic of South Africa (as he was then) had this to say in the *EFF* case:[26]

> '... a constitution is the supreme law; national legislation cannot have the effect of watering down or effectively nullifying the Constitution [rephrased]'[27]

Suffice it to say that laxity in public procurement governance impedes competition and runs counter to the objective of obtaining value for money, as well as unduly exerting pressure on the fiscus, and ultimately burdening the taxpayer.[28] In Zimbabwe, public

(e) any partnership or joint venture between the State and any person, which is prescribed in terms of this Act or the Public Finance Management Act 2009.

23 Constitution of Zimbabwe (Amendment No.19), s 2(1) 2013.

24 *Chironga and Another v Minister of Justice, Legal and Parliamentary Affairs and Others* CCZ14/20 para 1.

25 Section 2(1) of the Constitution read, 'this Constitution is the supreme law of Zimbabwe and any law, practice or conduct inconsistent with it is invalid to the extent of the inconsistency'.

26 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC) para 58.

27 The principles underpinning constitutionalism are universal and there is no doubt that South African judicial decisions have a persuasive force in the Zimbabwean legal landscape.

28 'OECD Principles for Integrity in Public Procurement 2009' <https://www.oecd.org/gov/ethics/48994520.pdf> accessed 26 April 2020.

procurement is largely governed by two primary legislative texts, namely the Public Procurement and Disposal of Public Assets Act[29] (PPDPA Act') and the Zimbabwe Investment Development Agency Act (ZIDA Act). [30] The PPDPA Act defines procurement as the purchase by any means, construction works[31] or services, including the disposal thereof.[32] The procurement of infrastructure projects through joint ventures, is regulated by the PPDPA Act, together with some portions of the ZIDA Act.[33] It is quite clear that the Zimbabwean public procurement regulatory framework does not make a distinction between the procurement of works, goods and services, as well as the procurement of infrastructure projects through public-private partnerships.[34]

Public procurement is one of the most effective tools for achieving economic, and environmental sustainability,[35] and technological and social goals.[36] It follows that public procurement policy need to be pursued in a way that protects the environment. With regard to public procurement in Zimbabwe, the Constitution expressly confers the right to a clean environment on everyone, encapsulating among other things, sustainable use of ecological resources, prevention of pollution, and degradation of ecological resources.[37]

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29 PPDPA Act, section 2. The PPDPA Act came into effect on 1 January 2018. The Public Procurement and Disposal of Public Assets Act is supplemented by Public Procurement and Disposal of Public Assets (General) Regulations, 2018 came into force by ministerial proclamation, Statutory Instrument 5 of 2018.

30 Act 2019.

31 'Construction works' is defined in the PPDPA Act as all work associated with the construction, reconstructrution, demolition, repair or renovation of any building or infrastructure, and includes—
(a) site preparation, excavation work, the installation of equipment or materials, decoration and finishing; and
(b) incidental services such as drilling, mapping, photography and environmental and seismic investigation, where—
(i) the services are provided pursuant to a procurement contract; and
(ii) the value of the services does not exceed that of fee construction work itself;

32 PPDPA Act, s 2.

33 PPDPA Act, s 100.

34 The definition of public procurement outlined in section 1 of PPDPA Act includes goods and services, while the provisions of the Act are applicable to ZIDA. The former legislation regulates infrastructure procurement through joint venture (public private partnerships).

35 Katrina Alhola, Marja Salo, Riina Antikainen and Annukka Berg, 'Promoting Public Procurement of Sustainable Innovations: Approaches for Effective Market Dialogue' in Khi V. Thai (ed), *Global Public Procurement Theories and Practices, Public Administration, Governance and Globalization* (Springer International Publishing 2017) 60. Environmental sustainability focus was on energy- or material efficiency, use of renewable energies and/or less environmental impacts.

36 Foreword to the Benchmarking Public Procurement, 'Assessing Public Procurement Regulatory Systems in 180 Economies 2016 International Bank for Reconstruction and Development' (The World Bank 2017) 1 <http://bpp.worldbank.org/> accessed 25 April 2020.

37 Constitution of Zimbabwe, s 73(1) (a) and b (i) -(iii).

1.3. Challenges facing Procurement in Zimbabwe

The evolution of public procurement law in Zimbabwe has been largely guided by its external legal history.[38] It is a known fact that South Africa and Zimbabwe have a shared legal history that is the Roman Dutch Law family influenced by English law. The South African jurisdiction has historically influenced the legal development in Zimbabwe. It is therefore projected that Zimbabwe's constitutional jurisprudence[39] will be fundamentally influenced by its southern neighbour. Though far from being perfect, South Africa has emerged as a pathfinder for constitutionalism and the rule of law on the African continent.[40] Since the demise of apartheid, the South African legal order has become a model to many countries yearning to embrace constitutionalism, democracy, the rule of law and respect of right rights.[41]Again, many African countries have embraced the call to practise good governance by adopting constitutions that seek to regulate arbitrary exercise of public power.

To this end, South African courts have been forthright in settling procurement disputes. In *Steenkamp v The Provincial Tender Board of the Eastern Cape,* the South African Constitutional Court held: [42]

'The capacity of the government and state-owned entities to contract is carefully regulated by legislation and the Constitution'

In view of this by the South African Constitutional Court, it is conceivable that Zimbabwean courts will come to a similar conclusion when adjudicating over public procurement disputes.

The importance of international development institutions insofar as the calibration of public procurement regulatory frameworks cannot be underestimated. The work of these institutions had a catalytic effect on public procurement reforms, particularly in Sub-Saharan Africa. It is universally known that the United Nations Commission on Trade

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38 James Tsabora, 'Public Procurement in Zimbabwe: Law, Policy and Practice' (2014) 1 African Public Procurement Law Journal 3< https://applj.journals.ac.za/pub/article/download/2/1>accessed 4 May 2020. The term external legal history relates to the factors which influence the evolution of a legal system, including political, constitutional, religious social and economic factors.

39 In terms of section 46(1) (1) of the Constitution of Zimbabwe, a court may consider foreign law when interpreting fundamental rights and freedoms.

40 South Africa ushered in a constitutional dispensation in 1994 after having gone through an era of racial strife. Thanks to the South African experience, other countries in Sub-Saharan Africa also adopted relatively progressive constitutions. Nations in this category, include, Zimbabwe and Kenya.

41 In many respects, the Constitution of Zimbabwe adopted in 2013 as well that of Kenya, bears striking resemblance to the South Africa Constitution.

42 2007 3 SA 121 (CC) par 20.

Law hereafter (UNCITRAL) has gained international acceptance and function as a model for nations undertaking public procurement reform. Notwithstanding, it has been observed that there has been international economic pressure exerted on developing nations by international development banks to reform their procurement laws along the lines of the Model law. In other words, the public procurement reform agenda has principally been driven by multilateral financing institutions as a precondition for accessing lines of credit for African countries.

1.4. International Obligations

Zimbabwe is part of the regional and sub-continental economic groupings, that is, the Southern African Development Community (SADC)[43] and Common Market for Eastern and Southern Africa (COMESA),[44] among others. From the two regional economic groups, only COMESA has binding procurement regulations, whereas the SADC is still to formulate procurement laws applicable to member countries. The membership of COMESA consists of countries from the southern and eastern part, and to a limited extent, the northern part of the continent of Africa.[45]

When interpreting legislation the courts are constitutionally required to adopt a position that is in compliance with international law as outlined in terms of section 327 (2). The aforementioned provisions read:

'When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement'

From an international relations perspective, the Constitution of Zimbabwe envisages a state in which international law must be respected and upheld. Section 34 of the Constitution read as follows:

[43] The Southern African Development Coordination Conference (SADCC) the forerunner to SADC, came into being on the 1st of April 1980 in Lusaka. Zimbabwe is one of the founding member states <https://www.sadc.int/files/8613/5292/8378/Declaration_Treaty_of_SADC.pdf> accessed 20 July 2020.

[44] Zimbabwe is a founding member of COMESA having signed and ratified the COMESA Treaty on the 16th of November 1993 and ratified it on the 8th of December 1994 <https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012_with-zaire_final.pdf> accessed 10 July 2020.

[45] 'Member States of COMESA' <https://www.comesa.int/comesa-member-states> accessed 13 July 2020.

'The State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law'

Among other principles governing Zimbabwe's foreign policy is the need to uphold international law.[46] The provisions of section 12(2) succinctly states:

'The State must promote regional and pan-African cultural, economic and political co-operation and integration and must participate in international and regional organisations that stand for peace and the well-being and progress of the region, the continent and humanity'

The definition of Pan-Africanism is far and broad. In its simplest form, Pan-Africanism relates to the:[47]

'…simultaneous intellectual, cultural, social, political, economic and artistic project that calls for the unification and liberation of all people of African ancestry, both on the African continent and in the African diaspora'

The underlying philosophy driving the idea of Pan-Africanism is to promote unhindered movement of people, goods and services on the African continent thereby fostering mutual interdependency among African states. One such avenue for the realisation of this vision is regional trade. With the independence of many African states from the colonial yoke of bondage, numerous regional trading blocs have sprouted. These are, the Arab Maghreb Union (AMU/UMA), Economic Community of West African States (ECOWAS), East African Community (EAC), Intergovernmental Authority on Development (IGAD), Southern African Development Community (SADC), Economic Community of Central African States (ECCAS), Community of Sahel-Saharan States (CEN-SAD) and the Common Market for Eastern and Southern Africa (COMESA).

Pursuant to the Article 151(2) (d) as read with Article 165 of the COMESA Treaty, the Council of Ministers[48] promulgated Public Procurement Regulations (Public Procurement Regulations').[49] The Council is vested with the powers to make regulations, issue

[46] Constitution, s 12 (1) (b).

[47] Reiland Rabaka, 'Introduction : on the Intellectual elasticity and political plurality of Pan-Africanism' in Reiland Rabaka (ed), *Routledge Handbook on Pan-Africanism* (Taylor & Francis Group 2020)8; Ackah, Pan-Africanism, 1–35; Adi, Pan-Africanism, 1–5; W.E.B. Du Bois, "To the Nations of the World," in Report of the Pan-African Conference, held on 23rd, 24th, and 25th July 1900, at Westminster Town Hall, eds. Alexander Walters, Henry Sylvester Williams, Henry B. Brown, and W.E.B. Du Bois (London: Pan-African Conference Committee, 1900), 10–12.

[48] Art 9 of the COMESA Treaty.

[49] Official Gazette of COMESA Volume 15 No. 3. The COMESA Public Procurement Regulations were adopted at the 26th Council of Ministers' Meeting held from the 2nd to the 4th of June 2009 at Victoria Falls, Zimbabwe <https://www.comesa.int/wp-content/uploads/2019/02/2009-Gazette-Vol.-15-No3.pdf> accessed 19 January 2020.

directives, take decisions, make recommendations and deliver opinions.[50] The COMESA Public Procurement Regulations are binding on all member states.[51] Consequently, Zimbabwe as a member state has a duty to uphold these Public Procurement Regulations by affording the opportunity to suppliers domiciled in the COMESA region to participate in its procurement proceedings.[52]

The Public Procurement Regulations were enacted to promote the harmonisation of procurement laws, amongst member states.[53] The rationale behind the promulgation of Public Procurement Regulations was founded upon the need to accelerate and promote trade among COMESA member states. According to the United Nations Economic Commission for Africa (UNECA) 2019 Report,[54] COMESA had a combined Gross Domestic Product of USD657.4 billion and total exports of USD95 billion.[55]

The purpose of opening public procurement to foreign suppliers is to maximise competition in the economy, thus enhancing efficient use of public funds and ultimately lessening the burden on treasury.[56] In fact, preferential treatment of domestic suppliers and products is frowned upon in terms of international law.[57] Furthermore, opening up of public procurement to foreign suppliers promotes and emphasises competition, hence endeavouring to meet the primary objective of public procurement, which is value for money.[58] The foregoing is based on the need to promote international trade and dislodge all forms of legal bulwarks to regional and international integration. Conversely, domestic preference of local suppliers is permissible in international trade law to meet the socio-

[50] art 10 of COMESA Treaty.
[51] art 10(2) of the COMESA Treaty.
[52] art 7 of the COMESA Public Procurement Regulations.
[53] Preamble to the COMESA Public Procurement Regulations.
[54] United Nations Economic Commission for Africa '2019' <https://repository.uneca.org/bitstream/handle/10855/23017/b11560861.pdf?sequence=1&isAllowed=y> accessed 12 October 2020.
[55] United Nations Economic Commission for Africa <https://www.uneca.org/oria/pages/comesa-common-market-eastern-and-southern-africa#_ftn1> accessed 13 July 2020.
[56] Sue Arrowsmith, 'Public Procurement: Basic Concepts and the Coverage of Procurement Rules' in Sue Arrowsmith (ed), *Public Procurement Regulation* (Asia Link and EuropeAid Nottingham 2010) 16.
[57] article 2(4) of the COMESA Treaty. See First Paragraph of the Preamble to the United Nations Commission on International Trade Law Model Law on Public Procurement, Adopted by the General Assembly resolution 66/95 of 9 December 2011.
[58] Last paragraph to the Preamble to the United Nations Commission on International Trade Revised Model Law on Public Procurement.< https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2011-model-law-on-public-procurement-e.pdf>accessed 28 July 2020.

economic needs of Low Income Countries (LIC).[59] In conclusion, the preceding discussion underscores the need for a delicate balance to be struck by developing nations and economies in transition by shielding domestic suppliers to competition from foreign suppliers.[60]

1.5. Contemporary issues in Public Procurement

Contemporary issues effecting the public procurement field must be discussed in the context of the constitutional standard envisaged in section 315(1). The framers of the Constitution intended to use its sacred provisions for socio-economic transformation.[61] There are generally three models of public procurement regulation.[62] A brief explanation of the public procurement models is given in the paragraph below.

The conceptual framework underpinning public procurement regulation can be articulated in the context of three models, namely, political, economic, and international.[63] This will be explained in light of the public procurement regulatory framework envisioned in the Constitution. Consistent with the foregoing, governments adopt regulatory models to pursue political, economic and international objectives.[64] In the furtherance of economic objectives,[65] governments embrace the classical free market theory wherein competition fuels the economy in order to attain economic efficiency.[66]

The attainment of social and political objectives by governments is done through the political regulatory model.[67] Admittedly, the political regulatory model stifles competition and economic efficiency in order to enhance social values. The international model takes cognisance of the fact that governments have reciprocal duties to honour bilateral and multilateral trade treaties and agreements.[68] The international model seeks to foster

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59 art 8(1) of United Nations Commission on International Trade Law Revised Model Law on Public Procurement, 2011.

60 art V of the Revised Agreement on Government Procurement <https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf> accessed 3 May 2020.

61 Constitution of Zimbabwe, Preamble.

62 ibid.

63 Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regu lation* (Oxford University Press 2004) 25.

64 ibid.

65 The model assumes fair competition and reacts to market failures.

66 Deirdre Halloran 'The Social Value in Social Clauses: Methods of Measuring and Evaluation in Social Procurement' in KV Thai (ed), *Global Public Procurement Theories and Practices, Public Administration,Governance and* Globalization (Springer International Publishing, 2017) 43.

67 ibid.

68 Halloran (n 67) 45.

competitive advantage for individual nations in the global economy. Hence, the regulation of public procurement seeks to protect domestic suppliers, private and public players alike.[69]

Sustainable procurement, has become a topical issue in public procurement. [70] Sustainable innovation relates to innovation towards sustainable technological and organisational systems and processes that use resources and produce waste products within the confines of environmentally permissible laws, socially tolerable levels of prosperity and the achievement of social justice.[71] At its optimal, public procurement must be done in conformity with principles underpinning sustainable procurement. Sustainable use of financial and material resources is given emphasis in the Constitution.[72] Beyond doubt, public procurement legislation must be undertaken in a sustainable way. This thesis will provide a cursory view of how sustainable procurement is implemented and the extent to which sustainable procurement is implemented. The overview is informed by the fact that sustainable procurement is not part of the research questions of this study.

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69 Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (n 64) 26.

70 Cleantech innovations is a term with the same descriptive parameters as sustainable innovations. According to Cleantech Group (2014). 'What Is Cleantech?' <https://awsassets.panda.org/downloads/wwfreport global_cleantech_innovation_index_2014__final_.pdf> accessed 13 October 2020. It refers to new technologies and related business approaches that offer competitive returns for internal and external stakeholders at the same time availing possible remedies to global challenges. Cleantech represents a wide range of products, services and processes, meant to offer high performance at lower cost while greatly lowering or eliminating negative ecological effects and improving the productive and responsible use of ecological resources.

71 Tim Foxon and Peter Pearson 'Overcoming Barriers to Innovation and Diffusion of Cleaner Technologies: Some Features of a Sustainable Innovation Policy Regime' (2008) Journal of Cleaner Production, 16S1:S148.

72 Section 73 (1) reads:

> Every person has the right—
> (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that—
> (i) prevent pollution and ecological degradation;
> (ii) promote conservation; and
> (iii) secure ecologically sustainable development and use of natural resources while promoting economic and social development.

While section 308 outlined the principles underlying public financial resources. Section 2 (c) provides as follows:

> the burdens and benefits of the use of resources must be shared equitably between present and future generations;

Public procurement has phenomenally grown as a sub-discipline of commerce and has been identified as a tool for economic growth, social inclusion and environmental equilibria.[73] The field of public procurement has become increasingly complex, encapsulating various other disciplines of finance, law and strategic planning.[74] Public procurement regulation entails balancing competition, socio-economic and national interests, global competition as stipulated in regional and international conventions and treaties, adhering to the prescripts of fairness, equity and transparency, maintaining and maximizing on competition, and deployment of information communication technologies such as e-procurement.[75]

The traction gained in the opening of markets leading to greater competition in public procurement witnessed a momentary disruption occasioned by the global financial crisis in 2007. The crisis led to some nations reassessing their positions on opening up international competition in procurement at the expense of domestic procurement. [76] Domestic procurement is whereby the procurement of goods and services, as well as works by buyers from suppliers that are operating within the nation's borders.[77] The policy is meant to support the growth of the local industry leading to spin-offs such as job creation and fiscal prudence.[78] In other words, for domestic procurement to be achievable, there is a need for regulatory and policy framework that supports local industries.[79]

1.6. *Hypothesis*

There is an inherent danger in that without proper comprehensive and effective procurement legislation, the core and subsidiary objectives of procurement may be scuttled. The constitutional principle underpinning this study is that Zimbabwe is a constitutional state.[80] One of the core elements of good governance[81] is that public administration[82]

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[73] Sue Arrowsmith, 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) 10 (2) Journal of Public Procurement 149-186. < https://www.emerald.com/insight/content/doi/10.1108/JOPP-10-02-2010-B001/full/html> accessed 27 August 2020.

[74] Khi V Thai 'An Introduction' in KV Thai (ed), *Global Public Procurement Theories and Practices, Public Administration, Governance and Globalization* (Springer International Publishing, 2017) 1.

[75] ibid.

[76] Gordon Murray 'Public Procurement Strategy for Accelerating Economic Recovery' *2009*) 14(6) Supply Chain Management 429-434.

[77] Trepte, Peter, and Mario Ohoven, "The Role of Domestic Procurement Policies in Promoting Economic Development" (2018) 1(2) *International Journal of Public Procurement* 78, 80.

[78] ibid.

[79] ibid.

[80] Section 2(1) of the Constitution.

[81] Good governance is of the cardinal elements of national objectives set out in terms of Chapter 2 of the Zimbabwean constitution.

[82] The field of public administration is broad encompassing disciplines such as law, business, admin

must be executed in a manner that is compatible with constitutional provisions.[83] As noted above, sections 195(2) and 315(1) in the Constitution outline the fundamental principles that public procurement legislation must comply with. The principles are transparency, fairness, honesty, cost-effectiveness, competitiveness and openness. The legislature, in compliance with the provisions of section 315(1) of the Constitution enacted the PPDPA Act.[84] Therefore, it is taken that Zimbabwe's public procurement regulatory framework is compatible with the provisions of sections 195(2) and 315(1) of Constitution.

1.7. *Research Problem*

It has been reported that a significant amount of funds is wasted each year due to poor public finance management underpinned by public procurement policies.[85] The Constitution of Zimbabwe is quite clear about the need to ensure that public procurement is effected in a manner that is transparent, fair, honest, cost-effective, and competitive. [86] It's worthwhile to engage in the study to determine the fitness of the public procurement legislation to the constitutional contours envisaged in terms of section 315(1) and 195(2).

The legislative framework desired in the abovementioned constitutional provisions must satisfy the principles of transparency, fairness, honest, cost-effective, and competitiveness and openness. In short, the Constitution of Zimbabwe sets the bar for public procurement regulation. The constitutional standard watered down by legislation. The constitutional public procurement principles were carefully included in the Constitution to promote accountability and building a prosperous nation.[87] Simply put, the principles are there to entrench governance.

Should the public procurement legislation fail to address the constitutional principles, the ability of the public entities to meet their constitutive mandate will be jeopardised. Plaining speaking, it is the ordinary people who are the ultimate losers in the event of that the

istration, construction, just to mention a few.

[83] Constitution of Zimbabwe, s 194(1).

[84] Constitution of Zimbabwe, s 315 (1).

[85] De Lange S, 'Irregular state expenditure jumps 62%', *Business Day* (2011) <http://www.businessday.co.za> accessed 23 October 2019.

[86] Section 315 of the Constitution.

[87] Preamble to the Constitution.

public procurement legislation falls below the yardstick outlined in the Constitution. Public entities exist to transform the social and economic well-being of the people of Zimbabwe. The economic revival of the Zimbabwe is hinged on the performance of the public entities which contributed more than forty percent (40%) of the nation's Gross Domestic Product (GDP) before the turn of the 21st century.[88]

These principles must be interrogated in the context of prevailing procurement legislation and how best the Zimbabwean regulatory framework fares against international benchmarks as enunciated in the COMESA Procurement Regulations. The main functions of a public procurement regime are acquire value for money, ensure the integrity of the process, and achieve transparency, implement industrial and social policies.[89] The continued noncommittal posture by some member states, Zimbabwe included, to uphold in whole or part the COMESA Procurement Regulations frustrates regional integration efforts. Hence, the peoples of entire COMESA member states miss the dividends accruing from regional integration and belittles the stature of the whole regional trading bloc.

As a nation that is founded upon the rule of law, the upholding international law is a constitutional requirement in Zimbabwe.[90] The domestication of international legal agreements must be done through primary legislation.[91] Against this background, an investigation to determine the level of compliance of Zimbabwe's public procurement regulatory framework to international law obligations takes will take centre stage in this study. The basis of this study is informed by the fact that the COMESA Public Procurement Regulations are binding on member states.[92] This study provide great insights into the orientation of public procurement regulatory framework of Zimbabwe in relation to the demands set out in COMESA Public Procurement Regulations.

88 National Development Strategy 1 para 845.
89 Sue Arrowsmith, 'National and international perspectives on the regulation of public procurement: harmony or conflict', in Sue Arrowsmith and Arwel Davies (eds) *Public procurement: global revolu tion* (Kluwer Law International, 1998) 3.
90 Constitution of Zimbabwe (No.20), 2013, s 3 (1) (b).
91 Constitution of Zimbabwe (No.20), 2013, s 34.
92 art 10 (2) of the COMESA Treaty.

1.8. Research Objectives

The study seeks to establish whether Zimbabwe's procurement regime conforms to the six principles of COMESA Procurement Regulations. Regulations adopted by COMESA Council of Ministers are binding on member states.[93] Naturally, if the procurement regime in Zimbabwe does not conform to the above, the study will recommend, firstly, constitutional amendment followed by the amendment to the applicable procurement legislation.

To sum up the above, this study seeks to achieve the objectives set out below. Firstly, to determine whether Zimbabwean procurement legislation complies with sections 195(2) and 315(1) of the Constitution setting forth constitutional principles underpinning public procurement, namely, fairness, honesty, transparency, competitiveness and cost-effectiveness. This enquiry means subjecting public procurement legislation to against the afore-stated constitutional principles. Scrutinising public procurement legislation, entail an inquiry into the following, procurement activities,[94] procurement proceedings or procurement process.[95]

Secondly, it will be established whether the procurement regulatory framework in Zimbabwe conforms to COMESA Public Procurement Regulations. Thirdly and lastly, the researcher will suggest possible constitutional and legislative amendments in order to make the Zimbabwean public procurement regime amenable to firstly, its constitutional provisions, and secondly, the COMESA Procurement Regulations.

1.9. Justification of the study

As the case with most developing countries, during the time when the Procurement Act was still in force, Zimbabwe lacked an independent institution charged with the overall responsibility of ensuring that the procurement regime was functioning efficiently and

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[93] art 10(2) of the COMESA Treaty < https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012_with-zaire_final.pdf> accessed 23 June 2022.

[94] Section 2 of Public Procurement and Disposal of Public Assets Act defines procurement activities as – *'one or more of the totalities of the specific activities or tasks required in any way to bring the procurement process to a successful conclusion or to ensure that the process has been conducted in accordance with this Act'*.

[95] "procurement proceedings" or "procurement process" is defined in terms of section 2 of Public Procurement and Disposal of Public Assets Act as all stages or any stage of the procurement of goods, construction works or services conducted by a procuring entity from the pre-bid stage up to and including the award of the contract.

was strictly enforced.[96] Notwithstanding its deficiencies, the Procurement Act was deemed to be a crucial starting point upon which future reforms were to be established.[97]

In terms of the now repealed Procurement Act,[98] the State Procurement Board was vested with powers to regulate and manage the procurement activities of all government ministries and departments, public entities and local authorities.[99] A number of questions arose. The first question was whether the State Procurement Board could effectively discharge the role of enforcing compliance on the requirements of the Procurement Act? Secondly, whether the State Procurement Board could manage procurement activities on behalf of state-owned enterprise and parastatals, as well as government ministries.[100]

The accounting officer was empowered to constitute tender adjudication committees made people who were knowledgeable with the Procurement Act as stated in terms of regulation 14(4) of the Procurement Regulations of 2002. Tender adjudication committees were responsible for drawing up the specifications of goods and services to be tendered as well as evaluating submitted bids.[101] The recommendation of the tender adjudication committee was be reviewed by the procurement committee headed by the accounting officer or a person appointed for such purposes.[102] The accounting officer had the powers to constitute a procurement committee whose functions were to procure goods and services.[103] The Regulations promulgated under the Procurement Act further vested the accounting officer with powers to constitute a tender adjudication committee that was to be subordinate to the procurement committee.[104] Appreciably, the Procurement Regulations did endeavour to state that both members of the two mentioned committees had to be conversant with procurement.

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96 Robert R Hunja 'Obstacles to Public Procurement in Developing Countries' in Sue Arrowsmith and Trybus Hupkes (ed), *World Bank Report* (Kluwer International 2003) 66.

97 Joel Zowa, Naison Machingauta and Phoebe Bolton, 'The regulatory framework for public in Zimba bwe' in Geo Quinot & Sue Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press 2013) 216.

98 Procurement Regulations, SI 2002/171.

99 Procurement Act 1999, s 4 and s 5.

100 Zowa *et al* (n 151).

101 Procurement Regulations (General), SI 2002/171, reg 14 (4).

102 Procurement Regulations (General), SI 2002/171, reg 14 (1).

103 Procurement Regulations (General), SI 2002/171, reg 14 (2). The regulation read as :
'[t]he procurement committee shall be responsible for the procurement of goods and services in line with the Procurement Act'.

104 Procurement Regulations (General), SI 2002/171, reg 14 (3). The regulation read:
'[t]he Accounting Officer shall establish, when required, tender adjudication committees conversant with the Act to draft tender requirements, evaluate tenders and submit recommendations to the pro curement committee'.

The Act was deficient in many respects. For example, assuming that one of the committee members had an understanding of procurement law, the Act failed to categorically mention the qualifications of the other committee members. In practice, it was impossible for all the committee members to be knowledgeable in procurement law. In summary, the practical effects of these legal provisions were cast in doubt.

In addition to the above, the Procurement Act centralised procurement in the State Procurement Board.[105] Obviously this was a herculean administrative task. Implicitly, the turnaround time of the procurement process was unduly extended and ran the risk of encountering public procurement corruption.[106] In summary, the Procurement Act did not promote the principles enunciated in the UNCITRAL Revised Model Law on the Procurement.[107] For example, the SPB had the powers to override the decisions of procuring entities and was vested with the legislative authority to direct an entity to accept a bid.[108] In deference to principle of co-operative intergovernmental relations, public entities had no recourse, but to the meekly submit to the order. This impaired the principles of fairness, transparency and competiveness outlined in the UNCITRAL Revised Model Law.

It is respectfully submitted that the provisions of regulation 21 of the Procurement Regulations of 2002 were manifestly unlawful. A survey of available literature shows that limited studies have been undertaken to assess the current procurement regulatory framework in Zimbabwe.[109] It is against this background of insufficiencies of the past regulatory framework that the present procurement regime requires scrutiny through the lens of international best practices.

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[105] For goods, services and works beyond USD300 000.00 the procurement process had to be handled by SPB.

[106] Abel Dzuke and Micheline J.A. Naude, 'Procurement challenges in the Zimbabwean public sector: A preliminary study' 2015 Journal of Transport and Supply Chain Management Vol 9, No 1 a166 4 <https://jtscm.co.za/index.php/jtscm/article/view/166>accessed 23 June 2020.

[107] Adopted by the General Assembly resolution 66/95 of 9 December 2011. The Revised Model Law is refined version of United Nations Commission on International Trade Law Model Law on Procurement of Goods, Construction and Services, which require procurement of the public goods and services be underpinned by the principles of economy, efficiency and competition in procurement and, at the same time, fosters integrity, confidence, fairness and transparency. The Model Law provides a framework for member states to harmonise their public procurement regulatory framework.

[108] Procurement Regulations, SI 2002/171 reg 21.

[109] Tsabora (n 39); Zowa et al (n 151).

Public procurement reform in Africa, generally is in its formative stages and concerned with the opening up of procuring entities and governments to global competition.[110] Over the past two decades, the procurement reform agenda has been necessitated by the multi-dimensional diplomatic onslaughts generated within and outside Africa.[111] The net effect of the increased emphasis on regional integration and opening up of closed markets meant that African countries had to embrace transparency and competition in public procurement.[112] Unfortunately, Zimbabwe was quite slothful on its public procurement reform agenda.

1.10. Research Questions

This study examines the Zimbabwean public procurement law to determine whether it meets constitutional objectives. Put differently, this study is to determine whether the public procurement legislation complies with the constitution. In addition, the study will determine whether the framework upholds the COMESA rules. The Constitution demands that the state be governed in harmony with international treaties which the state is party to.[113] In summary, the study will seek to answer the following questions;

a. Does the Zimbabwean procurement regulatory framework conform to the founda tional procurement principles laid down in the Constitution?
b. What is the constitutional standard for public procurement law in Zimbabwe?
c. To what extent does the Zimbabwean procurement regulatory framework uphold, fulfil, and promote COMESA Procurement Regulations?

1.11. Research Methodology

This study will identify the constitutional standard for public procurement law in Zimbabwe. The study will be based on the analysis of relevant literature. It will analyse primary and secondary sources, namely, legislation case law and international legal instruments, policy documents, as well as books, journal articles, and theses. In a nutshell, the study

[110] Sebille Ngo Nyeck 'Introduction' in S N Nyeck (ed) *Public Procurement Reform and Governance in Contemporary African Political Economy* (Palgrave Macmillan 2016) 23.

[111] ibid. The diplomatic efforts gave birth to a number of significant intra and intercontinental plurilateral agreements such as European Economic Partnership (EU-EPA) trade agreements with Africa, Carib bean and Pacific (ACP) countries, The African Growth Opportunity Act (AGOA) by the US Congress in 2000, the MENA-OECD Network on Procurement, the East African Public Procurement Forum (EAPF), and New Partnership for Africa's Development (NEPAD).

[112] Nyeck (n 162) 27.

[113] Section 12.

will take a two-pronged inquiry wherein, firstly, the Zimbabwean procurement legislation will be measured against the constitutional dictates. Secondly, it has to be determined by this study whether the Zimbabwean procurement regulatory regime conforms to the COMESA Public Procurement Regulations.

This study will proceed to analyse the Zimbabwean procurement legislation against the constitutional benchmark. The foregoing entails juxtaposing what is set out in the PPDPA Act, and other statutes on incidental to public procurement such as administrative justice, against the constitutional yardstick. The next segment of the study will evaluate the entire Zimbabwean procurement regulatory framework against what is laid down in COMESA Public Procurement Regulations.

In evaluating constitutional principles underpinning procurement, this study does not lose sight of the fact that there are numerous laws closely related to key public procurement legislation. These laws, which directly and indirectly relate to public procurement, such as laws on administrative justice, intellectual property, corporate governance, and public finance management, will be examined to determine the extent to which they give effect to the constitutional principles underpinning public procurement mentioned earlier on.

1.12. Structure of the study

The study comprises seven chapters. The first chapter is an introduction. Chapter Two fleshes out the constitutional principles anchoring public procurement in Zimbabwe as articulated in terms of sections 315(1) and read together with sections 195(2) of the Constitution of Zimbabwe. The second part of the chapter assesses whether the public procurement cycle conforms to the constitutional standard. This is done through examining the public procurement legislation. In summary, Chapter Two sets out to measure the extent to which the six public procurement principles outlined in the above constitutional provisions are manifested.

The third chapter examines a range of legislation that is directly and indirectly related to the field of public procurement in Zimbabwe. The institutional governance system currently in place to curb public procurement corruption is examined in Chapter Four. This segment of the study takes a look at the legal mechanisms available to guarantee a public procurement regime that inspires public confidence. Possible legislative amendments are

further suggested with a view to galvanise public interest in the way public procurement is executed.

The regional trade obligations of Zimbabwe to COMESA are articulated in Chapter Five. This is done by unpacking the COMESA Public Procurement Regulations and identifying the responsibilities of member states. This is important in the sense that it enables the researcher to explicitly comment on shortcomings of Zimbabwe's public procurement regulatory framework to the Public Procurement Regulations. The Public Procurement Regulations are one of the numerous means through which COMESA can achieve its constitutive goal of regional integration, principally through increased intergovernmental trade.

The subsequent chapter examines the degree to which Zimbabwe as a state party to COMESA has incorporated the Public Procurement Regulations in its public procurement laws. This is premised on the fact that Zimbabwe has a constitutional obligation to uphold international law. In addition, this chapter identifies the shortcomings of the Zimbabwe public procurement regulatory framework insofar as it relates to regional competitive bidding as required by COMESA Public Procurement Regulations, proffers solutions to these deficiencies.

CHAPTER 2: CONSTITUTIONAL STANDARD FOR PUBLIC PROCUREMENT IN ZIMBABWE

2.1. Governance in Zimbabwe

2.1.1. *Overview*

The principal aim of this chapter is to determine the constitutional standard for public procurement law in Zimbabwe. Put simply, the aim of this chapter is to determine what the provisions of section 315(1) of the Constitution mean as a whole. Moreover, this chapter makes an inquiry into how these principles are to be applied in the daily practice of public procurement law. Stated differently, the chapter will analyse the foundational principles articulated in the Constitution.

As a rule of thumb, constitutional provisions cannot be construed in isolation.[114] In view of this, a detailed study of the closely connected constitutional provisions is done to establish the constitutional standard for public procurement. Legislation focusing on public procurement as well as public finance will be examined. Before embarking on this enquiry, a brief history of events that gave rise to the promulgation of the Constitution is provided. [115] This will enable the study to bring to light some of the governance issues that led to the constitutionalisation of public procurement in Zimbabwe. A short explanation on the challenges that faced the public procurement regulatory framework in Zimbabwe is given.

2.1.2. *Pre-2013 Dispensation*

An inadequate public procurement regime can result in inefficiency and ineffectiveness in the procurement process, leading to systematic abuse of financial resources, and failure to obtain adequate value in return for the expenditure of public funds.[116] Public procurement reform in Zimbabwe emanated from the ambiguities and inconsistencies arising from the Procurement Act 2009, (Procurement Act). Suffice to say that public procurement was not constitutionalised prior to the adoption of the 2013 Constitution. The enactment of PPDPA Act repealed the Procurement Act. The enactment of the PPDPA Act

[114] *Musa Kika v Minister of Justice and Others* HC 2021-2166; *Prosecutor-General v Telecel Zimbabwe Ltd* 2015 (2) ZLR CC at para 42H; *S v Makwanyane and Another* 1995 (6) BCLR 665 para 10.
[115] Amendment (No. 20) Act 2013.
[116] Guide to Enactment 34.

was premised on the need to inspire a paradigm shift in the Zimbabwean public procurement landscape.

Notably, the Procurement Act was enacted during the time when the Lancaster House Constitution was still in force.[117] The Lancaster House Constitution was meant to usher in political independence with limited legal mechanisms to enable efficient, transparent, and accountable governance for the new state.[118] Therefore, public procurement regulation like any other facet of public administration remained stagnant and entrenched inefficiency. Further elaboration is made in the following paragraph. In fact, the old legal and institutional arrangements for Zimbabwe's public procurement architecture was highly susceptible to corruption.[119] This is further elaborated in the paragraph below which illustrates some of weaknesses of the procurement governance framework.

The Procurement Act was patently deficient in that it failed to inspire an ethical public procurement system in numerous ways. Firstly, it did not provide for an ethical code to be observed and adhered to by procurement officers, as members of a distinct profession. Apart from promoting professional integrity, the Procurement Act had no provision for an aggrieved bidder to launch an intervening challenge to proceedings to forestall the execution of the contract until a competent tribunal had determined the integrity of the entire procurement cycle. The only remedy available to an aggrieved party was to approach the Administrative Court. [120] Consequentially, time taken by the Administrative Court to adjudicate over the procurement dispute would naturally be lengthy and this dissuaded aggrieved parties from embarking on litigation. The Administrative Court is a superior court in terms of the hierarchical court system of Zimbabwe.[121] Its jurisdiction is to hear administrative issues arising from the exercise of public power conferred by legislation.[122]

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[117] The Lancaster House Constitution was a negotiated Constitution between two Patriotic Fronts, Zimbabwe African National Union commonly known as ZANU (PF), and Zimbabwe African People Union, also known as ZAPU and the government of Ian Douglas Smith in 1979 in London.

[118] Zvenyika Eckson Mugari, *Press Silence in Postcolonial Zimbabwe Routledge* (Taylor and Francis 2020) 111.

[119] Nazaneen Ismail Ali, 'Zimbabwe: public procurement reform to catalyse greater transparency and development'(2019)<https://blogs.worldbank.org/governance/zimbabwe-public-procurement-reform-catalyze-reater-transparency-and-development> accessed 23 October 2019.

[120] Administrative Court Act 1979, s3, as read together with sections 162(e) and 173 of the Constitution of Zimbabwe.

[121] Constitution of Zimbabwe, s 162, and 163.

[122] Constitution of Zimbabwe, s172 (3); Administrative Court Act, s 4.

Furthermore, the Procurement Act lacked a provision for rejecting unresponsive bids.[123] As a result, suppliers with services below the prescribed tariffs for their respective sectors and industries could be awarded tenders, thereby negating the principal objective of value for money.[124] Moreover, the State Procurement Board, the supreme organ with oversight on public procurement, played a dual role in that it had supervisory functions[125] and handled procurement transactions.[126] The foregoing runs parallel to the tenets of good corporate governance and best international practice.[127]

It is noted that limited public procurement disputes were subjected to judicial scrutiny throughout the history of Zimbabwe. While it is disturbing that public procurement disputes find their way before the courts, it equally points to the trust people have in the judiciary and the respect of the outcome by the litigants and the executive.[128] In many cases, the executive usually defies court rulings in states where the rule of law is absent. The courts observed that the executive blatantly violated constitutional provisions in the pre-2013 legal order.

The *obita dictum* by Justice Hlatshwayo in *Chironga and Another v Minister of Justice, Legal and Parliamentary Affairs and Others* patently signifies the breakdown of the rule of law prior to the adoption of the Constitution in 2013.[129] Disputes resolution by recourse to the courts was frowned upon by parties to public procurement disputes, and all the more in public procurement disputes where politically connected suppliers wield immense power in the corridors of power.

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[123] Section 2 of the PPDPA Act, a responsive bid is defined as a bid that meets the requirements of a procuring entity. Conversely, an unresponsive bid means a bid that do not conform to the requirements of a procuring entity.

[124] *Oswell Security (Pvt) Ltd v State Procurement Board and Others* SC 45/16.

[125] Procurement Act, s 5(1) (b).

[126] Procurement Act, s 5(1) (a).

[127] Kingston Magaya and Tinotenda Chidhawu 'An Assessment of Professional Ethics in Public Procurement Systems in Zimbabwe: Case of the State Procurement Board (2009-2013)' (2016) 4(1) Review of Public Administration and Management 10.< https://www.walshmedicalmedia.com/open-access/an-assessment-of-professional-ethics-in-public-procurement-systems-inzimbabwe-case-of-the-state-procurement-board-20092013-2315-7844-1000185.pdf>accessed 18 October 2020.

[128] In *South African Post Office v De Lacy* 2009 (5) SA 255 (SCA) at [1] Nugent JA had this to say: '[c]*ases concerning tenders in the public sphere are coming before the courts with disturbing frequency'.*

[129] CCZ14/20 para 1.

Again, the Procurement Act was devoid of a comprehensive provision outlining the qualifications and experience of the persons to the State Procurement Board (SPB). The appointment of the members of the SPB was a presidential prerogative.[130] It is probable that these public officials could easily bend to presidential biddings. In fact, the Procurement Act empowered the president to issue policy directives to the SPB.[131]Perhaps there was a considerable degree of bias on the part of SPB towards appeasing the appointing authority as they executed their mandate based on the high level of corruption in procurement during this time period.

The proximity of the SPB to the presidency undermined its professional integrity in the eyes of the public and suppliers. Hence, the SPB was perceived as an inept and corrupt entity.[132] It has been noted that the misuse of public funds was rampant during the time when the Procurement Act was still operative.[133] Indeed, in the absence of effective and legal safeguards, there is always a temptation for public servants to stray off from their professional boundaries and overzealously make decisions contrary to constitutional dictates.[134]

Presumably, the foregoing could be attributable to the fact that post-independence Zimbabwe inherited the repressive Rhodesian legal structure unadulterated in both form and substance.[135] Therefore, the executive wantonly and wilfully disrespected the progressive constitutional interpretations of the law made by the courts. [136] It must be borne in mind that an efficient, effective and transparent procurement regulation thrives in a constitutional democracy, in which human rights and rule of law are promoted and respected.[137] Regrettably, post-independence Zimbabwe has been marked by a culture of excessive

[130] Procurement Act, s 6 (1).
[131] Section 20 (1).
[132] Tsabora (n 39) 19.
[133] Maxwell Sandada and Portia Kambarami, 'The Determinants of the Compliance to Public Procurement Policy Requirements among Public Enterprises in Zimbabwe' (2016) 8(1) *Acta Universitas Danubius* 44.< http://journals.univ-danubius.ro/index.php/administratio/article/view/3561>accessed 21 October 2020.
[134] *Economic Freedom Fighters* (n 21) para 8.
[135] Welshman Ncube, 'Lawyers Against the Law'? Judges and the Legal Profession in Rhodesia and Zimbabwe (1997) 4 Zimbabwe Law Review 110<https://core.ac.uk/download/pdf/30267109.pdf> accessed 10 July 2020.
[136] ibid.
[137] Frank S Jenkins, 'Decentralization and Accountability Challenges to Appointing Independent Bid Committees in the Public Sector' in Nyeck Sebille Ngo (*ed*) *Public Procurement Reform and Governance in Africa Contemporary African Political Economy* (Palgrave Macmillan 2016) 169.

authority and curtailment of human rights, a phenomenon which runs counter to accountable and responsive governance.[138] In contradistinction, the post 2013 legal order espouses accountable governance.[139]

From a cursory reading of the Procurement Act,[140] there was no designated cabinet minister responsible for administering the Procurement Act. It therefore became the discretionary prerogative of the President to assign the administration of the Procurement Act to whosoever he chose.[141] As a matter of practice, the SPB was accountable to the Ministry of Finance and Economic Development,[142] while functionally being closer to the Office of the President and Cabinet (OPC).[143]

The Procurement Act did not clearly provide for the appropriate qualifications of the members of the evaluation committees of tenders enabling them to discharge their statutory duties effectively and efficiently.[144] In view of the enactment of PPDPA Act, it is important to evaluate what is set out therein against the backdrop of constitutionalisation of public procurement law. The Zimbabwean procurement regulatory framework will be analysed to establish the extent to which it upholds, promotes and gives effect to COMESA Procurement Regulations.

2.1.3. *Post 2013 Dispensation*

As noted, the public procurement regulatory framework of Zimbabwe has been heavily criticised by multilateral financial lending institutions, including the World Bank. The World Bank takes serious interest in procurement regimes of recipients of its funds, Zimbabwe, being one of them. As such, the World Bank has its own operational guidelines and protocols on procurement for its own financed projects, in order to curb corruption.

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138 Chief Justice Anthony Gubbay (*as he was then*) was sent into early retirement after presiding over the *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement* 2000 2 ZLR 469 (SC). The Commercial Farmers Union had approached the Supreme Court (the apex court then) for a restraining order against the unlawful appropriation of land by the Government of Zimbabwe (GoZ). The political authorities refused to obey the ruling. This was a clear indication that the executive was reluctant to respect and observe the law and had no respect for state institutions.

139 Constitution of Zimbabwe, s 194(1)(a)-(k).

140 Section 1.

141 ibid.

142 Procurement Regulations 2010.

143 Tsabora (n 39) 11.

144 Procurement Regulations, SI 2002/171 reg 14.

In line with what is explained in the above paragraph, the World Bank systematically carries out assessment surveys for each individual recipient country to determine strengths and weaknesses of their public procurement. As a result, new procurement legislation had to be enacted in Zimbabwe. Due to the need to reform the public procurement regulatory framework in Zimbabwe, Parliament enacted an Act as directed by section 315(1) of the Constitution. The provision reads:

'An Act of Parliament must prescribe procedures for the procurement of goods and services by the State and all institutions and agencies of government at every level, so that procurement is effected in a manner that is transparent, fair, honest, cost-effective and competitive'

Furthermore, section 195(2) of the Constitution provides that:

'Companies and other commercial entities referred in subsection 1 must establish transparent, open and competitive procurement systems'

In order to give effect to the provisions of section 315 of the Constitution, Parliament enacted the PPDPA Act 2017. As mentioned earlier on, the PPDPA Act chiefly regulates the procurement of goods and services, and construction works by procuring entities, while the procurement of infrastructure projects through private public partnerships is regulated by ZIDA Act 2019. In light of this, government ministries and departments, public entities and local authorities are now guided by what is laid down in the PPDPA Act and the Public Procurement and Disposal of Public Assets (General) Regulations 2018 (PPDPA Regulations). From a cursory reading of the provisions of sections 195(2) and 315 of the Constitution, it is clear that the two provisions are closely related.

Section 195 (2) relates to the need for state owned enterprises and parastatals to have effective procurement systems. It is submitted that the drafters of the Constitution should have incorporated section 315, which regulates public procurement. This is premised on the provisions of section 315 which prescribes foundational public procurement principles underpinning legislation. The inclusion of section 195(2) perhaps connotes poor drafting. It appears the locus of the foregoing legislative text is misplaced considering that there is a dedicated section in the Constitution wholly reserved for public procurement. In addition, the PPDPA Act provides a clear, methodical and comprehensive roadmap for state owned entities and parastatals as far as procurement of goods and services is concerned.

From another perspective, section 195 (2) and section 315(1) of the Constitution can be deemed complementary, and mutually inclusive. The two sections enumerate six foundational principles of Zimbabwean public procurement law. The foundational principles are transparency, fairness, honesty, cost-effectiveness, competitive and openness. Government controlled entities, therefore, must adhere to and observe these principles when contracting.

In real practice, much ground needs to be covered to bring to life the constitutional dream articulated in terms of sections 195 (2) and section 315(1). The arrest and subsequent firing of the Minister of Health and Child Care over the irregular procurement of medical equipment and materials to curb the spread of COVID-19 attest to the level vigilance and the gravity of the political power needed to eradicate corruption in Zimbabwe. The president should be applauded for the swift action he took to relieve the former cabinet minister from his official duties. Verily, the maintenance of orderliness, peace, stability and devotion is constitutionally entrusted in the president and this constitutional being is further required to uphold, defend and respect the Constitution.[145] Regarding the fundamental role of the president in the post-apartheid legal order, the Constitutional Court of South African had to this say:[146]

'Unsurprisingly, the nation pins its hopes on the president to guide it in the right direction and accelerate our journey towards a peaceful, just and prosperous destination that all other progress-driven nations strive towards on a daily basis (*rephrased*)'

The Constitution outlines the basic values and principles governing public administration. For the purpose of this study, two principles are key, which are, maintenance and promotion of a high standard of professional ethics, and promotion and fostering efficient and economical use of resources. The aspect of good governance resonates across the Constitution of Zimbabwe. The Constitution requires the state to adopt policies and legislation that uphold efficiency, transparency, competency, accountability, personal integrity and financial integrity in all its agencies and institutions. Public officials are obliged to use public funds in a transparent, prudent, economic, and effective and accountable

[145] Constitution of Zimbabwe (No.20), 2013, section 90; *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (5) BCLR 618 (CC).

[146] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (5) BCLR 618 (CC) para 20.

manner. This is further supplemented by the provisions of the Public Finance Management Act (PFMA), enjoining accounting authorities to efficiently and economically manage available working capital.

Additionally, persons in custody of, and charged with the expenditure of public funds are required to ensure that such funds are used for proper and authorised purposes. Equally related to the preceding statement is the duty placed on government officials and other public officials to safeguard the leakage of public resources through misuse, destruction, misappropriation, damage and loss. The expansiveness of section 308 of the Constitution, one would think, is to capture the widest possible scenarios of misappropriation of public funds which manifests itself, chiefly through public procurement corruption and of course, negligence.

At a glance, the Zimbabwean procurement regulatory framework strives to attain environmental, social and economic policy objectives. Section 4(1) (d) of the PPDPA Act reads:

'The objectives of the Act are to secure the implementation of any environmental, social, economic and other policy that is or required by any law to be considered by a procuring entity in procurement proceedings'

This provision essentially means that public procurement may be used to achieve a secondary objective such as socio-economic policies of government. The principal objective of the study will be to determine the degree to which the public procurement legislation conforms to the standard articulated in section 315(1) as read with sections 195(2) of the Constitution. The subsidiary objective of the study will also entail examining the degree to which Zimbabwe's public procurement regulatory framework upholds COMES Public Procurement Regulations. As a state party, Zimbabwe's public procurement regulatory framework must conform to Public Procurement Regulations.

The government of Zimbabwe has a constitutional obligation to uphold international conventions, agreements and treaties since the COMESA Procurement Regulations are binding on all member states. In keeping with the spirit of harmonious coexistence in the community of nations, the Constitution empowers the courts to adjudicate disputes in a manner which upholds international law not the contrary.

The provisions of section 327(6) of the Constitution reads:

'When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement'

The researcher will suggest possible legislative amendments to ensure that the Zimbabwean public procurement laid down in terms of sections 195(2) and 315 of the Constitution, does conform to the generally acceptable international standards.

2.1.4. *History of the Constitution making process*

The promulgation of the Constitution in 2013 repealed the old Constitution which had been in force since the attainment of independence from Great Britain in 1980. [147] On one hand, the old Constitution was a transitional charter that lacked vital provisions to usher the newly found state on a democratic path. On the other hand, the 2013 Constitution is a document formulated against the backdrop of strife generated by the disputed harmonised elections held in 2008.[148] The leading election contestants agreed for a transitional governance framework under the auspices of the Global Political Agreement, (GPA).[149] Simply put, the Constitution was adopted in compliance with the provisions of the GPA. [150]

The enactment of the Constitution heralded a new era in the history of Zimbabwe. [151] It had been hoped that the nation would be part of countries with progressive constitutions, founded upon democratic tenets, such as good governance, the rule of law and accountability of public officials. Put differently, the Constitution was progressive in engendering a sense of hope for democracy, accountability, and supremacy of the law. Moreover,

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[147] It had been operative since the 18th of April 1980. As already mentioned, the Lancaster House Charter was a negotiated document among the protagonists for the belligerents during the Rhodesian Bushy War. The belligerents were the Rhodesian Army, Zimbabwe People's Revolutionary Army (ZIPRA), and Zimbabwe African National Liberation Army (ZANLA). The Constitution was mediated by representatives of the British government.

[148] Art 6 of the Global Political Agreement provided for the need for crafting the people-driven constitution. <https://constitutionnet.org/sites/default/files/global_political_agreements_2008.pdf> accessed 26 January 2021.

[149] See the Preamble, Articles I and XXII to the GPA. The GPA was birthed by the SADC mediation efforts under the leadership of the then South African President, Thabo Mbeki in his capacity as SADC appointed facilitator. Consequently, the successful implementation of the GPA was to be guaranteed by SADC.

[150] Art 6 of the GPA.

[151] 22nd of August 2013.

the Constitution specifically provides for transparency, fairness, and honesty among other key fundamental tenets underpinning good governance.[152]

Under the new constitution, the courts are expressly empowered to declare any law, practice, and conduct which is incompatible with constitutional values, invalid to the extent of the inconsistency.[153] Also, the provisions of the Constitution are binding on the three arms of the state, namely, the judiciary, legislature and executive, and government-controlled entities,[154] natural and juristic persons.[155] Thus, there is a plethora of constitutional safeguards to curb the arbitrary exercise of public power.

As noted, public procurement involves the expenditure of public resources.[156] Against this background, the Constitution requires government policies and legislation to inspire financial probity, transparency, accountability, competency, personal integrity and efficiency for public officials.[157] The aspects are reinforced and ring-fenced throughout the Constitution.[158] Furthermore, efficiency, competence, accountability, transparency, personal integrity and financial probity are central to the national building agenda in Zimbabwe. Emphasis on the foregoing aspects is a clear testament of the onerous duty of public officials to manage public resources properly. In other words, there are numerous overlapping and mutually inclusive constitutional provisions that address matters pertaining to good governance throughout the Constitution.

The fact that these values are methodically repeated in the Constitution highlights their significance to Zimbabwe's constitutional project. Furthermore, the Constitution imposes an obligation on public officials to delicately balance the exploitation of public finances between the present and future generations.[159] Implicitly, public procurement must be pursued in a fiscally and ecologically sustainable manner. The next segment of this chapter discusses the constitutional standard for public procurement in Zimbabwe.

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[152] Ninth paragraph to the Preamble to the Constitution.
[153] Section 2(1).
[154] Section 332 of the Constitution defines a government-controlled entity as –
> [a] body corporate whose operations or activities are substantially controlled by the State or by a person on behalf of the State, whether through ownership of a majority of shares in the body corporate or otherwise.

[155] Section 2 (2).
[156] Schick (n 2).
[157] Constitution of Zimbabwe, s 9.
[158] Section 298.
[159] Section 298 (1) (c).

2.2. *Constitutional Standard for Public Procurement*

2.2.1. *Procurement of Goods and Services*

As previously stated, the promulgation of the Constitution elevated public procurement to constitutional status.[160] Section 315 (1) of the Constitution provides:

'[A]n Act of Parliament must prescribe procedures for the procurement of goods and services by the State and all institutions and agencies of government at every level, so that procurement is effected in a manner that is transparent, fair, honest, cost-effective, and competitive'

The foregoing provision constitutes the constitutional standard for public procurement law in Zimbabwe. This constitutional provision is unpacked in the paragraph below. Section 315(1) is clear that public procurement procedures must be incorporated in an Act passed by Parliament. The use of the verb, 'must' signifies a command. This is a constitutional obligation on Parliament requiring diligent execution.[161] In terms of section 116 of the Constitution, legislative authority is vested in the Legislature and the President acting in accordance with constitutional prescriptions.

Evidently, Parliament has the sole responsibility of passing legislation, while the President performs the administrative function of assenting to a parliamentary Bill turning it into law, if he or she has no reservations regarding the legality of the Bill.[162] Once the President signs a Bill, automatically the Bill becomes an Act of Parliament.[163] Hence, no other arm of the state, save for the Parliament, can pass an 'Act of Parliament' contemplated in section 315 (1).

The people of Zimbabwe are the source of this authority.[164] In *Biti & Another v Minister of Justice Legal and Parliamentary Affairs & Another*, the full bench of the Supreme Court of Zimbabwe (as was the apex court then) had this to say:[165]

'…it is true that Parliament is supreme in the legislative field assigned to it by the Constitution...'

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[160] Para 1.2 above.
[161] Section 324 of the Constitution.
[162] Section 131 (2) (b) of the Constitution.
[163] The provision of section 132 of the Constitution governs the various ways through which an Act of Parliament can become operative.
[164] Section 117(2) of the Constitution.
[165] *Biti & Another v Minister Justice Legal and Parlimentary Affairs & Another* (SC 10 of 2002, Civil Application 46 of 2002) [2002] ZWSC 10 (26 February 2002); *Makoni v Prisons Commissioner & Another (*CCZ 8 of 2016, Constitutional Application CCZ 48 of 2015) [2016] ZWCC 8 (13 July 2016).

The Act must prescribe the procedures and the manner in which public procurement is to be carried out. This means that the legislation is required to provide for comprehensive and unambiguous methods for the execution of public procurement. Stated differently, the Act must clearly outline the procurement pathways for public entities. It follows therefore that public procurement activities can only be done in accordance with the systems laid down in the Act envisioned in terms of section 315(1).

The scope of the application of the Act is confined to goods and services. The definition of goods is provided in section 1 of the PPDPA Act as follows:

"goods" means things of any kind or description, including—

(a) raw materials, products and equipment; and

(b) things in solid, liquid or gaseous form; and

(c) electricity; and

(d) services incidental to the supply of the goods, where the value of the services does not exceed that of the goods themselves;

In term of section 2 of the PPDPA Act, services relates to:

'a procurement requirement that is performed through a consultancy or non-consultancy service'[166]

The application of the Act is restricted to the State and all institutions and agencies of government at every level. There are three tiers of government in terms of the laws of Zimbabwe.[167] These are national government, provincial and metropolitan councils, and urban councils and rural councils.[168] It is general knowledge that the three arms of the state are the legislature, executive and the judiciary. The import of the foregoing is that all agencies constituted under the three arms of the states must conduct procurement activities in terms of an Act adopted pursuant to the provision of section 315(1). In short, these agencies must be controlled by government.

The definition of a government controlled entity is given in the Constitution as follows:[169]

'a body corporate whose operations or activities are substantially controlled by the State or by a person on behalf of the State, whether through ownership of a majority of shares in the body corporate or otherwise'

Thus, the provisions of section 315(1) set out the fundamental constitutional principles that procurement legislation must uphold, which are;

i. transparency;

[166] The PPDPA Act further defines non-consultancy services a labouring or other service that is performed physically, while consultancy service means a service of an intellectual and advisory nature.

[167] Constitution, s 5.

[168] Section of the Constitution, s 5(a)-(c).

[169] Section 332.

ii. fairness;
iii. honesty;
iv. cost-effectiveness; and
v. competitiveness;

The Act of Parliament must provide a mechanism through which these principles can be realised and achieved. The fact that the above principles are not mutually exclusive and may overlap is a testament of the composite nature of the field of public procurement. Public procurement is multi-disciplinary, incorporating the other disciplines such as law, strategic planning, and finance.[170] Therefore, an analysis of the provisions of section 315(1) leads to two interpretative conclusions. These will be discussed below.

The substantive elements of the legislation enacted in compliance with the Constitution must give effect to the constitutional public procurement principles stated in section 315(1). The preamble to the PPDPA Act clearly articulates that the purpose for its enactment is to provide for a public procurement regime that is transparent, fair, honest, cost-effective, and competitive.[171] Hence, procurement legislation when examined as a whole must comply with six constitutional principles underpinning public procurement. Legislation that does not uphold cardinal constitutional principles on public procurement would be unconstitutional to the extent of the inconsistency.[172] As stated before, since the adoption of the Constitution in 2013, few public procurement disputes have been brought before the courts.[173]

The provisions of section 315 (1) as read in conjunction with the provisions section 195 (2) are peremptory. A peremptory legislative text requires mandatory compliance, meaning that failure to comply, results in the subsequent conduct being declared null and

[170] Para 1.1.2 above.
[171] PPDPA Act, s 4(1) (a).
[172] Constitution, s 2(2).
[173] Para 1.6.1 above.

void.[174] What flows from this constitutional interpretation canon[175] is that the courts are empowered to declare public procurement proceedings conducted not in accordance with these principles invalid.[176]

The Constitution lays down the framework for public procurement without attaching meanings for the provisions. Notably, core principles on public procurement have, as a result of practice and refinement by practitioners, academics and international organisations, gained worldwide acceptance and assumed certain definite meaning in the public procurement domain. Constitutional principles underpinning public procurement outlined in terms of section 315 (1) will be explained individually below. The sixth additional principle articulated in section 195 (2) will also be considered. The preceding constitutional provision fortifies what section 315(1) seeks to achieve.

2.2.2. *Constitutional Principles underpinning Public Procurement*

2.2.2.1. Transparency

Transparency is one of the core values enumerated in the Constitution that procurement legislation must uphold.[177] The constitutional imperative for transparency is absolute, meaning that public procurement activities must be conducted transparently without waiver. The inclusion of the word, 'must' indicates that the provision is peremptory.[178] One of the immediate goals of transparency in public procurement is to stimulate public debate, promote accountability and legitimise public procurement processes.[179]

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[174] *Shumba and Another v The Zimbabwe Electoral Commission* and Another 2008 (2) ZLR 65 (5) at para 80E-81C; Lourens Marthinus Du Plessis, *Re-Interpretation of Statutes* (LexisNexis South Africa 2002) 280; Christo Botha *Statutory Interpretation: An Introduction for Students* (Juta 2012) 173; The courts have over the years developed guidelines to determine whether a statutory provision is peremptory or not. These guidelines are based on the grammatical meaning of the language used in the provision. In the South Africa judgment *Messenger of the Magistrate's Court, Durban v Pillay 1952 (3)* SA 678 (A) it was held that:

> 'A word or words with an imperative or affirmative character indicate a peremptory provision (eg the words 'shall' or 'must')'

The use of the semantic 'must' in section 315(1), is a clear signification of the intention of the legisla ture.

[175] Lourens Marthinus Du Plessis *Re-Interpretation of Statutes* (n 227) 137.

[176] In another South African case, *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v. Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) the South African Constitutional Court emphatically ruled out that a tender awarded in violation of constitutional principles was invalid.

[177] Constitution of Zimbabwe, s 315(1).

[178] *Messenger of Magistrates Court, Durban* v *Pillay* 1952(3) SA 678 (A); *R* v *Busa* 1959 (3) SA 385 (A); *Maharaj and Ors* v *Ramperstad* 1964 (4) SA 638 (A) at 644; *Bhebhe and Ors v Chairman of the Zimbabwe Electoral Commission N.O. and Ors [2011] ZWBHC 139; Chiroswa Minerals (Pvt) Ltd & Anor v Min. of Mines & Ors* [2011] ZWHHC 261.

[179] Phoebe Bolton, 'Public Procurement System in South Africa: Main Characteristics' Public Contract

There is international consensus that corruption control should be an additional objective of public procurement regulation.[180] Transparency has multiple facets to it. These elements include, but are not limited to, disclosure of applicable rules to be applied in public procurement proceedings, timely publication of procurement opportunities, disclosure of the procurement requirements, how submissions are to be received, and an open system through which procurement proceedings are conducted in accordance with rules,[181] such as the evaluation criteria, existing mechanism to determine whether there is compliance with the prescribed rules, and enforcement.[182]

The preceding paragraphs clearly underscore the need for the specifications of the procurement requirement to be detailed with sufficient particularity for bidders to submit responsive bids appropriately and to specifications. In terms of section 27 of the PPDPA Act, the specifications must incorporate aspects such as quality, quantity, function and purpose, performance, and aspects relating to safe disposal.

In summary, transparency can be described as the capability of parties with a vested interest to know and comprehend the processes by which public contracts are awarded and managed.[183] Public procurement transparency can be achieved through increased accessibility of relevant and updated policies, information on upcoming tenders, use of standardised documentation and submission of bids, progress on tender adjudication and publication of outcomes at no costs.[184]

Law Journal, Summer 2008, Vol. 37, No. 4 (Summer 2008), 781< : https://www.jstor.org/stable/25755688>accessed 7 December 2021; Phoebe Bolton 'The regulatory framework for public procurement in South Africa' In Khi V Thai (ed) *International Handbook of Public Procurement* (Taylor and Francis 2009) 362; Anoeska Buijze, 'The Six Faces of Transparency' (2013) 23 Utrecht Law Review, 9 (3) < https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.233/>accesed 3 March 2021.

[180] Sope Williams-Elegbe, *Fighting Corruption in Public Procurement A Comparative Analysis of Dis qualification or Debarment Measures Studies in International Law* (Hart Publishing Ltd 2012) 3; Pre amble 126 to the European Union 2014 Public Procurement Directives Official Journal of the European Union 94/65 28.3. 2014 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>accessed 2 December 2021.

[181] Such as the evaluation criteria.

[182] Allison M Anthony 'Re-Categorising Public Procurement in South Africa: Construction Works as a Special Case' PER / PELJ 2019(22) 15 <http://dx.doi.org/10.17159/1727- 3781/2019/v22i0a5270> accessed 23 September 2022.

[183] Jan Telgen, Christine Harland and Louise Knight 'Public Procurement in Perspective Christine Har land, Jan Telgen,' in Khi V. Thai, Guy Callender and Katy McKen (eds), *Public Procurement Interna tional Cases and Commentary* (Routledge Francis and Taylor 2007) 17.

[184] Paul R. Schapper, João Nuno, Veiga Malta, and Diane L. Gilber, 'Analytical Framework for the Man

Arrowsmith articulates in a straightforward and concise way, that a transparent procurement framework is quadrilateral. [185] Firstly, it involves disclosure of contractual opportunities, and secondly, has predetermined rules that restrict discretionary whims of public officials in the governing of procurement proceedings and activities.[186] Thirdly, it entails timely publication of canons to be observed during proceedings, and the means for monitoring and adhering to the applicable laws.[187] To implement the principle of transparency, the PPDPA Act has numerous mechanisms that include, but are not limited to, disclosure of rules applicable to the procurement activities; [188]publication of procurement opportunities;[189] prior determination of procurement requirements, publication thereof and the manner of consideration of submissions;[190] conduct of procurement according to the rules and procedures;[191] and an existing mechanism to monitor compliance with the foregoing outcomes and the means to enforce them.[192]

Again, transparency call for public procurement be done in an atmosphere devoid of connected dealings and procurement conspiracy.[193] Connected dealings describes situations wherein conflicts of interests by parties involved in decision making or contractual ar-

agement and Reform of Public Procurement' in Khi V. Thai (eds*), International Handbook of Public Procurement, Public Administration and Public Policy* (Taylor & Francis Group 2009*)* 98*; World Bank (*July 8, 2014b*) Procurement in World Bank Project Investment Finance: Procurement Policy (Draft) <https://www.worldbank.org/en/projects-operations/products-and-services/brief/procurement-policies-and-guidance>accessed 16 July 2021*.

185 Sue Arrowsmith, 'Public Procurement: Basic Concepts and the Coverage of Procurement Rules' in Sue Arrowsmith (ed), *Public Procurement Regulation* (n 57) 43.

186 ibid.

187 ibid.

188 PPDPA Regulations (General), SI 2018/5, reg 20. In English law jurisdictions, 'SI' is defined as fol lows:

> [a]re a form of legislation which allow the provisions of an Act of Parliament to be subsequently brought into force or altered without Parliament having to pass a new Act. They are also referred to as secondary, delegated or subordinate legislation

The above definition is extracted from the United Kingdom parliament website < https://www.parliament.uk/globalassets/documents/commons-information-office/l07.pdf> accessed 28 June 2022. In some jurisdictions such as South Africa, Statutory Instruments are referred to as Regulations. Throughout its colonial history, Zimbabwe was under the control of the British and it adopted the traditional British nomenclature of Statutory Instruments.

189 Section 31.

190 Section 38.

191 Section 3(3) (a) and (b). This is prescribed through legislative authority as shall be explained later on in the study.

192 Section 6 (1) (b).

193 Sirilaksana Khoman, 'Procurement Conspiracies and Procurement Governance: Some Lessons from Thailand' in K.V. Thai (ed), *Innovation and Knowledge Sharing, Public Administration, Governance and Globalization* (Springer International Publishing 2015) 5.

rangements make favourable determinations due to business relations, family ties, institutional affiliation, and, or some other form of prior relationships of whatever form or creed.[194] Accordingly, public contracts awarded as a result of procurement conspiracy and connected dealings flies in the face of transparency and entrenches public procurement corruption.[195]

Poorly governed and regulated public procurement regimes are susceptible to corruption.[196] The PPDPA Act was enacted to ensure transparency in public procurement activities, thereby achieving one of the collateral objectives of public procurement that is attainment of best value for money.[197] Worth noting is that the legitimacy of public procurement markets is dependent on transparency, since it is one of the incentives for inviting qualified suppliers to participate in procurement activities.[198]

Public procurement regimes that are not transparent can be exploited for corrupt gains throughout the entire spectrum of the nation's economy, especially through solicitation of bribes.[199] On one hand, an inefficient and opaque procurement regulatory framework can lead to inflated prices of goods and services, and at the same time promote rent-seeking [200] by private corporations.[201] On the other hand, transparent procurement systems can ultimately lead to improved quality of goods and services, as well as adequate

[194] ibid.

[195] Zimbabwe signed and ratified the United Nations Convention on Against Corruption on the 8th of March 2007 <https://www.unodc.org/unodc/fr/corruption/ratification-status.html>accessed 20 April 2021. Bearing in mind the pernicious economic and social effects occasioned by corruption, pursuant to the provisions of Article 11 and 7 of the United National Convention on Against Corruption (UNCAC), public officials, the judiciary and the members of the legislative assembly have an obligation subject to the limits of the law, to strive for a corruption-free society.

[196] Auriol Emmanuelle, Stephane Straub, and Thomas Flochel (2016) "Public procurement and rent-seek ing:The case of Paraguay" *World Development* 77:395-407 <https://doi.org/10.1016/j.worlddev.2015.09.001>accessed 17 January 2021.

[197] PPDPA Act, s 4 (1) (c).

[198] Simon J Evernett and Bernard M Hoekman International Cooperation and the Reform of Public Pro curement Policies World Bank Policy Research (Working Paper 3720, September 2005) < https://elibrary.worldbank.org/doi/epdf/10.1596/1813-9450-3720>accessed 28 January 2021.

[199] Tania Ghossein Asif Mohammed Islam Federica Saliola, 'Public Procurement and the Private Business Sector Evidence from Firm-Level Data Development Economics Global Indicators Group' (WORLD BANK GROUP September 2018) < https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-8575> accessed 29 January 2021.

[200] Rent seeking can be described as the exploitation of political networks and processes for the generation of economic rents that could not have been made in ordinary market transactions.

[201] Auriol, Flochel, and Straub 2016 (no 204) 401.

infrastructure.[202] Competition is also one of the means of entrenching transparency in the public procurement process.[203]

An unventilated public procurement regulatory framework will naturally confer public officials with discretionary powers to unjustifiably award contracts to undeserving suppliers leading to a build-up of corrupt networks in the procurement ecosystems.[204] It is submitted that a delicate balance has to be struck between the need to confer public functionaries with discretionary powers[205] to identify procurement requirements and the need to conduct procurement process activities as prescribed by legal rules and prescripts.[206]

It is common knowledge that modern electronic communication technologies has fundamentally altered the conduct of businesses.[207] The use of information communication technologies in procurement activities in Zimbabwe stands to inspire a new paradigm of transparency.[208] In the presence of an efficient and effective e-procurement platform, role players in the procurement system can easily access contractual opportunities with minimal financial resources through the use of freely accessible centralized or decentralized web-based tools.[209]

Without a doubt, a robust information communication technology infrastructure supplemented with an effective e-procurement compliant regulatory framework would enhance transparency.[210] On a positive note, indications are that PRAZ initiated processes for the

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[202] Ohashi, Hiroshi 'Effects of transparency in procurement practices of government expenditure: A case study of municipal public works' (2009) Review of Industrial Organization 34: 267.

[203] Sue Arrowsmith, 'Electronic Procurement and Reverse Auctions' in Sue Arrowsmith (ed), *Public Pro curement Regulation: An Introduction* (Asia Link Europe Aid Co-operation Office 2010)14; Phoebe Bolton, 'Government Procurement as Policy Tool in South Africa' Journal of Public Procurement Vol ume 6, IS UE 3, 193-217 2006) 196.

[204] ibid.

[205] The need to scrutinise public officials is an essential mechanism for entrenching accountability in public sector governance.

[206] Guide to Enactment Guide to Enactment of the UNCITRAL Model Law on Public Procurement 6:33.

[207] In the context of public procurement, an efficient and effective e-procurement system should be able to support and perform a wide range of functions such as communication with suppliers and other administrative bodies, the publication of tenders and related information, debriefing of unsuccessful bidders and receiving valuable feedback from the general public.

[208] PPDPA Act, section 43 (2).

[209] Arrowsmith, 'Electronic Procurement and Reverse Auctions' in Sue Arrowsmith (ed), *Public Procurement Regulation: An Introduction* (n 254) 141.

[210] The Government of Zimbabwe tried to engage a consulting firm, Crown Agents to formulate e-Gov ernment Procurement (e-GP) strategy. However, fully operational platform for e-GP yet to be unveiled <https://www.crownagents.com/project/developing-an-e-government-procurement-strategy-for-zimbabwe/>accessed 13 March 2021.

e-filing on documents for registration of suppliers and contractors.[211]This will maximize the utilisation of financial resources and enhance accountability in the Zimbabwean public sector.

Sadly, this has a negative trade-off in that it competitively excludes Micro, Small and Medium Scale Enterprises (MSMEs) from participating in public procurement as shall be explained below. Furthermore, it has been observed that e-procurement comes with its challenges in low-income countries like Zimbabwe.[212] These challenges vary from the unavailability of relevant and requisite information communication technology infrastructure to lack of skilled manpower, unreliable power supply and high costs of electronic transactional data.[213]

The values upon which Zimbabwe's public procurement regulatory framework must conform to, are not new. These have their foundations in the UNCITRAL Model Law on the Procurement of Goods and Services, 1994 (Model Law) and the refined version, Revised Model Law of 2011. Therefore, what the Constitution seeks to attain should be viewed within the prism of international benchmarks as articulated in the foregoing international legal instruments.

In view of the above, the constitutional requirement of transparency requires that:[214]

a. Laws, and regulations on public procurement are promptly made available and timeously published;
b. Availability and accessibility of a wide spectrum methods of communication to prospective suppliers;
c. Determination of qualification, examination, and evaluation criteria at the com mencement of the procurement and publication in the bid documents;

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[211] Blessings Chidakwa, 'VP Chiwenga launches PRAZ e-learning portal' *The Herald*, (Harare, 22 Octo ber 2021) https://www.herald.co.zw/vp-chiwenga-launches-praz-e-learning-portal/accessed 19 November 2021.

[212] Low-Income Countries (LIC) have low Human Capital Index hereafter 'HCI', poor infrastructures such as lack of electricity and poor financing for the growth of SMMEs.

[213] Allison Anthony, 'The Use of E-procurement in South African Public Procurement Law: Challenges and Prospects Law, Development and Democracy' (2018) Volume 22, 42; Steven la Roux De la Harpe 'The use of electronic reverse auctions in public procurement in South Africa' (2012) 26 (1) Speculum Juris 21, 42.

[214] Guide to Enactment Commentary on the Text of the UNCTRAL Model Law on Public procurement para 34-35 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/guide-enactment-model-law-public-procurement-e.pdf>accessed 30 January 2021.

d. The extensive advertisements of invitations to participants and the rules for participation in proper and suitable language;
e. The deadline for submissions from the participants is published;
f. The disclosure of crucial information regarding procurement proceedings is made to all participants;
g. The public notice of any cancellation of the procurement is made;
h. The public opening of tenders is done;
i. The summary, safe and secure custody of procurement records is adhered to;
j. The way in which public procurement contracts are concluded and provision for the 'standstill' period for an aggrieved party to launch an intervening challenge;
k. The publication of any contract award notices and
l. Notices of procurement relating to direct solicitation.

Without controversy, public procurement reform has been largely influenced by various versions of UNCITRAL Model Law.[215] Regulations promulgated under Section 33 of the Procurement Act, the successor to PPDPA Act, made reference to the earlier version of the Model Law.[216] The richness of this study stands to be enhanced by examining the constitutional principles through the prism of the Model. This does not mean that the research will take an in-depth look at the Model Law.

The PPDPA Act clearly indicates that e-procurement may be undertaken in line with the e-procurement policy laid down by PRAZ.[217] The fact that the legislator deferred and then delegated the crafting of the e-procurement policy to PRAZ is an indication that Zimbabwe is still to embrace the e-procurement paradigm. On the face of it, the bid opening clause is a mechanically manual process with no electronic processes whatsoever.[218] The presence of bidders' representatives at bid openings is an undeniable hallmark of a *modus operandi* that is paper based in many respects.[219]

Commendably, the use of e-procurement stands to stimulate a certain dimension of transparency in the regulatory framework of Zimbabwe. It has been noted that e-procurement

[215] Model Law on Procurement of Goods, Construction and Services (1994) and Uncitral Model Law on Public Procurement (2011).
[216] Procurement Regulations (General), SI 2002/171, reg 33.
[217] Procurement Act, s 43 (2).
[218] PPDPA Act 2017, s 46.
[219] PPDPA Act 2017, s 46(2).

promotes transparency and can aid in saving costs for both suppliers and public entities.[220] The conspicuous absence of legislation to regulate electronic commercial transactions impedes the deployment of information communication technologies in public procurement activities. Adoption of legislation on electronic transactions would provide the much-needed impetus for e-procurement.

Cognizant of the significant part played by government-controlled entities, of section 315(1) and buttressed with section 195 (2) of the Constitution which provide that: [221]

'Companies and other commercial entities referred to in subsection (1) must establish transparent, open and competitive procurement systems'

Evidently, section 195 (2) mentions openness, as a further additional principle for public entities to comply with. The principles of transparency[222] and openness[223] may appear to mean one thing, but are distinct.

2.2.2.2. Openness

As required by the Constitution, state owned entities and parastatals are required to establish open procurement systems. In simple terms, openness means the manner in which a procurement process is inclusive embracing prospective suppliers permitting unfettered chance to engage.[224] In real practice, this involves advertisement of procurement opportunities to cover the widest possible geographical area, provision and accessibility of clear information regarding processes relating to procurement, while at the same creating a symmetrical plane for competition to thrive among suppliers.[225]

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[220] Allison M Anthony, 'The Use of E-procurement in South African Public Procurement Law: Challenges and Prospects Law, Development and Democracy' (n 264); De la Harpe 'The use of electronic reverse auctions in public procurement in South Africa' (n 264).

[221] Section 195(1) refers to companies and other commercial entities owned or wholly controlled by the State.

[222] Collins Dictionary <https://www.collinsdictionary.com/dictionary/english/> accessed 31 March 2024 defines transparency "*as a process, situation, or statement is its quality of being easily understood or recognized, for example because there are no secrets connected with it, or because it is expressed in a clear way*".

[223] Collins Dictionary <https://www.collinsdictionary.com/dictionary/english/> accessed 31 March 2024 defines openness: "If you describe a person or their character as open, you mean they are honest and do not want or try to hide anything or to deceive anyone".

[224] Organization for Economic Co-operation and Development (OECD), *OECD Principles for Enhancing Integrity in Public Procurement* (OECD Publishing 2015).

[225] ibid.

An open public procurement system must have safeguards against institutionalized segregation against or favour of any group or class of suppliers. Historical and current initiatives to develop the field of public procurement have been geared towards eradicating discrimination, which naturally impedes international trade. The achievement of this can only become a reality if there is a strong regulatory framework entrenching openness and transparency. Public procurement principles set out in the Constitution must be expressed at every stage of the procurement cycle. Fairness can also be promoted through e-procurement.[226] The paragraph below provides a more detailed explanation on this principle.

2.2.2.3. Fairness

Procurement legislation must lay down procedures that guarantees fairness envisioned in the Constitution. As a point of departure, a comprehensive, clear and unambiguous legislation for public procurement is a bedrock and precursor to the establishment of a fair and transparent public procurement regime.[227] Fairness in public procurement requires that there be no institutionalized discrimination against categories or class of suppliers by a procuring entity.[228] The Declaration of Rights set out in the Constitution applies to natural and juristic persons. [229]

There is no doubt that equality and fairness must be effected and seen to be done in public procurement activities. [230] It is submitted that procurement activities may only be done in violation of the principle of fairness, if there are legally tenable reasons for warranting justifiable discrimination of categories of suppliers. This means that there must be legally acceptable grounds for categories of suppliers to be preferentially selected ahead of other suppliers. The differentiation of suppliers is permissible in terms of the general law of application.

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[226] The OECD defines e-procurement "as refers to the integration of digital technologies in the replacement or redesign of paper-based procedures throughout the procurement process" <https://www.oecd.org/gov/public-procurement/OECD-Recommendation-on-Public-Procurement.pdf> accessed 31 March 2024.

[227] Andrea Appolloni and Jean-Marie Mushagalusa Nshombo, 'Public Procurement and Corruption in Af rica: A Literature Review' in Fancesco Dacarrolis and Marco Frey (eds)' *Public Procurement's Place in the World The Charge Towards Sustainability and Innovation* (Pelgrave Macmillan 2014) 202.

[228] Guide to Enactment Guide to Enactment of the UNCITRAL Model Law on Public Procurement 5:28.

[229] Section 45(3) of the Constitution read:

> *'[j]uristic persons, such as companies, as well as natural persons are entitled to the rights and freedoms set out in this Chapter to the extent that those rights and freedoms can appropriately be extended to them'.*

[230] Discrimination is prohibited in terms of section 56 of the Constitution. Section 56 (5) provides that discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

Integrity and ethics are interwoven with fairness in the execution of public procurement activities.[231] Therefore, procurement activities such as bid opening, evaluation, the identification of the ideal bid and the contract award phase, must uphold the core principle of fairness, and this extends to communication[232] with all interested parties to procurement proceedings.[233] Put differently, suppliers of goods and services and contractors in competitive bidding must be afforded the same opportunities in the procurement processes, including, but limited to, equal treatment of bidders, and equitable apportionment of rights and obligations between contracting parties and procuring entities, while at the same time providing straightforward and ascertainable mechanisms for a credible, quick and legitimate conflict resolution pathway.[234]

An efficient and effective complaints resolution mechanism, is an indispensable feature of fairness in public procurement.[235] Given the wide spectrum of stakeholders involved, public procurement can potentially generate intense litigation and delegitimise the public procurement process. Consistent with the foregoing, it is desirable therefore, that there be timely access to impartial and independent review mechanisms or a tribunal available to an aggrieved party to procurement proceedings.[236]

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231 Guide to Enactment Guide to Enactment of the UNCITRAL Model Law on Public Procurement 5:31.

232 ibid.

233 Benchmarking Public Procurement (2017) Assessing Public Procurement Regulatory Systems in 180 Economies 2016 International Bank for Reconstruction and Development / The World Bank <https://documents1.worldbank.org/curated/en/121001523554026106/Benchmarking-Public-Procurement-2017-Assessing-Public-Procurement-Regulatory-Systems-in-180-Economies.pdf>accessed 3 February 2021.

234 Sope Williams-Elegbe, 'The Evolution of the World Bank's Procurement Framework: Reform and Coherence for the 21st Century Framework' (2016) Volume 16 (1) Journal of Public Procurement 28< http://www.ippa.org/images/JOPP/vol16/issue-1/Article_2_Williams-Elegbe.pdf>accessed 10 February 2021.

235 OECD *Principles for Integrity in Public Procurement* 14.

236 Ibid 12.

2.2.2.4. Honesty

The core principles underpinning public procurement enunciated in section 315(1), as read in conjunction with section 195(2) of the Constitution,[237] are to a large extent, mutually reinforcing.[238] Pursuant to this, honesty requires the execution of public procurement processes and activities in earnest truth, that is to say beyond reproach. [239] Hence, the totality of procurement legislation must promote and address the integrity of the entire procurement cycle as a whole.[240]

The obligation squarely falls on procuring entities, and suppliers and contractors. It is submitted that the obligation to uphold honesty when carrying out public procurement activities is like a double-edged sword. Suffice to say that any element of deceit and dishonesty by parties to procurement proceedings have a ripple effect on the entire process, including corruption, delivery of poor quality or substandard goods and services, poor workmanship, and poor contractual performance; deceit and dishonesty also run counter to the duty placed on public office bearers to be good financial stewards.[241] The significance of this cannot be underestimated in view of the constitutional obligation imposed on public officials to exercise financial prudence in the course of duty.[242]

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[237] Section 195 (2) of the Constitution reads:
'[c]ompanies and other commercial entities must establish transparent, open and competitive procurement systems'.

[238] Admittedly, despite somewhat difference legislative texts between the Constitution and the objectives of the Revised Model Law, one is bound to reach inescapable conclusion that the public procurement objectives set out in the latter and the former seek to achieve the same ends. In terms of Revised Model Law, the six objectives should be:
i. Attainment of economy and efficiency;
ii. Embracing the participation of a broad spectrum of suppliers and contractors from across the globe;
iii. Maximizing competition;
iv. Ensuring fair, equal and equitable treatment;
v. Ensuring integrity, fairness, and public confidence in the procurement process; and
vi. Promoting transparency.

[239] *Collins Dictionary* <https://www.collinsdictionary.com/> defines 'honesty' is the quality of being hon est.

[240] OECD *Principles for Integrity in Public Procurement* 18.

[241] Guide to Enactment para 85.

[242] Section 298, as read with section 308 of the Constitution. In summary, the former provision enumerates the principles of public financial management including, among other things, transparency and account ability, where the latter reiterates the sacrosanct responsibility placed on public servants to be good custodians of public finances.

In essence, honesty must be an indispensable feature of public procurement regulatory framework and this curbs corruption and conflict of interest.[243] Once suppliers and contractors perceive a public procurement system as unfair, opaque and corruption laden, their future participation would not be guaranteed. Bidder fatigue will become the hallmark of such a public procurement process, consequently delegitimising it.[244]

2.2.2.5. Cost-effectiveness

There are numerous definitions of cost-effectiveness.[245] What is broadly captured in these varying definitions is that cost-effectiveness strives to balance the relational link between the value of outcomes and cost which has to be economical or acceptable. The cardinal function of public procurement is to obtain goods and services at the best possible value.[246] Noting the constitutional demand to secure cost-effectiveness in public procurement, this implies an obligation on public officials to achieve value for money.[247] A cost-effective public procurement regulatory framework must seek to address a dual function in the form of economy and efficiency.[248] These two aspects are a mainstay in achieving cost-effectiveness in public procurement activities and these are two variables employed to measure the concept of Value for Money (VfM).

The notion of Value for Money (VfM) has numerous definitions. Burger and Hawkesworth describe it as follows: [249]

'what a government judges to be an optimal combination of quantity, quality, features and cost, expected over the whole of the project's lifetime'

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[243] Sue Arrowsmith, 'Understanding the purpose of the European Union's procurement directives: the limited role of the European Union regime and some proposals for reform' in Västra Aros AB (ed) *The Cost of Different Goals of Public Procurement* (Swedish Competition Authority 2012) 47.

[244] ibid.

[245] Bolton describe cost-effectiveness as 'adequate financial return'. The Oxford Dictionary <https://www.oxfordlearnersdictionaries.com> defines cost-effectiveness as giving the best possible profit or benefits in comparison with the money that is spent, while Collins Dictionary, <https://www.collinsdictionary.com/> describe cost-effectiveness as something that saves or makes a lot of money in comparison with the costs involved.

[246] OECD POLICY ROUNDTABLES Collusion and Corruption in Public Procurement 2010.

[247] Sope Williams-Elegbe, 'The Evolution of the World Bank's Procurement Framework: Reform and Coherence for the 21st Century Framework' (2016) Volume 16 (1) 26 Journal of Public Procurement.

[248] Quinot Geo and Sue Arrowsmith, 'Introduction', Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation* (Cambridge University Press 2017) 8; Sue Arrowsmith, John Linarelli and Don Wallace Jr. *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International 2000) 28-31; Public Procurement 28-31; Guide to Enactment Para 3.

[249] Philippe Burger and Ian Hawkesworth, 'How to Attain Value for Money: Comparing PPP and Traditional Infrastructure Public Procurement' (2011) OECD Journal on Budgeting, 11(1): 91.

Generally, efficiency relates to 'optimum expenditure of public funds'.[250] On the other hand, economy in public procurement terms relates to the balanced relationship between the price and other factors such as quality of the procurement requirement, and an underlying assumption that the procurement requirement is justified and required at the time of the procurement.[251]

Public procurement efficiency relates to acquisition of lowly priced quality goods and services and the potential of saving costs in the long run, or possibly freeing up goods and services for a specific function.[252] Accordingly, a cost-effective public procurement regulatory system should attempt to empower public officials to select the most economical offer from suppliers and contractors.[253] The Public Finance Management Act of 2009 (PFMA) further enjoins public officials to use resources in an economic and efficient manner.[254]

Efficiency can best be understood in the terms of related transactional costs of the procurement regime and the turnaround time for each procurement procedure as well as its proportionate value.[255] Put differently, cost-effectiveness can thus be broadly understood to mean value for money. Public procurement must be strategically executed. To this end, public entities must have a full complement of highly trained professionals to reduce reactive decisions due to a lack of training.[256] Suffice to state that the public expects greater economic efficiency from the government's transactional business when compared to the free market economic operators.[257] The duty of ensuring the training and

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[250] Dekel, Omer, 'Improving Public Procurement Efficiency – Applying a Compliance Criterion' (March 16, 2015) 24 Public Procurement Law Review < https://ssrn.com/abstract=3001929> accessed 7 De cember 2021.

[251] Burger and Hawkesworth 'How to Attain Value for Money: Comparing PPP and Traditional Infrastructure Public Procurement' (n 302).

[252] Checklist for Supporting the Implementation of OECD Recommendation of the Council on Public Pro curement: Efficiency <https://www.oecd.org/governance/procurement/toolbox/search/Checklist%2006%20Efficiency.pdf>accessed 10 January 2022.

[253] PPDPA Act, s 25(1). According to the foregoing provision, division of procurement requirements is allowable where it anticipated that this could lead to substantial savings for government-con trolled entities.

[254] Section 45(b) provides:

'[A]n employee of a public entity shall to the extent that it is competent for the employee to do so be responsible for the effective, efficient, economical and transparent use of the financial and other resources of the public entity…'.

[255] Peter Baily, David Farmer, Barry Crocker, David Jessop, David Jones, *Procurement Principles and Management* (11th edn, Pearson Education Limited 2015) 84.

[256] ibid.

[257] Dekel (no 303).

professional development of procurement practitioners in Zimbabwe lies with PRAZ.[258] The purpose of this professionalization is to inculcate a high level of ethical standards among public procurement practitioners.[259] In addition, procurement practitioners are enjoined to adhere to and uphold the code of conduct for procurement officers.[260]

The constitutional imperative for cost-effectiveness or value for money in public procurement is also be attained through public procurement innovation[261] or innovative procurement.[262] The continuous demand for innovative products and services by procuring entities can trigger industrial innovations leading to net-spill overs to end-users, including low maintenance costs and prolonged life cycle for products, creating savings.[263] Competition is central to the process of achieving cost-effectiveness.

2.2.2.6. Competition

Competition promotes the lowest possible price by forcing bidders to make the prime offer they possibly can, so as to win the contract.[264] A competitive public procurement system must be underpinned by definite guidelines for contractors to vie for business opportunities with the state.[265] In essence, a competitive public procurement regulatory framework should ensure that, as many suppliers as possible are involved throughout all

[258] PPDPA Act 2017, s 6(1) (h)
[259] ibid.
[260] PPDPA Act 2017, s 71(1).
[261] Public procurement innovation or innovative procurement refers to the procurement of goods which must still be designed, or manufactured, or existing goods that require further modifications by exploit ing newer technologies through research and development (R&D).
[262] Bolton, 'Public Procurement as a Tool for Driving Innovation in South Africa' 2016 (19) 4 PER / PELJ.
[263] Jakob Edler, Luke Georghiou, Elvira Uyarra and Jillian Yeow 'The meaning and limitations of public procurement for innovation: a supplier's experience' in Charles Edquist, Nicholas S. Vonortas, Jon Mikel Zabala-Iturriagagoitia Andjakob Edler (eds) *Public Procurement for Innovation* (Edward Elgar Publishing Limited UK)37.
[264] Phoebe Bolton 'Government procurement as a policy tool in South Africa'(2006) Journal of Public Procurement, 6 (3) 196, 193–217; Stephanus De la Roux Harpe 'Procurement law: a comparative anal ysis' (Unpublished PhD thesis, University of South Africa 2009) 92< https://uir.unisa.ac.za/bitstream/handle/10500/3848/thesis%20le%20roux_pdf.pdf>accessed 2 March 2021; Travis K Taylor 'Countertrade Offsets in International Procurement: Theory and Evidence' in Murat K Yulek and Travis K Taylor (eds) *Designing Public Procurement Policy in Developing Countries How to Foster Technology Transfer and Industrialization in the Global Economy* (Springer 2012)18.
[265] Geo Quinot and Sue Arrowsmith "Introduction" in Quinot Geo and Arrowsmith Sue (eds) *Public Pro curement Regulation in Africa* (Cambridge University Press Cambridge 2013)16-17.

the phases of the procurement cycle.[266] It is in this light that competition aids in the promotion of international trade.[267] This entails that contracting authorities embrace new suppliers while endeavoring to sustain business relationships with old suppliers.

Notwithstanding the constitutional imperative to conduct procurement in a competitive manner, it is doubtful that Zimbabwe's economic development trajectory will embrace foreign suppliers and contractors for a foreseeable period.[268] Projections are that Zimbabwe's public procurement policy will be pursued in consonance with the national economic development objectives. [269] Given its status as a developing state, Zimbabwe's public procurement policy trajectory is likely to track the same path.[270] However, the pursuit of public policy is not cast in stone, as successive governments may take a diametrically opposite direction as informed by the prevailing political, social and economic determinants.

Procuring entities must not include a criterion that may be perceived as favouring one supplier.[271] An urgent chamber application was made at the Harare High Court for an order to suspend procurement proceedings initiated by the Zimbabwe Manpower Development Fund (ZIMDEF). [272] The determination of this application was meant to confirm an interim application. The foregoing entity is a statutory body that falls under the auspices of the Ministry of Higher and Tertiary Education, Innovation Science and Technology Development. The tender was for the provision of software licence. One of the tender

[266] Peter Baily, David Farmer, Barry Crocker, David Jessop, David Jones, *Procurement Principles and Management* (11th edn Pearson Education Limited, UK 2015)103.

[267] PPDPA Act 2017, s 26(2) (a); Sue Arrowsmith, 'Electronic Procurement and Reverse Auctions' in Sue Arowsmith (ed), *Public Procurement Regulation: An Introduction* (no 254) 16.

[268] Zimbabwe is not a party to the Revised Government Procurement Agreement (GPA). See Revised GPA <https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf>accessed 04 February 2021.The GPA is a plurilateral agreement crafted with the objective of attaining the liberation of international trade by embracing foreign suppliers in procurement. However, the GPA recognises the level of economic development of least developed nations by affording concessions and suspensive conditions for them (least developed nations).

[269] ibid; In accordance with the section 12(2) of the Constitution, national economic development objectives must be pursued in a Pan-African manner.

[270] The thrust of the National Development Strategy 1 to achieve a middle-income status by 2030 is a testament to Zimbabwe's present economic state. The substance of the Executive Summary to the National Development Strategy 1 plainly shows admissions by Zimbabwean policy makers to the effect that the country falls under the Least Developed Nations (LDN) category. Notably, key economic indicators synonymous with LDN such as poverty, underdeveloped infrastructure, lack of clean and accessible water, poor public healthcare system and poor industrial capacity utilisation, as well as shallow industrial base, are given much prominence therein.

[271] PPDPA Act, s 73 (1).

[272] *Twenty Third century (Private) Limited v Minister of Higher and Tertiary Education, Innovation Science and Technology Development and Others* HC 1737/22.

requirements was that prospective suppliers needed to have a SAP licence. This requirement was deemed anti-competition, unreasonable and restrictive by the applicant.

The procuring entity, ZIMDEF had awarded the tender to *Tano Digital Solutions (Pvt) Ltd*. Aggrieved by the this decision, the applicant instituted review proceedings of the tender process by the review panel as outlined in section 73 of PPDPA Act. The review panel found against the applicant. The applicant approached the High Court seeking an order to cancel and nullify the tender process. The Court found in favour of the applicant.

The Court was of the view that while section 73 of the PPDPA Act did provide for the suspension of the procuring proceedings subject to an intervening challenge, to allow for the award of the tender to proceed would frustrate the purpose of the PPDPA Act.[273] It was further held that the remedy sought by the applicant to stay the award of the tender had to be effective, reasonable and adequate.[274] The Court was instructive in that procuring entities may not tender afresh for goods and services in cases there is an ongoing challenge before the courts relating to the tender for the same procurement requirement.[275]

The decision by the High Court demonstrates that courts are ready to intervene in order to fulfil the objectives of the PPDPA Act. Sadly, the learned judge failed to properly articulate the real procurement aspects that lied at the core of this application, it is respectfully submitted. Instead, the reasoning of the court centred on aspects not related to procurement. The inclination is that the judicial officer should have taken time to pen a well-reasoned judgement informed by the underlying principles indicated in the PPDPA Act and most importantly stated in section 195(1) of the Constitution.

In synch with the drive to retool its industrial base reeling from decades of neglect and economic stagnation, it is foreseen that Zimbabwe's procurement regulatory model would automatically prefer goods and services from local suppliers and contractors.[276] The predilection for the selection of locally manufactured goods and services actually

[273] *Tano Digital Solutions (Pvt) Ltd* para 8.
[274] *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 56 (SC).
[275] *Tano Digital Solutions (Pvt) Ltd* para 12.
[276] The realisation of entirely domestic supply chain would not be plausible in the short term due to a myriad of constraints, such as, limited sophisticated and expansive industrial capacity.

reduces costs, guarantees continued supply, tends to create employment for the locals, and creates a conducive atmosphere for local innovation.[277]

The general view is that innovative procurement leads to improved quality of goods and services or competitive pricing, accrual of technological dividends to the procuring entities, and ultimately, the beneficiaries who are the public.[278] The argument in favour of restricting public procurement to domestic suppliers against the international market cannot be sustained regardless of the national economic narrative. Mindful of the constitutional obligation to uphold international law, it has to be stated that public procurement policy must be compliant with Zimbabwe's regional and international legal obligations.[279] It follows, therefore, that the Zimbabwean public procurement regulatory framework must comply with international rules.[280]

2.3. *Conclusion*

Given the constitutional foundations of public procurement law in Zimbabwe, this chapter set out to carry out an in-depth analysis of the provisions of the Constitution. This was crucial in laying the basis for a thorough examination of public procurement legislation. It is noted that section 315 (1) sets out a strong constitutional footing for public procurement law in Zimbabwe. In order to find the proper meaning of the constitutional principles underpinning public procurement enumerated in the foregoing provision, numerous mutually reinforcing portions of the Constitution had to be examined.

The constitutionalisation of public procurement law is a welcome development to suppliers and contractors, legal scholars, and the general public. It lays a firm legal framework for public procurement legislation. It was noted that a public procurement regulatory framework that is operationalised in a democratic and open society, and in observance of the rule of law, leads to the achievement of value for money.[281] Furthermore,

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[277] Murat K Yulek and Travis K Taylor (eds) *Designing Public Procurement Policy in Developing Countries How to Foster Technology Transfer and Industrialization in the Global Economy* (Springer 2012) 36.

[278] Phoebe Bolton P 'Public Procurement as a Tool to Drive Innovation in South Africa' PER / PELJ (19) (n 315)
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[279] Constitution of Zimbabwe, sections 34 and 327.

[280] Anoeska W G J Buijze, 'Transparency: The Swiss Knife of EU Law' (2015) 26 European Review of Public Law 1123.

[281] Preamble to the Constitution.

an effective and efficient public procurement regulatory framework is one of the facets of good governance. Without doubt, the existence of strong independent institutions such as the judiciary constitutes a cornerstone for the resolution of disputes arising from procurement activities.

Additionally, this chapter elaborated on the six fundamental principles constituting the basis of public procurement law in Zimbabwe as outlined in the Constitution. These fundamental principles are transparency, fairness, honesty, cost-effectiveness, competitiveness and openness. To give these principles contextual meaning, numerous constitutional provisions had to be examined. It was established in this chapter that the purpose of conducting public procurement activities is to attain the maximum return on money, and concomitantly, guard against public procurement corruption and reckless public spending.

In explaining the principles, the socio-economic needs of Zimbabwe as a developing state were given due consideration. The enduring legacy of the UNCITRAL Model Law, and its successor document, Revised Model Law 2011,[282] as the cradle for public procurement reform particularly in Africa, was discussed in brief. As an extension of the Model Law, the Guide to Enactment, also served as a point of reference in elucidating the constitutional principles on public procurement in Zimbabwe.

Observably, the Constitution does not make a distinct demarcation on the procurement of goods and service, and infrastructure procurement. Undeniably, the Constitution sets a solid legal infrastructure for public procurement activities in Zimbabwe. It is submitted that the magnification of procurement principles enunciated in the Constitution through legislation and the operationalisation thereof is hinged on political will. In conclusion, the constitutional public procurement benchmark was identified and comprehensively explained. The following chapter will provide an in-depth analysis of the public procurement legislation in Zimbabwe. In examining the public procurement legislation, other laws linked to the field of public procurement will also be analysed.

[282] UNCITRAL Model Law on Public Procurement (2011), *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (UN document A/66/17). <https://uncitral.un.org/en/texts/procurement>accessed 25 November 2021.

CHAPTER 3: LEGISLATIVE FRAMEWORK FOR PUBLIC PROCUREMENT IN ZIMBABWE

3.1. Introduction to the public procurement system

Public procurement has been accorded constitutional status in the post 2013 dispensation. This signals a fundamental commitment to good governance. Efficient and economic use of public resources is one of the indices of good governance.[283] It needs no repetition that the public procurement regulatory framework of Zimbabwe was perceived as susceptible to corruption.[284] Since the promulgation of the new constitution, legislation impacting public procurement and geared towards improving efficiency, transparency, and profitability of public entities has also been passed. Some of these legislative enactments include, the Public Entities Corporate Governance (PECG) Act, Freedom of Information Act (FIA), and the Public Finance Management Regulations, among others. A more detailed insight into the impact of the foregoing pieces of legislation will be discussed in this chapter.

Public procurement legislation, therefore, must endeavour, in broad and unequivocal terms, to give effect to the constitutional principles relating to transparency, fairness, honesty, cost-effectiveness, and competitiveness.[285] Drawing from the foundational public procurement principles articulated in the previous chapter, this part of the study will examine Zimbabwean public procurement legislation. This will entail examining the principal public procurement legislation, the PPDPA Act and related legislation. At the end of this chapter, it will be assessed whether public procurement legislation adequately addresses the principles set out in section 315 (1) as read with section 195 (2) of the Constitution. To begin with, the goals of Zimbabwe's public procurement policy will be briefly discussed against the public procurement constitutional imperatives.

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[283] The definition of public resources as provided in section 2 of the Public Finance Management Act. Public resources mean, 'public money and State property', and public money means-

(a) revenues; and

(b) all other money received and held, whether temporarily or otherwise, by an officer in his or her official capacity.

[284] Paras 1.6.2; para 1.3.

[285] Constitution of Zimbabwe, s 195 (2) and s 315(1).

3.2. *The objectives of public procurement policy*

3.2.1. *Introduction*

The Public Procurement and Disposal of Public Assets (PPDPA) Act of 2017 is a parliamentary response to the provisions of section 315(1) of the Constitution. Surprisingly, the PPDPA Act is silent about the constitutional provision that gave rise to it as is the norm in statutory enactments arising from the Constitution.[286] Despite this aberration, the constitutional principles enumerated in terms of section 315 (1) are mentioned in the preamble to the PPDPA Act.[287] In other words, in addition to appearing in the preamble of the PPDPA Act, the constitutional principles are also directly referred to in section 4, which sets out the objectives of the legislation.

The preamble to the PPDPA Act, however, is unequivocal in that it seeks to govern the acquisition and disposal of goods and services in a transparent, fair, honest, cost-effective and competitive manner.[288] This is further augmented by the Public Finance Management Act of 2009 (PFMA) which places an obligation on accounting authorities to establish and maintain appropriate procurement systems that are fair, equitable, transparent, competitive and cost-effective.[289]

The import of the enactment of PPDPA Act are far and wide. The objectives of the Act are summed up below;

a. To promote and fulfil the constitutional public procurement principles;[290]
b. To promote competition among bidders;[291]
c. Provide for the fair and equitable treatment of all bidders resulting in the execution of public contracts that accords value for money;[292]
d. Promote the integrity of, fairness and public confidence in, procurement processes;[293]

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[286] Botha C, *Statutory Interpretation An Introduction for Students :* 36 , holds the view that it a fundamen tal legislative drafting principle that at the very least, the preamble to a legislation should refer to a constitutional provision which would have given birth to it (legislation). The courts seems to be of the same view as well as held in *S v Mhlungu* 1995 (3) SA 867 (CC) para 112.
[287] Section 1 (a).
[288] Preamble to the PPDPA Act.
[289] Paragraph iii of section 1 of section 44; Sections of Public Finance Management (General) Regulations 2019, SI 2019/135, reg 17(3) (c).
[290] ibid.
[291] Section 4 (1) (a).
[292] Section 4 (1) (c).
[293] Section 4 (1) (d).

e. To secure the implementation of any environmental,[294] social,[295] and economic objectives;[296] and

f. To fulfil and promote any other policy that is authorised by a procuring entity in procurement proceedings.[297]

The preceding paragraph clearly signifies that the Zimbabwean procurement regulatory framework intends to use public procurement as a tool to attain socio-economic objectives.[298] Automatically, an obligation arises for procuring entities to conduct procurement proceedings in full compliance with the objectives of PPDPA Act.[299] In terms of the PPDPA Act, unresponsive bids are regarded as unlawful.[300] Therefore, bids from suppliers that do not discharge their tax obligations and fail to remit social security contributions, are precluded from partaking in public procurement activities.[301]

3.2.2. *Collateral objectives*

3.2.2.1. Introduction

In developing countries, public procurement is one of the conduits for the achievement of social and political objectives.[302] The argument that this public procurement model stifles some of the values of public procurement such as cost-effectiveness, competition, and openness was already highlighted in Chapter One.[303] A cursory view of the PPDPA

[294] United Nations Environmental Programme Report (2011), Towards A Green Economy: Pathways to Sustainable Development and Poverty Eradication. This Report is consolidated on the ground-breaking 987 Brundtland Commission Report.<https://sustainabledevelopment.un.org/content/documents/126GER_synthesis_en.pdf>accessed 30 March 2021. The environmental issues linked to public procurement are, environmental resource management, urban planning, carbon dioxide reduction, alternative energies such as solar and wind, sustainable agriculture, marine resource management, protection of ecosystems, pollution and waste management, among others.

[295] ibid. The social issues include but not limited to human rights; clean drinking water; food security; observance of labour laws; anti-child labour and forced labour laws; fair trade; health and safety; gender equality including universal education; child mortality and maternal health.

[296] ibid. On the economic aspect, the matters pertaining to economic regeneration; sustainable economic development; emerging markets; development of SMMEs; total cost of ownership and life cycle cost ing; value for money; poverty reduction.

[297] Section 4 (1) (e).

[298] Section 29 (b) of PPDPA Act instructs public entities to give preference to women controlled entities in tender evaluation. Surely, this provision seeks to achieve gender parity in public procurement.

[299] Section 4 (2). As noted the objectives of PPDPA Act are set out in terms of section 4(1) (e).

[300] PPDPA (General) Regulations, SI 2018/5, reg 28 (1).

[301] PPDPA (General) Regulations, SI 2018/5, reg 28 (1) (e).

[302] Para 1.5; Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (n 64) 27. For example, section 217 (2((a) and (b) of the South Africa Constitution provides for the formulation of preferential public policy geared towards the economic and social emancipation of historically disadvantages persons, particularly, back people. In accordance with this constitutional bidding, Broad Based Black Economic Empowerment Act (BBBEEA) and the Preferential Procurement Policy Framework Act (PPPA) were enacted.

[303] Para 1.5.

Act reveals that social and economic goals are meant to be achieved through public procurement. A more detailed analysis will be provided below.

3.2.2.2. Environmental Considerations

Despite the lack of an express provision on sustainable procurement in the Constitution, there is ample implied evidence in the form of mutually fortifying provisions on sustainable resource utilisation and environmental sustainability. This is articulated in sections 73(2) (b) (iii), sections 317(1) (b) and 194(1) (b) of the Constitution. Using the foregoing as a point of departure, it is abundantly clear that the Constitution lays a strong basis for the use of public procurement as a means to achieve environmental, social, and economic sustainability. This provides an avenue for the realisation of rights set out in the Declaration of Rights.[304]

In line with its international obligations to promote sustainable development,[305] Zimbabwean public procurement policy has to be conducted in an environmentally sustainable way.[306] Therefore, a delicate balance has to be struck in the advancement of economic, social and environmental interests against legitimate business needs.[307] Cognisant of the constitutional emphasis for the protection and respect of environmental rights, the public procurement regulatory framework must promote the flourishing of environmental rights.[308]

It is trite that sustainable procurement connotes embracing environmental, socio-cultural, planetary and financial considerations.[309] A well-regulated public procurement system is

[304] Chapter 4 of the Constitution.

[305] Transforming our world: the 2030 Agenda for Sustainable Development. UN Doc. /RES/70/1, 25 October 2015 (SDGs), Goal 12.<https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf> accessed 23 August 2021.

[306] Constitution of Zimbabwe, s 73. The right to clean, safe and sustainable environment is protected in terms of the Zimbabwean Constitution. In fact, the foregoing provisions specifically lays out the environmental rights that accrue to both individuals and the community.

[307] Marta Andrecka & Katerian Peterkova Mitikids, 'Sustainability requirements in EU public and private procurement – a right or an obligation' (2017). Nordic Journal of Commercial Law, (1), 56-89 <https://journals.aau.dk/index.php/NJCL/article/download/1982/1536> accessed 12 December 2022; Helen Borland, "Conceptualising global strategic sustainability and corporate transformational change" (2009)*International Marketing Review* 517 July 2009 <http://dx.doi.org/10.1108/02651330910972039> accessed 27 July 2021.

[308] Chapter 4 of the Constitution set out declaration of rights and fundamental rights and freedoms.

[309] Arrowsmith S and Peter Kunzlik K, 'Introduction' in Sue Arrowsmith and Peter Kunzlik *Social and Environmental in EC law* (New Directives and New Direction) (n 314) 3; Borland H, 'Conceptualizing global strategic sustainability and corporate transformational change (n 315) 9 International Marketing

a precondition for the achievement of Sustainable Development Goals (SDGs) and sustainable development.[310] In accordance with SDG target 2, member states are to enact laws that promote sustainable public procurement practices. Governments are tremendous consumers of goods and services in developing countries in that public expenditure has the potential to grow the national economy.[311] Public expenditure injects more funding into the economy which translates to improved standards of living for the general citizenry.[312]

In acknowledging the inextricable link between public procurement and violation of rights, countries, including Zimbabwe, must be watchful of contracting with perceived and actual human rights violators, whether these are states or corporations.[313] There is an international obligation for Zimbabwe to uphold, promote, respect, and fulfill human rights.[314] Hence, public procurement is ideally placed for the Government of Zimbabwe to fulfil its international human rights obligations.[315]

Green procurement has great potential benefits including environmental and financial benefits, and ultimately creates a market for sustainable goods and services.[316] Legislation encourages public entities to give environmental considerations in bid evaluations.[317] The adoption of green procurement is consistent with the constitutional requirements to uphold Zimbabwe's international obligations.[318] Therefore, the Zimbabwean state has a duty to enact laws that promote, respect, and fulfil environmental protection. To this end, the Government of Zimbabwe has signed and ratified numerous international agreements

'Review, 26(4/5).

[310] Benon Basheka, 'Public Procurement Reforms in Africa: A Tool for Effective Governance of the Public Sector and Poverty Reduction' in Khi V. Thai (*ed) International Handbook of Public Procurement in Africa: A Comprehensive Public Program* (Taylor & Francis Group 2009) 133.

[311] Sue Arrowsmith, John Linarelli and Don Wallace Jr. *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International 2000) 101.

[312] Arrowsmith Sue, "Horizontal Policies in Public Procurement", in: Journal of Public Procurement 10 (2), 2010a, 149–186.

[313] UN Guiding Principles on Business and Human Rights (UN GPs) Principle 6< https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 23 June 222.

[314] Preamble to the Universal Declaration of Human Rights. < https://www.jus.uio.no/lm/en/pdf/un.universal.declaration.of.human.rights.1948.portrait.letter.pdf>accessed 10 February 2021. Zimbabwe is also a party to African Charter on Human and People's Rights (ACPR).

[315] Olga Martin-Ortega and Claire Methven O'Brien Public procurement and human rights: interrogating the role of the state as a buyer in Olga Martin-Ortega and Claire Methven O'Brien (*eds) Public Pro curement and Human Rights; Opportunities, Risks and Dilemmas for the State as Buyer* (Corporations, Globalisation and the Law series) (Edward Elgar Publishing 2019) 4.

[316] Green procurement entails procurement that takes into account environmental considerations in the procurement processes, as well as the entire lifecycle costs of goods and services.

[317] PPDPA Act, s 50(3) (f).

[318] Constitution of Zimbabwe, s 12 (2).

and conventions regulating environmental sustainability to lessen the adverse effects of climate change.[319] In light of these international obligations, the acquisition of goods and services must, therefore, be eco-friendly. In pursuit of these obligations, the legislature enacted the Environmental Management Act 2002 for sustainable natural resource management and environmental protection.[320] Regrettably, the foregoing legislation does not adequately address environmental considerations in procurement activities.

While the passing of this Environmental Management Act is celebrated, environmentally focused procurement never took centre stage. Stated differently, environmental considerations were never integrated into the public procurement domain through the passage of Environmental Management Act. Simply put, there is no systematic approach when it comes to practical application of sustainable public procurement law in Zimbabwe. The implementation of environmental policies remains the preserve of the environmental management regulator, the Environmental Management Agency (EMA). This is somehow anomalous given the statutory powers conferred on PRAZ to advise the government on matters pertaining to the environmental aspect of sustainable procurement.[321] The phraseology used in section 4 of the PPDPA Act, implies that PRAZ is mandated to play a critical role in shaping government policy on green procurement.

The ambit of the Environmental Management Act is expansive and fleshes out the environmental rights conferred by the Constitution.[322] Electricity power generation is poten-

[319] < https://www.informea.org/en/node/251/parties>accessed 31 March 2021. These international agreements and conventions are the Basel Convention; Cartagena Protocol; Convention on Biological Diversity; Kyoto Protocol; Nagoya Protocol; Paris Agreement; Ramsar Convention; Stockholm Con vention; United Nation Framework Convention on Climate Change; United Nations on the Law of the Sea; Vienna Convention and Bamako Convention.

[320] Preamble to the Environmental Management Act.

[321] PPDPA Act, s 4.

[322] Section 4 enumerates environmental rights and principles underpinning environmental management. The provisions of section 4 (1) of the Environment Management Act reads;

> *(1) Every person shall have a right to—*
>
> *(a) a clean environment that is not harmful to health; and*
>
> *(b) access to environmental information; and*
>
> *(c) protect the environment for the benefit of present and future generations and to participate in the implementation of the promulgation of reasonable legislative policy and other measures that—*
>
> *(i) prevent pollution and environmental degradation; and*
>
> *(ii) secure ecologically sustainable management.*

tially toxic to the environment. Implicitly, energy procurement must also be in conformity with Zimbabwe's environmental obligations.[323] To illustrate its commitment to mitigate the disastrous results of climate change, Zimbabwe has made the adoption of environmentally friendly energy sources (renewable energy)[324] a top priority, as opposed to the fossil based fuels with high carbon content.[325] Indeed, the complete substitution of fossil fuel sources[326] with renewal energy sources is a crucial pillar of climate change mitigation processes.[327]

Furthermore, bids that are energy efficient must be given preference at bid evaluation.[328] Such public procurement policy trajectory is delightedly welcomed as n public procurement constitutes a considerably large economic activity in many jurisdictions, as explained in Chapter One.[329] Viewed from this perspective, disregard for environmental sustainability means nations will collectively pay heavily for such recklessness in future. The negative impact of climate change are manifold, these are, increased natural disasters, loss of biodiversity, disruption of the global food supply chain, depletion of the ozone layer, and reduced water quality.[330] Without carefully crafted public procurement regulatory regimes, efforts to mitigate climate change will not have any meaningful impact.[331] Arguably, sustainable procurement has become central in achieving SDGs in the quest to fulfil international conventions and treaties on environmental rights.

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[323] Part of the IV of the Glasgow Climate Pact addresses the mitigatory measures to be instituted by Parties to reduce global warming by 1.5 ºC. In terms of section 17 of the Glasgow Climate Pact, Parties made commitments to reduce their greenhouse gases, chiefly, carbon dioxide by forty-five (45) per cent by 2030 relative to the 2010 level and to net zero by 2050.<https://unfccc.int/sites/default/files/resource/cop26_auv_2f_cover_decision.pdf>accessed 25 December 2021.

[324] Such as non-fossil energy sources (wind, solar, geothermal, wave, tidal, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases).

[325] National Renewable Energy Policy (19 August 2019) para 8.2. <https://www.zera.co.zw/National_Renewable_Energy_Policy_Final.pdf>(accessed 24 May 2021.

[326] Example of fossil of fossil fuel are petroleum (or, crude) natural gas, and coal. When under combustion, these produce carbon dioxide that cause global warming, a phenomenon that is cause climate change.

[327] Weber Rolf H. and Rika Koch, 'International Trade Law Challenges by Subsidies for Renewable En ergy', 49(5), 2015 Journal of World Trade 757.

[328] PPDPA Act, s 50(3) (h).

[329] Para 1.1.

[330] United Nations Environment Programme Annual Report 2011 <https://wedocs.unep.org/bitstream/handle/20.500.11822/8053/-UNEP%202011%20Annual%20Report-20121086.pdf?sequence=5&amp%3BisAllowed=y%2C%20French%7C%7Chttps%3A//wedocs.unep.org/bitstream/handle/20.500.11822/8053/-UNEP%202011%20Annual%20Report-20121086-french.pdf%3Fsequence%3D6&amp%3BisA=>accessed 17 April 2022.

[331] Sue Arrowsmith and Peter Kunzlik, 'Public procurement and horizontal policies in EC law: general principles' in Social and Environmental Policies in EC Procurement Law Sue Arrowsmith and Peter Kunzlik (eds) (New Directives and New Directions) (Cambridge University Press 2009) 14.

The procurement of clean energy technologies such as solar and wind can help Zimbabwe to be within the permissible range for carbon emissions prescribed in the Paris Agreement.[332] What is noteworthy is that green procurement is a new phenomenon which most countries have not fully embraced.[333] The absence of well-defined legal mechanism to operationalise green procurement practices has been singled out as a major setback.[334] Moreover, environmental agencies are at the forefront of promoting green procurement in developing countries, particularly in Africa.[335] Noteworthy is that eco-friendly technologies can be expensive especially for low income countries to adopt, particularly on the continent of Africa.[336] Suppliers are therefore not eager to invest in environmentally compatible goods since they are capital intensive.

Public procurement legislative reform inclined towards green procurement is still nascent and will evolve with time in developing countries.[337] Some of the reasons for this have been cited as lack of institutional, human resource, and technological capabilities to execute green procurement.[338] Lack of political will has also been cited as one of the stumbling block.[339] There is empirical evidence pointing to the manifold benefits of green procurement. These include cost savings, smart investment, providing avenues for innovation, and enabling governments to meet local and international environmental obligations.[340]

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[332] Zimbabwe signed and ratified the Paris Agreement of 2016. The Agreement was the culmination of deliberations of the United Nations Conference Framework Work on Climate Change in 2015. It came into force on the 4th of November 2016. In nutshell the Agreement is a commitment by state parties to reduce greenhouse emissions and attain climate neutral word by 2050 <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en> accessed 6 May 2021.

[333] Rajesh Kumar Shakya *Green Public Procurement Strategies for Environmental Sustainability* (The World Bank, USA, 2019) 2.

[334] Phoebe Bolton, 'Protecting the environment through public procurement: the case of South Africa' (2008) 1-10 Natural Resources Forum, 32.

[335] Rolien Roose and Stephanus Del La Harpe, 'Good governance in public procurement: a South African case study' (2008). PER: Potchefstroomse Elektroniese Regsblad, 11(2) < http://www.scielo.org.za/scielo.php7pidM1727-37812008000200006&scriptsciarttext> accessed 17 April 2022.

[336] The Conference of the Parties 27 <https://unfccc.int/sites/default/files/resource/1CMA4_1CMP171COP27_preliminary_draft_text.pdf> accessed 22 December 2022.

[337] Rajesh Kumar Shakya *Green Public Procurement Strategies for Environmental Sustainability* (n 395) 3.

[338] Green Audit for the Environmental Sustainability (World Bank 2019).

[339] Akenroye, Temidayo O, Oyegoke, Adekunle Sabitu , Eyo, Ama Bassey, 'Development of a frame work for the implementation of green public procurement in Nigeria; (2013) 6(1) International Journal of Procurement Management, 1. doi:10.1504/IJPM.2013.050607.

[340] Adriana Salazar, Cota Luz Fernández and Wilhelm Dalaison, 'Green Procurement ¿How to encourage green procurement practices in IDB funded projects? (Inter-American Development Bank October

Despite efforts to transpose international environmental obligations into the Zimbabwean municipal law, regrettably, it is submitted that public procurement legislation has not yet reached the expected international standards. This will be discussed further below. The crafting of public procurement policy directives which are environmentally compliant is to be done in due course by the public procurement regulator, PRAZ.[341]

The PPDPA Act barely confers public entities with the powers to consider environmental aspects in public procurement activities. Sadly, a lack of skilled procurement officials in procuring entities stands to militate against the realisation of green procurement. The achievement of environmental imperatives in public procurement can be made easy if there is a legal framework to guide public entities. The framework must incorporate the environmental requirement discussed in the paragraph below. Globally, international development banks have championed environmental and sustainable procurement.[342] This will be discussed further, below.

The World Bank Group (WBG) has formulated guidelines which could assist policy makers in jurisdictions that are still lagging behind on this aspect such as Zimbabwe.[343] A comprehensive public procurement legislation that is sensitive to environmental sustainability, as required by the Constitution, will put Zimbabwe on the right path as it attempts to fulfil its local and international environmental obligations. It is recommended that legislative reforms be made in public procurement, taking into account environmental considerations in order to fulfil constitutional demands. Possible legislative intervention should include the incorporation of technical specifications for goods and services and infrastructure with minimum performance that is eco-friendly.[344] This has to be regionally and internationally benchmarked. It is submitted that legislation must provide for public entities to explicitly lay down environmental aspects in tender documents to inform the submission of eco-friendly bids.

2018) 13 < https://publications.iadb.org/publications/english/document/Green-Procurement-How-to-Encourage-Green-Procurement-Practices-in-IDB-Funded-Projects.pdf>accessed 17 April 2022.

341 Para 5.3.2 below.

342 Adriana Salazar, Cota Luz Fernández and Wilhelm Dalaison, 'Green Procurement ¿How to encourage green procurement practices in IDB funded projects? (Inter-American Development Bank October 2018) 13 < https://publications.iadb.org/publications/english/document/Green-Procurement-How-to-Encourage-Green-Procurement-Practices-in-IDB-Funded-Projects.pdf>accessed 17 April 2022.

343 Rajesh Kumar Shakya *Green Public Procurement Strategies for Environmental Sustainability* (n 397)11.

344 ibid10.

In fact, the use of eco-labels that are nationally and internationally certified must be distinctly provided in the legislation.[345] There are varied definitions of eco-labels.[346] Notably, eco-labels can potentially drive the implementation of sustainable procurement.[347] The inclusion of eco-labels in tenders can be used as green criteria to aid procurement practitioners to select environmentally responsible bids.[348] Due regard must be accorded to the need not to impede the realisation of constitutional principles underpinning public procurement. In other words, environmental considerations must not overshadow the realisation of the constitutional principles on public procurement. This means that the pursuit of environmental objectives must be implemented wholesomely along with principles underlying public procurement.

To nurture transparency, the adoption of eco-labels must be agreed to by the numerous stakeholders involved in the public procurement ecosystem such as the government of Zimbabwe, association of industry and commerce, critical agencies such as the Environmental Management Agency (EMA), as well as the Standards Association of Zimbabwe (SAZ). Alternatively, a provision should be made for the acceptance of written undertaking issued by a competent body stating that a product or service from a supplier satisfies the stipulated environmental test.[349]

Alive to the contribution public procurement law can be exploited for eco-friendly gains, it is recommended that EMA and PRAZ work in conjunction for the validation of eco-labels. Public procurement legislation must further require contractors and suppliers to provide proof of environmental technical expertise in their employ and the requisite equipment to execute a public contract in an environmentally sustainable manner.[350] On the use of functional performance of goods and services, legislation must preferentially

[345] ibid. Eco-labelling as a phenomenon originated the late 1970s with the West German Blue Angel.

[346] The Global Ecolabelling Network (GEN) an independent and non-profit global entity that is an associ ation ecolabelling organisations defines ecolabelling as follows:
'[E]colabelling is a voluntary method of environmental performance certification and disclosure'.

[347] United Nations Office for Project Services (UNOPS), A Guide to Environmental Labels for Procure ment Practitioners of the United Nations System (UNOPS 2009) 13 < https://www.ungm.org/Areas/Public/Downloads/Env_Labels_Guide.pdf ? > accessed 27 September 2021.

[348] ibid.

[349] Global directory for ecolabels < https://www.ecolabelindex.com/ecolabels/>accessed 14 September 2021.

[350] Rajesh Kumar Shakya *Green Public Procurement Strategies for Environmental Sustainability* (no. 397).

promote suppliers whose products, performance and function are not environmentally degrading.[351] This entails that a provision must be made for the performance of goods and services that are compatible with environmental management systems. The foregoing can be operationalised through certification by competent bodies or environmental comparable standard models.

Overally, the awarding of the contract must be done in such a manner that a supplier with the best environmental incentive is selected.[352] Equally important is the issue of life cycle cost as determined by environmental considerations. Additionally, provision has to be made for the inclusion of environmentally compliant provisions in the contract for the purposes of monitoring and evaluation.

3.2.2.3. *Social objectives*

The social responsibility of public procurement entails procuring entities recognising the impact of their business operations in the community.[353] Hence, suppliers, contractors and consultants with a proven track record of corporate social responsibility history should be selected. Corporate Social Responsibility (CSR) relates to conducting business in ways that promote and protect environmental, economic and social considerations without undermining the economic success of a business entity.[354] The statutory requirement for the establishment of ethics and social committees of the boards of governors for public, and private companies has gained traction in many jurisdictions across the globe, including Zimbabwe and South Africa.[355] Social responsibility committees should provide strategic leadership in promoting responsible corporate citizenship, sustainable development and stakeholder driven relationships.[356]

In pursuit of the social dimension envisaged in the PPDPA Act,[357] it is recommended that a policy be crafted in consultation with the organs of state such as the Environmental

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[351] ibid.

[352] Phoebe Bolton, 'Protecting the environment through public procurement: the case of South Africa' (2008) 1-10 Natural Resources Forum, (no 398) 32; Sue Arrowsmith, 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) 10(2) Journal of Public Procurement, 149.

[353] Rajesh Kumar Shakya *Green Public Procurement Strategies for Environmental Sustainability* (n 397)2.

[354] Keith F Snider, Halpern H Barton, Rene G Rendon and Max V Kidalov (2013) 19 Journal of Purchas ing & Supply Management 63 < http://www.elsevier.com/locate/pursup> accessed 23 September 2022.

[355] King Code (2016) Institute of Directors in South Africa 56.

[356] King Code (2016) Institute of Directors in South Africa 57.

[357] One of the principal objectives of the PPDPA Act as outlined in terms of section 4 (1) (e) is to 'promote to secure the implementation of any environmental, social, economic and other policy that is authorised

Management Agency (EMA),[358] National Social Security Authority (NSSA), and other relevant stakeholders.[359] This policy should be applicable to domestic suppliers while an alternative mechanism could be sought to ensure some measure of compliance on matters pertaining to those issues mentioned above on social responsibility for foreign suppliers.

The quadrilateral nature of corporate social responsibility is explained briefly below. Firstly, the economic dimension requires economic operators to conduct business according to the expectations of the stakeholders.[360] Secondly, the aspect entails that business operations are to be done in compliance with laws and the expectations of the government.[361] The third paradigm is discretionary, whereby businesses are to meet philanthropic and charitable needs of the society at large.[362] Lastly, the ethical aspect encourages business operations to be executed in conformity with the societal mores and ethical norms.[363]

The policy should strive to ensure compliance on pertinent issues such as dissuading the employment of minors (child labour), poor labour practices, and observance of occupational health standards and safety in the supply chain.[364] This would be consistent with

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or required by any law to be taken into account by a procuring entity in procurement proceedings'.

358 EMA is a statutory body established in terms of section 9 of the Environmental Management Act 13 of 2000, responsible for enforcement of environment laws in Zimbabwe.

359 NSSA is the national pensions entity incorporated in terms of section of Part III of National Social Security Authority Act 1989. In terms of its mandate, NSSA is supposed receive pension contributions from all employers operating in Zimbabwe. Fortunately, NSSA does issue certificates for compliance for defaulting organisations pursuant to the provisions of Pension and Other Benefits, SI 393/1993, Accident Prevention and Workers Compensation Scheme, SI 68/1990 as read with National Social Security Authority Act. In order to secure full compliance with the provision of regulation 28(1) (e) of PPDPA (General) Regulations, SI 2018/5, suppliers must be required to provide a compliance certificate from NSSA. This will entail amending the Regulations to cater for this recommendation.

360 Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (Oxford University Pres 2007) 4; Keith F. Snider and Barton H. Halpern, Rene G. Rendon and Max V. Kidalov, 'Corporate social responsibility and public procurement: How supplying government affects managerial orientations' (2013) 63–72 (64) *Journal of Purchasing & Supply Management* 19 <https://doi.org/10.1016/j.pursup.2013.01.001>accessed 18 April 2022.

361 ibid.

362 ibid.

363 ibid.

364 Olga Martin-Ortega and Claire Methven O'Brien, 'Public procurement and human rights: interrogating the role of the state as a buyer' in Olga Martin-Ortega and Claire Methven O'Brien (eds*) Public Procurement and Human Rights; Opportunities, Risks and Dilemmas for the State as Buyer* (Corporations, Globalisation and the Law series) (Edward Elgar Publishing 2019) 8; The United Nations Guiding Principles on Business and Human Rights (UNGPs) : *Implementing the United Nations "Protect, Respect and Remedy" Framework* (United Nations 2011) 3 <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf>accessed 18 April 2022.

the constitutional obligation placed on juristic persons to protect, fulfil and respect fundamental human rights and freedoms.[365] Suppliers would be ranked annually, and certificates issued thereto in accordance with their performance with regard to the above. In addition, a negative ranking system can also be adopted whereby points are deducted for failing to uphold the above aspects. Bid notices would make it mandatory for suppliers to submit aforementioned certificates in addition to other historical documents.[366] However, putting into operation this recommendation would require serious financial and material resources to ensure strict compliance.

Surprisingly, the PPDPA Act has no provision that compels suppliers to submit compliance certificates on matters connected to social security contributions, observance of environmental laws and upholding labour law. However, the PPDPA Act has a provision for the submission of tax clearance certificates issued by the tax watchdog, the Zimbabwe Revenue Authority (ZIMRA) as tax compliance proof, along with other constitutive documents for suppliers.[367]

Tender evaluation committees must consider these social aspects in the evaluation process as required by the PPDPA Act. [368] Worth stressing is that this could be one of the numerous avenues for giving effect to labour rights enshrined in the Constitution.[369] It is submitted that this could be a useful tool for the realisation of the social benefit of public procurement. This would be in synch with the global thrust for nations to institute public procurement policies from a human rights perspective.

3.1.3. *Market Consultations*

The purpose of conducting market consultations is to prepare contractual specifications and alerting potential suppliers of the entity's procurement plans and specifications of the procurement requirement.[370] While undertaking this exercise, a procuring entity may solicit for technical facts and recommendations from experts or competent bodies for the

[365] The Sixth paragraph of the Preamble to the Constitution of Zimbabwe, 2013.
[366] Such as proof of registration with PRAZ, certificate of incorporation and so forth.
[367] PPDPA Act, s 28 (2) (d).
[368] Section 50 (3) (o).
[369] Section 65.
[370] PPDPA Act, s 26 (1).

purpose of strategizing the execution of the envisaged procurement.[371] Market consultations must not be surreptitiously carried out with the intent of impeding competition and discriminating other suppliers.[372] To secure transparency, where possible, information gathered from a potential bidder(s) during the consultations must be subsequently transmitted to other bidders.[373]

Therefore, market consultations are to be transparently done.[374] Public entities are required to make invitations for market consultations by way of a notice in appropriate media such as newspapers in wide circulation or *Government Gazette* to capture the audience of as many potential suppliers as possible.[375] The *modus operandi* for gathering information during market consultations can take a wide range of forms such as written documents soliciting for information on a specified procurement requirement;[376] open discussion forums such as on open days;[377] interviews with potential suppliers;[378] and request for submissions through electronic means.[379]

3.2.3. *Domestic Preferences*

The PPDPA Act is crafted with undeniable intent of favouring domestic suppliers and growth of the local industry.[380] Zimbabwe's public procurement regulatory framework is synonymous with national aspirations of a developing state. Bolton asserts that developing states use public procurement as a socio-economic implementing tool.[381] Public

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371 PPDPA Act, s 26 (2).
372 PPDPA Act, s 26 (2) (a).
373 PPDPA Act, s 26 (2) (b); PPDPA (General) Regulations, SI 2018/5, reg 9(4).
374 PPDPA (General) Regulations, SI 2018/5, reg 9(1).
375 PPDPA (General) Regulations, SI 2018/5, reg 9(2).
376 PPDPA (General) Regulations, SI 2018/5, reg 9(3).
377 ibid.
378 ibid.
379 ibid.
380 Section 29(a); PPDPA (General) Regulations, SI 2018/5, regs 8 and 18. In terms of Public Procurement and Disposal of Public Assets (General) (Amendment) Regulations, 2020 (No. 2), SI 219/2020 reg 10(3)(a)-(c) procuring entities may only invite Zimbabwean suppliers in cases where :
    i. above the equivalent of twenty thousand (20 000) United States dollars, but does not exceed the equivalent of five million (5 000 000) United States dollars, in the case of construction works; or
    ii. above the equivalent of ten thousand (10 000) United States dollars but does not exceed the equivalent of three hundred thousand (300 000) United States dollars, in the case of goods; or
    iii. above the equivalent of five thousand (5 000) United States dollars but does not exceed the equivalent of one million (1 000 000) United States dollars, in the case of consultancy and non-consultancy services.
381 Phoebe Bolton P 'Public Procurement as a Tool to Drive Innovation in South Africa' PER / PELJ (n 315).

procurement can be used to achieve geopolitical strategic goals,[382] socio-economic and environmental needs, has gained international acceptance.[383] In tandem with the foregoing, public procurement policy in Zimbabwe is poignantly intended to meet socio-economic needs.

Regrettably, the provisions of the PPDPA Act on the achievement of collateral objectives, particularly socio-economic needs, in their current state, it is submitted, are inadequate. The reasoning emanates from the lack of a well-defined roadmap to achieve this feat. Clearly, the public procurement policy in Zimbabwe is still searching for a predictable path. This policy will have to consider Zimbabwe's historical past, while at the same time being modelled around the country's socio-economic aspirations.[384] Notably, the full implementation of this noble aspect is left to public entities that are not manned by a professionally competent cadre. It is expedient, therefore, that a comprehensive subordinate legislation be enacted for points to be allocated for tender evaluation on certain specified categories such as-

i. Domestic firms;
ii. SMMEs
iii. Companies with Social Corporate Responsibility footprint indexed against their annual financial performance

Beyond doubt, the national development thrust seeks to accelerate the emancipation of SMMEs in the mainstream economy through public procurement.[385] It is further observed that the PPDPA Act strives to achieve economic gender parity through the deliberate selection of women-controlled suppliers and the subcontracting thereof.[386] Realising the present and potential economic impact women controlled financial enterprises

[382] Geopolitical strategic objectives relate to actions taken by states calculated towards achieving specified out comes within the domain of international relations to secure favourable trade routes and ultimately enhances geographical importance.

[383] Phoebe Bolton, 'Government procurement as a policy tool in South Africa' (2006) *Journal of Public Procurement*, 6 (3) (no 317)..

[384] The post Second World War epoch gave birth to regional and continental regional economic trading blocs such as SADC, COMESA and AU. Plurilateral agreements such as Government Procurement Agreement (GPA) have also evolved from this global economic integration. The basis for the emer gence of these blocs is to pull each member state's economic and material strength for the benefit of entire trading bloc through inflating their bargaining power in international trade. Naturally, this phe nomenon frown upon discrimination of foreign suppliers.

[385] Para 439 of the National Development Strategy 1.

[386] Section 29(b).

can contribute to the GDP of Zimbabwe, this preferential procurement policy is laudable.[387]

Moreover, domestic suppliers whose intellectual output, engineering, and industrial designs are registrable in Zimbabwe and generated by local institutions of higher learning must be preferentially favoured ahead of foreign suppliers.[388] This must be qualified by clearly elaborating it in the tender documents as per guidelines issued by PRAZ.[389] The fact that the legislature delegated the crafting of these guidelines to PRAZ to a later date is duly noted and quite telling.

Perhaps the legislature was alive to present diminutive potential in the Zimbabwean research institutions to produce registrable intellectual output of international proportion after years of massive brain drain and neglect of these vital institutions. And it could be that the legislature was fully cognisant of the nation's depressed industrial output and that it might not competitively match international suppliers whose brands have stood the test of time. It is submitted that without these guidelines, the operationalisation of the provisions of section 29 will entirely be in abeyance.

As an insulating measure against financial loss to contracting authority, successful tenderers are required to provide performance security in the form of bank guarantees prior to the commencement of a contract.[390] The requirement for performance guarantees must be explicitly stated in the bid solicitation notice. [391] This is an attempt to entrench secure transparency through the publication of procurement rules. At the same time, bidders maybe required to furnish procuring entities with bid securities when submitting tenders to dissuade irresponsible bids and to encourage the fulfilment of conditions of bids by bidders.[392]

At a glance, the Zimbabwean public procurement legislation is designed to meet the socio-economic goals of Zimbabwe as a developing state. The PPDPA Act is silent when

[387] Technical Report: Policies that Promote SME Participation in Public Procurement (September 2017) <https://ppp.worldbank.org/public-private-partnership/library/technical-report-policies-promote-sme-participation-public-procurement>accessed 31 March 2021.
[388] Section 29 (c).
[389] PPDPA Act, s 28(c) (ii).
[390] PPDPA Act, s 56.
[391] ibid.
[392] PPDPA Act 2017, s 44.

it comes to emancipation of SMMEs. Therefore, public procurement legislation in its current state is immensely prohibitive for SMMEs. Arguably, legislation must provide for an even turf for both SMMEs and big corporations to competitively participate in public procurement activities. To mitigate the above, the achievement of the socio-economic objective of procurement legislation could be revised to plug in provisions to accelerate the inclusion of SMMEs through subcontracting at the very least, framework agreements, and consortia enterprises.[393] Additionally, there could be legislative changes in the form of embracing e-procurement and relaxation on the qualifications.[394] However, the adoption of e-procurement has its own *pros* and *cons* for the participation of SMMEs in public procurement. This shall be seen in the later part of this chapter.

3.2.4. *Decentralisation of Public Procurement*

The PPDPA Act confers public entities with the powers to regulate their own procurement subject to the proviso that the procurement requirements are below the specified financial threshold.[395] Notably, the PPDPA Act has different categories of financial thresholds for various procurement arrangements.[396] The power to determine financial thresholds beyond which the approval of PRAZ is required is subject to ministerial discretion.[397]Moreover, public procurement legislation permits public entities to conclude

[393] Khi V. Thai, 'International Public Procurement: Innovation and Knowledge Sharing' in Khi V. Thai (ed) *International Public Procurement Innovation and Knowledge Sharing* (Springer International Pub lishing 2015) 20.

[394] ibid.

[395] These are set out in terms of Public Procurement and Disposal of Public Assets (General) (Amendment) Regulations, SI 2020/2019, reg 3. The thresholds are as follows:

(a) above the equivalent of twenty thousand (20 000) United States dollars, but does not exceed the equivalent of five million (5 000 000) United States dollars, in the case of construction works; or

(b) above the equivalent of ten thousand (10 000) United States dollars but does not exceed the equivalent of three hundred thousand (300 000) United States dollars, in the case of goods; or

(c) above the equivalent of five thousand (5 000) United States dollars but does not exceed the equivalent of one million (1 000 000) United States dollars, in the case of consultancy and non-consultancy services.

[396] Sections 14 and 34.

[397] Section 101.

framework agreements with suppliers.[398]Framework agreements have been established to have *quid pro quo* between competition and efficiency.[399]

In fact, the PPDPA Act prohibits the commencement of procurement proceedings for a procurement requirement in excess of a specified financial threshold without the express approval of PRAZ with respect to framework agreements.[400]Arguably, this provision is meant to restrict procuring entities from resorting to framework agreements as a convenient procurement path thereby ousting competitive bidding as the default procurement method.

Framework agreements are by their very nature procedurally not cumbersome, and practitioners can easily abuse them. By procuring through a framework agreement, procuring entities are guaranteed of continued specified procurement requirements for a predictable period. Naturally, this procurement route alleviates practitioners from the administrative burden synonymous with competitive bidding which has to be done at short intervals of time for the same type of goods and services. Hence, procuring entities have to delicately weigh the scales when it comes to the use of framework agreements and competitive bidding. It needs no repetition that at its best, competitive bidding is inherently best suited to fulfil the constitutional principles anchoring public procurement outlined in section 315 (1) as read with section 195 (2).

[398] Section 1. In terms of PPDPA Act framework agreement means;

> 'an agreement between a procuring entity and a bidder (or bidders consisting of two or more competing suppliers of the procurement requirement) to establish the terms and conditions governing procurement contracts to be awarded during a period, in particular with regard to price and, where appropriate, the quantities envisaged; "goods" means things of any kind or description, including—
>
> (a) raw materials, products and equipment; and
> (b) things in solid, liquid or gaseous form; and
> (c) electricity; and
> (d) services incidental to the supply of the goods, where the value of the services does not exceed that of the goods themselves'.

[399] Robert D. Anderson, William Kovacic and Anna Caroline Muller, 'Ensuring integrity and competition in public procurement markets: a dual challenge for good governance' in Sue Arrowsmith Robert D. Anderson (eds), WTO *Regime on Government Procurement Challenge and Reform* (Cambridge Uni versity Press 2011) 695.

[400] Section 15.

The Zimbabwean public procurement regulatory framework has a strikingly conspicuous feature in the form of a statutory body, going by the name of Special Procurement Oversight Committee (SPOC).[401] Its function is to scrutinise especially sensitive[402] or especially valuable contracts and ultimately select the 'best bids'.[403] Is SPOC an indispensable administrative body necessary to entrench efficiency, openness, transparency, and effectiveness? In other words, do the functions of SPOC impede the realisation of some or all of the constitutional principles set out in section 315 (1) and section195 (2)?

What is concerning is that there is no provision in the PPDPA Act for a review of decisions of SPOC. The discussion below will either vindicate or bemoan the existence of SPOC. *Prima facie*, the existence of SPOC is meant to partially centralise public procurement. The existence of SPOC in Zimbabwe's public procurement governance framework might be prejudicial to the realisation of constitutional principles that underlie public procurement, as this study will show hereunder.

Public entities are obliged to remit a record of the evaluation proceedings to SPOC, through PRAZ, before the selection of the highest ranked bidder for the former to determine the winner.[404] In simple terms, SPOC determines the 'best bid', something that otherwise falls within the purview of the procuring entity. Regrettably, this is immensely retrogressive since it reverses the gains attained upstream and meant to actualise principles enunciated in terms of section 315(1). Evidently, the powers conferred on SPOC are bent on centralising public procurement activities. The composition of SPOC might inherently make it susceptible to political pressure and prejudices.[405]

In the *Inkandla* scandal,[406] the South African Constitutional Court remarked that lowly ranked public officials had the propensity to overzealously spend public resources in an

[401] Constituted in terms of section 54 (2) (a)-(d) of PPDPA Act.

[402] In relation to a public contract means a contract negotiated and concluded pursuant to a ministerial waiver to exclude it to the dictates of PPDPA Act. The foregoing contract may have serious impact on the national economy or interest of the State; defence and security, public interests; or has monumental impact of the State's foreign international relations.

[403] Relates to a public contract whose value exceeds the prescribed threshold.

[404] PPDPA Act, s 54 (5) and (6).

[405] It is made of senior government officials who might be insulated from pressure emanating from politi cal superiors.

[406] These were allegations of financial impropriety and unethical conduct with respect to security upgrades at the private residence of former President Zuma. Public Protector, had to investigate these allegations and the findings were published in report titled, *Secure in Comfort : Report on an investigation into*

effort to ingratiate themselves with top ranked public servants.[407] The potential quandary emanating from the powers of SPOC to make procurement decisions on behalf of public entities can also be understood within the context of duty placed on accounting authorities. Commenting on an almost similarly worded provision in South African public procurement legislation, Jenkins[408] notes the imbroglio facing accounting authorities with regard to accounting for public resources and compatibility of that provision with the PFMA.[409]

In terms of PFMA, accounting authorities are vested with the powers to expend public funds within the limits of mandate of entities they superintend, and account for the same resources.[410] It follows that accounting authorities must be on the guard against reckless, and unauthorised and unfit for purpose spending. By the same token, a central and bureaucratically inert legislative committee in the form of SPOC, might be susceptible to succumbing to political pressure by corruptly awarding a tender to a corporation or supplier affiliated to or related with the ruling elite.

The definition of accounting authority is quite clear in that it creates statutory autonomy for accounting authorities. Congruently, accounting authorities have no obligation to cede this power without the express authority of the Treasury.[411] It is respectfully submitted that the legal provision requiring accounting authorities to relinquish their statutory authority to the national Treasury, flies in the face of the spirit of devolution permeating across the Constitution.[412] This creates inordinate administrative chaos in the public sector.

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allegation of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma in the KwaZulu-Natal Province Report 25of 2013/14 < https://www.gov.za/sites/default/files/gcis_document/201409/public-protectors-report-nkandlaa.pdf>accessed 22 April 2022.

[407] *Economic Freedom Fighters* (n 21)*; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] para 8.

[408] Frank S Jenkins, 'Decentralization and Accountability Challenges to Appointing Independent Bid Committees in the Public Sector' in Elisabetta Morlino (ed), *Procurement by International Organisations A Global Administrative Law Perspective* (Cambridge University Press, UK 2019) 167.

[409] Coincidentally, in Public Finance Management Act (PFMA), Zimbabwe and South African have legislation with the same nomenclature and to a certain degree, the substance is much of muchness.

[410] Section 10 (1).

[411] PFMA 2009, s 41(3).

[412] Decentralisation of governmental powers and functions is of the issues articulated in founding values of the Constitution in terms of section 3 (2) (l).

It is recommended that in the spirit of decentralisation and devolution of public power, public procurement decisions solely remain the preserve of public entities through the accounting authority. Sadly, the PPDPA Act unjustifiably divests accounting authorities of their power by conferring financial decisions making power to a statutory committee, SPOC, to make procurement decisions but at the same time requiring them (accounting authorities) to account for funds allocated to public entities. This is despite providential oversight and accounting responsibilities conferred on accounting officers by PFMA.

From a constitutional perspective, the responsibility of management and expenditure of public funds is conferred on public officials who are accountable for the operations of public corporations.[413] In other words, the PFMA empowers accounting authorities to govern the expenditure of funds in their respective entities and have a corresponding duty to account for those funds.[414]

On another note, SPOC, by virtue of being a government committee, possibly, can be faced with a decision in which one of the competing suppliers to a tender is a government-controlled entity. When faced with such a scenario, it is likely to act in favour of such an entity, despite being aware of the incapability of the government-controlled entity to discharge contractual obligations.[415] This has a ripple effect in that it forestalls the actualisation of constitutional values of cost-effectiveness and efficiency. In concluding, the existence and functions of SPOC offend the statutory autonomy of public entities conferred by the Constitution and enabling legislation.

3.2.5. *Exclusion of PPDPA Act*

The ambit of PPDPA Act covers the entire stages of the processes in the acquisition of goods, construction works, and services.[416] Interestingly, the PPDPA Act provides that should there be a conflict between an international agreement or treaty between Zimba-

[413] Section 308 (2).

[414] Comments submitted by the *African Procurement Law Unit* on Draft Public Procurement Bill 2020 of the Republic of South Africa accessible http://africanprocurementlaw.org/wp-content/uploads/2020/06/APLU-Submissions-on-the-Draft-Public-Procurement-Bill-2020-South-Africa-Final.pdf.

[415] Most government-controlled entities have not been performing at their optimum levels due to poor corporate governance failures. Hence, the default position for the government is to capacitate the enti ties by availing business opportunities to such whenever possible.

[416] Section 3 (1) (a).

bwe and foreign governments or states or multinational financial institution, the international treaty or agreement must prevail.[417] The contestations arising from the above can be understood in two ways. Firstly, this provision elevates international legal agreements and treaties which Zimbabwe is party to, above domestic law notwithstanding that there is a constitutional imperative for an international treaty or convention to be approved by parliament or domesticated into national law before it binds Zimbabwe.[418]

The PPDPA Act was enacted while the Indigenisation and Economic Empowerment Act of 2007 (IEEA) was still in force.[419] Surprisingly, when the new political leadership assumed power in 2017, the IEEA was partially repealed.[420] Presumably, the IEEA was perceived as antithetical to the interests of regional integration as well as scaring off potential investors.[421] It must be mentioned that the public procurement regulatory framework in Zimbabwe is open. It would appear there is a deliberate attempt on the part of the government to increase investment from foreign companies in Zimbabwe. This policy shift comes at the backdrop of close to two decades of international isolation. The present thrust by the Government of Zimbabwe (*GoZ*) is to create a conducive environment for foreign direct investment through legislative means.[422] Hence, there is a measured attempt to remove the legal bulwarks that stand against foreign suppliers.

Without vigilant parliamentary scrutiny, the build-up of corrupt networks is inevitable. It is needful to subject the national executive which conclude international treaties and agreements on behalf of the state to scrutiny to secure transparency. Secondly, it empowers financing foreign government(s) or international financial institution to dictate the procurement regime to be employed in the execution of the agreement. This is the norm for privately financed projects. On a positive note, this has a serious bearing on competitiveness as local suppliers would be forced to match with international suppliers, which

[417] Section 3 (2) (a) and (b).
[418] Constitution of Zimbabwe 2013, s 327(2) (a)-(b).
[419] The IEEA was a controversial and ambitious empowerment law that compelled all businesses operating in Zimbabwe to cede fifty one percent (51%) of the company shareholdings to Zimbabwean citizens.
[420] The amendment was done through the Finance Act of 2018, Zimbabwean Government Gazette Extraordinary dated 14th March 2018.
[421] Golden Sibanda, 'Economy on the path to sustainable growth: Mthuli' *The Herald* (Harare, 06 October 2020) <https://www.herald.co.zw/economy-on-path-to-sustainable-growth-mthuli/>accessed 27 June 2017.
[422] Point 593 to the TRANSITIONAL STABILISATION PROGRAMME REFORMS AGENDA October 2018 – December 2020 "Towards a Prosperous & Empowered Upper Middle Income Society by 2030" 05 October 2018 Harare <https://zimbabwe.un.org/sites/default/files/2020-06/Transitional-Stabilisation-Programme-Final.pdf>accessed 25 December 2021.

usually offer high quality goods and services. The net effect is that it leads to attainment of efficiency, and ultimately the realisation of value for money. However, this paradigm runs counter to the use of public procurement for the attainment of socio-economic objectives such as growth of the local industrial base.[423]

Sadly, the PPDPA Act bestows the state President with quasi-legislative powers. The President is empowered to issue a proclamation designating certain procurement activities to be done outside the existing public procurement regulatory framework.[424] Such activities include defence and security procurement, and what the PPDPA Act describes as procurement undertaken with a view to safeguard national interests.[425] The conventional approach in many jurisdictions is to delicately balance the need for secrecy, and transparency and accountability in defence and security procurement.[426]

In terms of Statutory 56 of 2023, the president renamed the Sovereign Wealth Fund (SWF) to Mutapa Investment Fund (MIF).[427] The newly renamed entity shall be the holding company of more than twenty government owned companies. The president has gracefully exercised the powers contemplated in terms of section 3(6) of the PPDPA Act by exempting the MIF from complying with the PPDPA Act.[428] The president made the proclamation in terms of the Presidential Powers (Temporary Measures) Act of 1986.[429]

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[423] The case in point is where Chinese funded infrastructural projects (whether funded by the Government of China (mainland) or its state-owned corporations, for they are numerous) across the African continent, Zimbabwe included. Chinese investment has become a source of joy and at the time gener ated public resentment due to the huge Chinese expatriate community constituting part of the labour force at the exclusion of the natives. This infuriates the local business community since Chinese funded projects procure virtually all construction related material ranging from giant structural metalwork to meagre consumables such as nails from China. Consequentially, this negatively stifles the growth of the local industry.

[424] Section 3 (6).

[425] Such as construction works.

[426] Matthew Powell, 'Defence procurement in perspective: what the history of the aircraft industry can tell us about UK defence procurement' (2023) 39(1) *Defense & Security Analysis* 15–33 <https://doi.org/10.1080/14751798.2023.2159103> accessed 31 March 2022; Sue Arrowsmith, 'Rec ommendation for Urgent Procurement in the EU Directives and GPA: COVID-19 and Beyond' in Sue Arrowsmith, Luke RA Butler, Annamaria La Chimia and Christopher Yukins (*eds*) *Global Lessons From COVID-19 Pandemic* (Hart Publishing 2021)104.

[427] The statutory instrument was enacted accordance with the provisions of section 14(6) of the Sovereign Wealth Fund Act of Zimbabwe 7 of 2014.

[428] The president announced that seven more government controlled companies would fall under MIF through Statutory Instrument 51 of 2024.

[429] Section 2.

The term 'national interests' is a broad term which is subject to numerous interpretations by a wide array of political operatives who answer to conflictual political, socio-economic, defence and security persuasions. [430] The import of the above is the inherent danger that underhand procurement dealings can be pursued under the guise of furtherance of 'national interests'. And this would obviously lead to personal financial gains for those involved at the expense of the public that arduously labour under the heavy yoke of taxation.

The test for legality in the abovementioned presidential administrative determination is whether it would have been done in a reasonable and justifiable manner based on transparency in a democratic and open manner.[431] The test for the expression, 'reasonable and justifiable manner based on transparency in a democratic and open manner' will be provided by the courts when the invitation to do so arise. The oversight body, PRAZ, may exempt a public entity from complying with the PPDPA Act when executing certain procurement proceedings.[432] Such a procuring entity must state the justification for non-compliance and the notice for non-adherence must lie for inspection by interested parties.[433]

Sadly, it is observed that PRAZ is extensively clothed with legislative powers which might make it susceptible to political pressure given that the appointment of its board is a ministerial prerogative that further requires presidential assent.[434] This arrangement could be used by powerful political elites working in cahoots with huge and influential business corporations and individuals to form cartels to influence decision making at this vital national institution. The next segment examines the organisation of public procurement in Zimbabwe as informed by the relevant legislation.

[430] The online *Merriam-Webster* Dictionary, the term national interest means;
'the interest of a nation as a whole held to be an independent entity separate from the interests of subordinate areas or groups and also of other nations or supranational groups'.

[431] Preamble to the Constitution.

[432] The power conferred on the regulator to issue exemptions is regrettable. This position can create breed ing ground for corrupt activities.

[433] Section 3 (7).

[434] PPDPA Act 2017, s 8(1).

3.3. Governance of public procurement in Zimbabwe

3.3.1. *Introduction*

This segment outlines the institutional power wielded by the public procurement regulator, PRAZ. The legislative provisions explaining the professional conduct of public procurement practitioners will be also explained in this segment. The organisational architecture of a public procurement regulator requires that it be independent. This should be bolstered by a professional cadre within the rank and file of both PRAZ and the public entities. In summary, an inquiry into the regulatory functions of PRAZ will be made. What role and function does PRAZ play in the realisation of the constitutional foundations of public procurement law in Zimbabwe? Stated differently, is the organisational and regulatory function of PRAZ, as envisaged in the PPDPA Act, comprehensive and adequate to meet the expectations set out in s 315(1)? An interrogation of this question is provided hereunder.

3.3.2. *Public Procurement Regulator*

Given the extensive and far-reaching powers conferred upon PRAZ by the PPDPA Act, there is no doubt that it must be the pivot of an effective and efficient public procurement governance in Zimbabwe. Notably, PRAZ is extensively clothed with quasi-legislative authority.[435] Having regard to that, it is crucial therefore, to provide for a continuous mechanism to guarantee the financial, structural, and functional independence of PRAZ. This will capacitate it to recruit a highly competent and professional cadre to monitor public entities in order to fulfil the expectations of the PPDPA Act.

PRAZ has investigative powers on matters relating to the breaches of the PPDPA Act.[436] It exercises the sole discretion to appoint investigators whose authority carries the same weight as those of a commission of inquiry.[437] It is trite that PRAZ has immense statutory power in terms of the PPDPA Act. It can rescind an award of a contract citing previous and present violations of the procurement laws by a supplier.[438] Furthermore, PRAZ has the authority to issues circulars on eligibility criteria for domestic preferences.[439] Public

[435] Section 99 on debarment.
[436] Section 96.
[437] PPDPA Act 2017, s (2).
[438] Section 99.
[439] PPDPA (General) Regulations, SI 2018/5, reg 8.

entities are required to immediately notify the regulator on irregular public procurement activities executed in violation of the PPDPA Act.[440]

The mammoth legislative responsibility imposed on PRAZ, might lead to proliferation of subordinate or subsidiary legislation which leads to a disorganised public procurement system that negates the constitutional public procurement principles. It is observed that most of the powers vested in PRAZ to issue practice directions, policies and notes are unduly excessive in terms of the PPDPA Act. It is respectfully submitted that some of the issues must have been explicitly set out in the original legislation thereby consolidating public procurement legislation in Zimbabwe. Mindful of the fact that the stakes are high in public procurement, delegating the legislative role to the political authority in charge of administration of the PPDPA Act would not have been ideal either. Section 315(1) bestows the legislature with the revered duty of enacting public procurement legislation.

The PPDPA Act provides that funds may be appropriated by Parliament to PRAZ for the purpose of achieving its constitutive functions. [441] Notably, the wording of the foregoing is directory, implying that appropriation of funds to PRAZ is a ministerial discretion.[442] This then leaves PRAZ in a financially precarious position to effectively monitor public entities on compliance, among other numerous constitutive functions. Notwithstanding the weighty responsibility delegated to the public procurement regulator and the duty of ensuring compliance with the PPDPA Act squarely falls on accounting authorities.[443]

Regarding constitutional procurement requirement of efficiency and cost-effectiveness, accounting authorities owe fiduciary duties to the public entities by acting in their best interest.[444] These fiduciary duties extend to the manner in which accounting authorities

[440] Public Finance Management (General) Regulations, 2019/135, reg 25(4).
[441] PPDPA Act 2017, s 16 (1) (a) of the First Schedule.
[442] Section 305 of the Constitution. Whereas the PPDPA Act states that the appropriate of funds for govern ment expenditure is done by Parliament, in practice, it's the minister of finance who draws up consol idated statement from government ministries and agencies showing the estimated expenditure and rev enue for each preceding year. What Parliament does is to ratify this statement. This is understandably so due to the complexities of budget crafting process which presumably most members of Parliament would not have expected to comprehend and later on query.
[443] Public Finance Management Act 2009, s 41(2).
[444] PFMA 2009, s 42(1).

superintend over procurement activities to uphold integrity, honesty, and economic use of financial and material resources.[445]

Public officials are further directed to guard against riotous, irregular, unbefitting and unrewarding expenditure. [446] Stated differently, accounting authorities are forewarned against the temptations of public procurement criminal enterprise. By extrapolation, this means circumventing and violating the rules laid down in the PPDPA Act and related legislation for personal gain, hence forestalling the manifestation of an efficiency, transparency, and cost-effectiveness in public procurement system activities.

The framers of the Constitution envisaged a blissful and vivacious wellbeing for the citizens of Zimbabwe, spurred by strong public economic performance.[447] The dual function of public entities as consumers of goods and services and manufacturers and suppliers in Zimbabwe's public procurement supply chain is abundantly evident at both ends of the economic spectrum.[448] Cognisant of this, parliament enacted a comprehensive legislative framework for public entities on good corporate governance to ensure their profitability and continued survival.

The adoption of the Public Entities Corporate Governance Act 2018, (PECG Act) pursuant to section 194(1) of the Constitution heralded a new approach in the corporate governance landscape of public entities in Zimbabwe. The codification of good corporate governance norms, principles and rules articulated in the PECG Act further supplements the existing constitutive enactments for the individual public entities.[449] The PECG Act seeks *inter alia* to secure ethical and transparent governance of public entities to meet constitutional aspirations and fulfil national development goals. [450] In order to promote and inspire corporate transparency, it is a requirement that public entities formulate ethics

[445] ibid; PFMA 2009, s 44 (a) (i) and (b) (iii).
[446] PFMA 2009, s 44(1).
[447] Section 8(1).
[448] Public enterprises contribute a significant portion to the GDP in various sectors of the economy such as electricity generation and distribution, water treatment and reticulation, telecommunications and in formation communication technology, manufacturing, mining to mention a few.
[449] State owned entities and corporations are creatures of statute.
[450] These are articulated in terms of sub-section 3 of section 9 of the Constitution namely financial integrity and probity, personal integrity, transparency, accountability, competency, efficiency, honesty, and ef ficiency.

code and board charters.[451] The ethics and board charters are to be underpinned by constitutional governance tenets echoed in terms of section 194 (1).

Public entities are required to institute functional boards and subcommittees focusing on the financial, risk and audit facets of the corporations.[452] This resonates with the constitutional injunction for fiscal prudence in state corporations.[453] The boards of public entities are subordinate to the appointing authority, which is the line cabinet minister (with the concurrence of the president) under which the entity falls.[454] The size and the qualifications of the members of the boards varies. However, the persons must possess adequate experience and knowledge in their area of expertise.[455] The functions of the board is to provide direction to an entity in accordance with the enabling instrument governing each individual entity.[456]

The head of an entity, whose is the accounting officer and his or her management team is supervised by the board.[457] As the supreme decision-making organs, corporate boards are enjoined to formulate policies to inspire sustained commercial viability through audits to weed out fraud, corruption, unethical behaviour, and other financial improprieties.[458] On the face of it, there is a gamut of legislation to guarantee successful operation of government controlled entities for sustainable development and in conformity with the constitutional imperatives.

It would follow therefore that if the legislative provisions are religiously adhered to, incidences of financial mishaps relating to public procurement corruption and inefficiencies can be curtained. In the presence of functional policies, actual and perceived forms of public procurement corruption can be investigated while potential loopholes can be identified, and appropriate remedial actions taken. Essentially, the foregoing legislation on corporate governance sets clear legal parameters to guard against corporate failures

451 PECG Act 2018, s 16(2) (a)-(b).
452 Part V of the Public Entities Corporate Governance (General) Regulations, 2018 enacted through Stat utory Instrument 168 of 2108.
453 Section 308.
454 PECG Act, s 11.
455 PECG Act, s 11(6).
456 PECG Act, s 2.
457 PECG Act; PFMA, s 11.
458 Section 227(d) of the National Code on Corporate Governance Zimbabwe inserted as the *First Schedule* to the PECG Act; PFMA 2009, s 84.

which are detrimental to the national economy and delegitimise the whole public procurement ecosystem.[459]

Is the enactment of public procurement and corporate governance laws, the panacea for public sector turnaround in Zimbabwe? The lingering question has always been, why do public entities that receives so much financial support from government and wield immense monopolistic power across the wide spectrum of the national economy have nothing to show for it? One hopes the era of corporate failures for government controlled entities is over in Zimbabwe.

Alive to the potential unethical pressure exerted on heads of public entities in procurement activities by higher ranked public officials, such as cabinet ministers, the legislator inserted a provision to insulate the heads of state-owned entities from criminal liability, and moral blameworthiness.[460] This provision permits heads of state-owned entities to meekly submit to political directives from higher ranked public officials despite the unlawfulness of such an instruction.[461] The effect of the foregoing is colossal. To begin with, this provision essentially means that public officials can raise the defence of duress by awarding tenders to undeserving suppliers. This would obviously lead to violation of the principles of fairness, honesty, and transparency and cost-effectiveness.

The PPDPA Act then shields heads of state-owned entities from criminal prosecution by instructing them to provide a written report to a long list of higher ranked government officials in the state bureaucracy.[462] Evidently, the provisions permitting public officials to follow questionable and unlawful directives that are at variance with the tenets of good governance propounded in the Constitution. This is quite telling in that it points to tacit acceptance of criminal behaviour which is innocuous to the governance of public entities and parastatals. Public entities are at the core in the provision of critical infrastructure,

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459 The *Enron Debacle* epitomized poor corporate governance failures in companies at the dawn of the 21st century in America. To curtail future corporate governance scandals, Congress passed the Sarbanes-Oxley Act which among other sought to delineate taxation and auditing functions for auditing and taxation consulting services thereby improving corporate governance aspects.

460 PPDPA Act 2017, s 16; Public Entities Corporate Governance (General) Regulations, SI 2018/168, reg 23.

461 ibid.

462 Section 16 (2). The officials are Minister responsible for administrating the PPDPA Act, Auditor-General, Accountant-General, Minister in which the public entity falls and the Chief Secretary to the Cabinet.

such as water, transportation, electricity, and telecommunications, their (public entities) maladministration have significant social and economic ramifications for the entire economy.

In a nation with legally ascertainable outcomes, and further reinforced by the strong desire to root out unethical conduct among public officials, upon receipt of an unlawful directive contemplated above, heads of public officials are to report such a case to the police, thereby initiating prosecution proceedings against the issuer of the directive. This would nip corruption in the bud. Suffice to say that the continued presence of the afore-stated provision in the PPDPA Act promotes illegal actions in public procurement activities and violates the Constitution.

It is saddening to note that the PPDPA Act does not have a penal provision for a superior who issues an unlawful directive to the lower tier public official, despite the wording of section 16 signifying the unlawfulness of the directive. Considering the above, the fundamental question is whether the tender awarded by a public entity pursuant to a manifestly illegal order is valid? It is extremely doubtful if the tender would be valid. The courts, will, in due course, provide an answer, once the afore-stated provision is subjected to judicial scrutiny. It is respectfully submitted that this provision should be deleted from the two statutes, and substituted with a provision that empowers public official from disobeying a manifestly unlawful order or directive. The evisceration of this controversial provision in the abovementioned statutes will go a long way in entrenching the rule of law and establishing a public procurement regulatory framework desired by the Constitution.

In formulating an opinion on the above legal question, the Zimbabwean courts, might possibly, delve into the South African legal repository in search for juridically reasoned findings.[463] Indeed, since the advent of democracy in 1994,[464] and even way before that, South African courts have been an arena of public procurement litigation. The South

[463] When interpreting the constitutional provisions, Zimbabwean judicial officers have the professional latitude to consider foreign law in terms of section 46(1) (e) of the Constitution.

[464] *South African Post Office v De Lacy* 2009(5) SA 255 (SCA) at [1]. Nugent JA mentioned that public procurement litigation was common occurrence in South Africa.

African Constitution Court held that a tender awarded in violation of constitutional principles is invalid.[465]

3.3.3. *Ethical Standards for Practitioners*

As noted in the previous paragraph, PRAZ is mandated with the training and professional development of public procurement practitioners. Bolton submits that the training and professionalisation of the discipline of procurement should take centre stage, as this has a potential to enhance efficiency and cost-effectiveness in a procurement system.[466] Procurement officers are required to uphold the code of conduct for procurement officers, which among other things underscores the need for recusal in circumstances where conflict of interest might be inevitable;[467] forbids procurement officers from colluding with bidders involved in competitive bidding;[468] and the disclosure of interest when need arises.[469] The Revised Model Law clearly articulates the importance of instituting a code of conduct to regulate the behaviour of public procurement practitioners.[470] The code has to address matters pertaining to conflict of interest, and training needs among others.[471]

With regard to ethical standards, procurement officers are to further conduct themselves with integrity and fairness,[472] be responsive,[473] serve public interest,[474] be accountable and transparent,[475] endeavour to serve legitimate purpose of government,[476] and be discerning on whether or not to accept gifts.[477] In a nutshell, procurement officers, as public officials, are obliged to abide by the basic principles constituting the cornerstones of public administration that are cited in section 194 of the Constitution.[478]

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465 *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (No 2) [2014] ZACC 12 para 78.
466 Phoebe Bolton 'Public Procurement as a Tool to Drive Innovation in South Africa' PER / PELJ (no 315) 27.
467 PPDPA Act 2017, s 71(2) (b).
468 PPDPA Act 2017, s 71(2) (c).
469 ibid.
470 art 26.
471 ibid.
472 PPDPA (General) Regulations, SI 2018/5, reg 6 and 7.
473 ibid.
474 ibid.
475 PPDPA (General) Regulations, SI 2018/5, reg 5.
476 PPDPA (General) Regulations, SI 2018/5, reg 7.
477 PPDPA (General) Regulations, SI 2018/5, reg 11.
478 PPDPA (General) Regulations, SI 2018/5, reg 4 (2).

3.4. *Public Procurement Cycle*

3.4.1. *Introduction*

This part of the study examines the procurement stages identifiable in the PPDPA Act. Recalling that competitive bidding is the method of choice in the PPDPA Act, it will be given much emphasis. In a nutshell, this segment provides a didactical analysis of the procurement cycle against the constitutional standard for public procurement. This will entail juxtaposing the cycle to constitutional principles underpinning public procurement.

3.4.2. *Identification of Procurement Requirement*

As noted, Zimbabwe has a partially centralised public procurement regime. The accounting officer is vested with the powers of making procurement decisions. [479] Public entities have the latitude to identify their own procurement requirements and complete the procurement processes culminating in the award of the contract with the proviso that the costs of procurement fall within prescribed limits.[480] In other words, accounting officers are required to constitute a Procurement Management Unit (PMU), manage procurement activities and determine its structure, location, and size.[481]

It is observed that PMUs are functionally and administratively answerable to the accounting officer, and from a regulatory perspective, to PRAZ.[482] The legislator foresaw that there could be public entities whose size do not justify having standalone PMUs.[483] The procurement activities of such entities are handled by the parent body or ministry, or another public entity can do so, subject to practice directions issued by PRAZ.[484]

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[479] PPDPA Act 2017, sections 17(1).

[480] PPDPA Act 2017, sections 14(1) (a) - (b) and 15(1) - (2).

[481] PPDPA Act 2017, sections 17(2). In terms of section 17(3) of PPDPA Act, PMUs have a sacrosanct responsibility of operationalising this Act. Their responsibilities include, but, not limited to, planning of procurement activities; selection of appropriate procurement method; preparation of bids, evaluation criteria and contractual specifications as required by the PPDPA Act; crafting of bids notices and shortlists; managing upstream activities of the procurement cycle such as pre-bid meetings, receiving of reports from evaluation committees; production and filing of reports to PRAZ, issuance of memo randums of clarifications; management of evaluation of offers from bidders and any post-qualification negotiations; drafting of contract documents and amendments and management of contracts.

[482] PPDPA Act 2017, s 17(2) (l).

[483] PPDPA Act 2017, s 17(4).

[484] PPDPA Act 2017, s 17(4) (a)-(b).

In the latter case, the accounting authority has the onerous responsibility of ascertaining the availability of funds budgeted for that purpose from instructing entity before the commencement of procurement activities.[485] This arrangement is laudable since this saves small public entities from incurring unnecessary labour costs to employ personnel to man PMUs, and administrative costs associated with procurement activities. The conferment of procurement prerogatives to heads of public entities is indeed compliant with constitutional dictates on good governance by ceding power from centrally controlled bureaucratic structures.[486]

3.4.3. Evaluation of Bids

The evaluation of bids is done by committees constituted of persons with requisite knowledge and skill in matters pertaining to procurement, legal and the field of finance.[487] The rationale for skills-mix evaluation committees is a necessity, noting that the field of public procurement is quite complex and incorporating a number of disciplines, such as finance, law, and strategic planning.[488] Bids valued below the prescribed thresholds do not require scrutiny by evaluation committees.[489] Presumably, this is so to reduce bureaucratic hurdles in administrative processes, leading to inefficiencies and bottlenecks.

To secure the integrity of the process, a member of the evaluation committees seconded from the entity's PMU is prohibited from casting a vote on matters under deliberation before the committee.[490] Perhaps the rationale for this is to ensure an objective assessment of bids by a panel that is not exposed to routine operations of an entity's procurement activities. The functions of the evaluation committees are to receive and scrutinise the bid opening record;[491] evaluate offers from suppliers and recommend to award tender and transmit the record to the PMU;[492] and execution of other ancillary functions pursuant to the fulfilment of the PPDPA Act.[493]

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485 PPDPA Act 2017, s 17(5).
486 Constitution of Zimbabwe, s 9.
487 PPDPA Act 2017, s 18(2) (a) and (b) (iii).
488 Khi V Thai 'An Introduction' in KV Thai (ed), *Global Public Procurement Theories and Practices, Public Administration, Governance and Globalization* (Springer International Publishing, 2017) 1.
489 Section 18 (1).
490 PPDPA Act 2017, s 18(3).
491 PPDPA Act 2017, s 18(4) (a).
492 PPDPA Act 2017, s 18(4) (b).
493 Section 18 (4) (d).

Evaluation committees are accountable to the accounting officer.[494] Invariably, an aggrieved party has a right of audience with a competent court seeking an order for the annulment of proceedings on the basis of subsequent introduction of a different evaluation criterion from the one initially disclosed. The need to publicise the evaluation criteria as envisaged in the PPDPA Act is indeed in conformity with constitutional principles on transparency and fairness.

The PPDPA Act has a slightly different approach in the selection and evaluation of bids for consultancy services. Put simply, the Act has numerous ways of evaluating bids as compared to the procurement of goods. Firstly, the PPDPA Act has a provision for the use of quality and cost-based selection method. This entails relative weightings being determined for quality and cost.[495] In evaluating the bids, the PPDPA Act instructs the evaluating committee to consider the experience of the consultant;[496] the way in which the service is to be provided, and whether execution process will result in the transfer of knowledge and skill;[497] the experience and qualifications of key personnel;[498] and any other criteria which may be set out in the rules.[499]

Additionally, the PPDPA Act employs a method called the fixed budget method.[500] In this method, government-controlled entities are first required to take cognisant of the quality of the services, while ignoring the price indicated in the offer.[501] Thereafter, the prices will be taken into consideration with prices above the budget rejected.[502]

Furthermore, a bid with the highest ranked score on quality will be selected.[503] Notably, procuring entities are obliged to disclose the budget earmarked for financing the procurement requirement in expression of interest notice and instruct prospective suppliers to

494 Section 18(5).
495 Section 60 (1).
496 Section 60 (3) (a).
497 Section 60 (3) (b).
498 Section 60 (3) (c).
499 Section 60 (3) (d).
500 Section 61 (1).
501 Section 60 (1) (a).
502 Section 60 (3) (b).
503 Section 60 (1) (c).

provide separate envelopes for financial and technical proposals.[504] Arguably, the foregoing provision is a way of making public procurement transparent as dictated by the Constitution and give effect to one of the purposes for the enactment of the PPDPA Act.

Another point is that the least-cost method entails the determination of minimum quality standards by the government-controlled entity, with bids below the set mark being rejected on evaluation.[505] Lowly priced bids must be selected.[506] As is the case with the fixed budget method, entities are required to state the least possible quality standards in the request for proposals and instruct prospective bidders to lodge two separate proposals for the financial and technical aspects.[507] From the above, it's clear that the PPDPA Act strives to achieve value for money. Finally, the quality-based method is dovetailed to enable procuring entities to initially identify and select superior technical offers, and thereafter, commence negotiation on the price, with the goal of achieving value for money. [508]

3.4.4. Contract Award and Debriefing

The PPDPA Act provides that a contract may be awarded to the least priced bid that meets the financial specifications, or most economically advantageous bid, pursuant to what would have been set out in the bid documents.[509] Contract execution between a contracting entity and the successful bidder is subject to a suspensive condition for a fourteen (14) day period within which an intervening challenge may be instituted by other bidders citing procedural and substantive irregularities.[510] In other words, particulars of the successful bidder and contract price are to be communicated to unsuccessful bidders in the spirit of transparency and openness.[511]

The standstill period provides discontented bidder(s) with a window of opportunity for equity and justice to prevail. This legitimises the competitiveness of the public procure-

[504] Section 60 (2).
[505] Section 62 (2) (a).
[506] Section 62 (2) (b).
[507] Section 60 (2).
[508] Section 63.
[509] Section 55 (1) (a) and (b).
[510] Section 55 (2) (a).
[511] Section 55 (2) (b).

ment framework. Therefore, this evidently attest to the transparency, fairness and openness of the public procurement legal framework. In a way, the constitutional standard for the abovementioned principles is met.

3.4. *Public Procurement Methods*

3.4.1. *Introduction*

As mentioned before, the PPDPA Act applies to government contracting. Its application is restricted to the procurement of goods and services, construction works and infrastructure.[512] Competitive bidding is the default public procurement method for government contracting in Zimbabwe.[513]Open tendering or competitive bidding must be deliberately structured in such a way that it promotes transparency, competition, and advertises government contracting opportunities to all prospective suppliers striving towards meeting public procurement objectives.[514] The PPDPA Act, however, has a provision for state owned entities to procure through restricted bidding method;[515] direct procurement;[516] request for quotation method;[517] and request for proposals in the case of consultancy services.[518]

The discretionary latitude conferred on public officials by the PPDPA Act to select the appropriate procurement route is delightedly welcomed. The pluses and minuses of various procurement methods, are that each method must be appropriate and suitable in the circumstances as determined by the cost savings, and urgency considerations and complexities involved.[519] It is needful to briefly examine the afore-stated procurement methods as they constitute some of the variables to be calibrated against the procurement principles mentioned in section 315(1) as read in conjunction with section 195(2) of the Constitution. Furthermore, competition is guaranteed in that the PPDPA Act forbids procuring entities from imposing admissibility criteria for suppliers to participate in procurement activities.[520]

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512 Section 2.
513 PPDPA Act 2017, s 30(1).
514 Arrowsmith, 'Electronic Procurement and Reverse Auctions' in Sue Arrowsmith (ed), *Public Procure ment Regulation: An Introduction* (no 254) 34.
515 Section 30 (1) (a).
516 Section 30 (1) (b).
517 Section 30 (1) (c).
518 Section 30 (1) (d).
519 Arrowsmith, 'Electronic Procurement and Reverse Auctions' in Sue Arrowsmith (ed), *Public Procurement Regulation: An Introduction* (no 55) 36.
520 Section 28 (3).

3.4.2. *Competitive Bidding or Open Tendering*

Competitive bidding entails soliciting for bids in conformity with the set criteria of eligible and qualified bidders.[521] The PPDPA Act has a provision for the use of expression of interest method as an alternative to competitive bidding in consulting for services for costs beyond the prescribed amounts.[522] The principal advantage of the competitive bidding method over other procurement methods is that it is best suited to achieve procurement goals such as transparency, openness, and competition.[523]

It is a legal requirement that tender notices documents be published by procuring entities spelling out clearly the following;

a. The identity and principal address of business for the procuring entity whereto further information can be sought;[524]
b. The procurement requirement and envisaged exact location of delivery of goods and services, and site of any construction works, and the actual time (s) within which the procurement requirement is needed;[525]
c. The manner in which solicitation documents are obtainable, the monies payable thereon, if any[526] and the site and the time within which bids or applications to prequalify are to be submitted.[527]
d. For high value or complex procurement requirements, public entities can con duct prequalification of bidders with a view to identify prospective bidders be fore the commencement of submission of bids.[528]

The principle behind prequalification of suppliers is to assess the financial and technical capabilities of prospective contractors. The invitation notice for bids must be published in the *Government Gazette* and a national newspaper of wide enough circulation to reach

[521] Section 31 (1) (b) and (c).
[522] Section 58. In the case of services costing less than the prescribed values, government-controlled entities are permitted to use the request for proposal method. As dictated by the provisions of section 58(3)(a) of PPDPA Act, it's a requirement that the notice inviting for expression of interest be published in an appropriate publication or over the internet to stimulate as much potential interest from prospec tive suitors as such as possible.
[523] Justin Laing, 'Deviations and (In)discretions in the Governance of South African Public Entities' Nyeck Sebille Ngo (ed), *Public Procurement Reform and Governance in Africa Contemporary African Political Economy* (Palgrave Macmillan 2016) 141.
[524] PPDPA Act 2017, s 38(1) (a).
[525] PPDPA Act 2017, s 38(1) (b).
[526] PPDPA Act 2017, s 38(1) (c).
[527] PPDPA Act 2017, s 38(1) (d).
[528] PPDPA Act 2017, s 33(3).

enough bidders to secure real competition.[529] It is an additional requirement that the notice be broadcasted over telecast and radio. [530] The tender notice can also be posted online in accordance with the guidelines issued by PRAZ.[531]

A further requirement for international procurement is that the procurement notice has to be published in at least two publications with editorial content focusing on international trade with extensive circulation or other broadcasting networks;[532] advertised online;[533] or made available at the Zimbabwean consular and diplomatic missions.[534] The rationale behind this multifaceted propagation mechanism is to attract as many international suppliers as possible to the bidding process. To guarantee competition, the procurement notice can also be transmitted to professional bodies, sectorial and trade federations, as well as to would-be bidders where application to prequalify is anticipated.[535]

3.4.3. *Restricted Bidding*

The Restricted Bidding Method entails the participation to procurement activities by suppliers at the discretion of public entities.[536] It is mandatory that public entities maintain lists of qualified suppliers[537] from which invitation for bids can be made for the purposes of restricted bidding.[538] To justify the use of the restricted method, public officials must reach an objective conclusion that there is a disproportionate relationship between the time required to consider a substantially high number of bids and the procurement requirement;[539] or the existence of urgency, not attributable to the procuring entity to make it impossible to invite suppliers to offer bids within the prescribed bidding periods.[540]

[529] PPDPA Act 2017, s 38(2) (a).
[530] PPDPA Act 2017, section 38(2) (a) -(c).
[531] ibid.
[532] PPDPA Act 2017, s 38(3) (a).
[533] PPDPA Act 2017, s 38(3) (b).
[534] PPDPA Act 2017, s 38(3) (c).
[535] PPDPA Act 2017, s 38(4).
[536] PPDPA Act 2017, s 32(1).
[537] These must have registered with PRAZ under different categories of supplies and duly complied with tax obligations.
[538] PPDPA Act 2017, s 2(2) (a).
[539] PPDPA Act 2017, s 32(2) (a).
[540] PPDPA Act 2017, s 32(2) (b).

The use of the restricted method is limited to a procurement requirement which does not exceed monetary thresholds.[541] The draw backs of this procurement route in that it unduly impedes competition and transparency. Potentially, this negates the attainment of value for money through the exclusion of prospective bidders as few economic operators (bidders) are initially identified for the eventual awarding of the contract.

The PPDPA Act permits public entities to contract with a single contractor without the need of receiving bids from other bidders.[542] In parlance, this is called procuring via the direct procurement method. For contracting authorities to resort to the direct procurement method, certain conditions must be prevailing. This is where non-responsive bids[543] would have been received pursuant to a tender notice, subject to a caveat forbidding procuring entities from altering the specifications of the initial requirement;[544] or, for the safeguarding of intellectual rights of a supplier or technical reasons it would be impracticable to identify and enlist an alternative supplier; [545] and in case of urgency with *culpa* not imputable to the public entity.[546]

3.4.4. Direct Procurement Method

Direct procurement is justifiable under strict prescribed circumstances.[547] These are out set out hereunder.

a. for the procurement of for auxiliary supply of goods, where a change of contractor can cause interoperability difficulties or leads to compatibility problems leading to incurrence of unforeseen additional costs;[548]
b. where a procurement requirement would have been developed as a result of strategic procurement; [549]
c. where a procuring entity requires additional services though not beyond the ambit of the initial contract, but, the service is crucial to achieve original objective, and due to unforeseen circumstances it would have become a necessity to have the

[541] PPDPA Act 2017, s 32(2) (c).
[542] Section 33(1).
[543] Section 2 of PPDPA Act 2017, qualifies a bid as responsive if it meets the requirement of the entity.
[544] PPDPA Act 2017, s 33(2) (a).
[545] Section 33(2) (b).
[546] Section 33(2) (c).
[547] The definition of direct procurement is set out in section 33 of PPDPA Act as –
'*…method of procurement in which e a procuring entity procures its requirement from one bidder or supplier without having received bids from other bidders'*.
[548] Section 33(2) (d).
[549] Section 33(2) (e).

service completed, subject to the proviso that the additional service does not surpass fifty (50) per cent of the original contract.[550]

Furthermore, direct procurement is allowable in terms of the PPDPA Act in respect of new procurement requirements (for services) that repeat similar services provided under a procurement contract awarded following the competitive bidding method of procurement. A procuring entity must indicate in the original procurement notice that a direct procurement method might be used in awarding contracts for such new services;[551] for acquisitions made under extremely favourable conditions from rare disposals such as legal forfeitures, liquidation, insolvency, judicial sale in execution, or other legally permissible disposals; [552] for acquisitions of spare parts of proprietary nature;[553] and the purchase of immovable property.[554] Arguably, direct procurement is acceptable in the circumstances contemplated by the foregoing provisions. Direct procurement is permissible as long as it strives to meet one or more constitutional principles underpinning public procurement.

Public entities can also resort to direct procurement when purchasing immovable property. Public entities seeking to acquire immovable property can only do so, upon two independent evaluations for the property earmarked for the purchase and an additional evaluation by the Ministry of Public Works.[555] It is submitted that this is possibly done to mitigate against the fixing of unreasonably high purchase price for corrupt gains by public officials working in concert with suppliers. Hence, a provision for three evaluations is meant to create certainty in the mind of a reasonable person that the value for money principle would be realised and fosters transparency and integrity of the process.

Direct procurement must be conducted in accordance with document[556] prepared by the procuring entity setting out the specifications, quantity, terms, and delivery [557]and validity period for bids which must be sixty days at minimum.[558] The PPDPA Regulations

[550] Section 33(2) (f).
[551] Section 33(2) (g).
[552] Section 33(2) (h).
[553] Section 33(2) (j).
[554] Section 33(2) (i).
[555] PPDPA (General) Regulations, SI 2018/5, reg 16(2).
[556] PPDPA (General) Regulations, SI 2018/5, reg 16(1) (a).
[557] PPDPA (General) Regulations, SI 2018/5, reg 16(1) (a) (i).
[558] PPDPA (General) Regulations, SI 2018/5, reg 16(1) (a) (ii).

(General) clearly states that procurement entities, where practicable, should allow a contractor to prepare a bid where direct procurement method would have been identified as the appropriate procurement route.[559]

3.4.5. *Request for Quotations Method*

The PPDPA Act vests public entities with the powers to solicit for competitive quotations from at least a minimum of three established suppliers that meet the specifications for the procurement requirement subject to the contract price being below the threshold levels.[560] Procurement requirements above the prescribed thresholds must be for tender. There is legislative command on public entities to solicit for quotations by a way of advertising, publication of notice on boards or electronic means.[561] This should be done on template documents issued by PRAZ for standardisation purposes.[562]

Arrowsmith opined that a procurement method such as the request for quotations is perfect for procurement of goods and services of low value and such that the cost of embarking on a tender process would be expensive.[563] In view of the foregoing opinion, it is submitted that numerous procurement methods are meant to promote cost-effectiveness as informed by varying circumstances. Intrinsically, the Zimbabwean public procurement regulatory framework strives to employ a wide array of procurement methods to give effect to the constitutional principle of cost-effectiveness.

When requesting for quotations, public entities are enjoined to make written requests to prospective suppliers setting out the procurement requirement(s) indicating clearly the quantity, quality, terms and place of delivery and any other matters incidental thereto;[564] the quotations must state the bid validity period of at least thirty days.[565] Suppliers are to prepare and submit quotations within three days of receipt of the written request [566] and are not permitted to alter the quotations.[567] At the end of the bidding period, the sealed

[559] PPDPA (General) Regulations, SI 2018/5, reg 16(1) (b).
[560] PPDPA Act, s 34(1).
[561] PPDPA (General) Regulations, SI 2018/5, reg 17(1) (b).
[562] ibid.
[563] Arrowsmith *EU-Asia Link* 42.
[564] PPDPA (General) Regulations, SI 2018/5, reg 17(2) (a) (i).
[565] PPDPA (General) Regulations, SI 2018/5, reg 17(2) (a) (ii).
[566] PPDPA (General) Regulations, SI 2018/5, reg 17(2) (b).
[567] PPDPA (General) Regulations, SI 2018/5, reg 17(2) (c).

quotations will then be opened from the tender box by a person designated by the accounting authority for that purpose.[568]

A print out of electronic quotations needs to be done and the hard copies be dropped into the tender box pending retrieval on the expiry of the bidding period.[569] Notably, this provision shows that Zimbabwean public procurement processes have not fully embraced e-procurement in its fullest dimension. At the effluxion of the bidding period, the contents of the tender box are emptied, signed and stamped, with the next stage being tender opening.[570] Public entities are directed to select the bidder with the lowest priced quotation whose bid meets the procurement requirement in relation to delivery and matters connected therewith.[571] Surprisingly, this provision fails to appreciate the whole life cost associated with a procurement requirement that could render it expensive in the long term.

In concluding this segment, the Zimbabwean public procurement regulatory framework has multidimensional procurement paths to cater for varying degrees of circumstances. Notably, competitive bidding remains the first-choice method for public procurement. This is commendable in that this method best attempts to give effect to the constitutional principles set out in sub-section 1 of section 315. Direct procurement method can only be resorted to as prescribed in the legislation such as in the event of extreme urgency and epidemics as was the situation when nations were grappling with the global pandemic, COVID 19. The restrictions placed on government-controlled entities to use the direct procurement method in limited circumstances is gladly welcome in view of inherent susceptibility of this method to corruption.

3.5. *Review*

3.5.1. *Administrative Rights*

It is a universally accepted legal principle that public procurement decisions constitute an administrative action.[572] This has far-reaching consequence, bearing in mind the sig-

[568] PPDPA (General) Regulations, SI 2018/5, reg 17(2) (d).
[569] ibid.
[570] PPDPA (General) Regulations, SI 2018/5, reg 17 (2) (e).
[571] PPDPA (General) Regulations, SI 2018/5, reg 17 (2) (f).
[572] Hoexter Cora and Penford Glenn Administrative Law in South Africa (3rd Edn., Juta 2021) 51; Elis abetta Morlino *Procurement by International Organisations* A Global Administrative Law Perspective

nificance attached to transparency, reasonableness and accountability in public administrative acts.[573] As previously stated, the right to administrative justice is constitutionally entrenched.[574] A situation analysis of the right to administrative action needs to be discussed in the context of public procurement. A brief discussion of the Administrative Justice Act of 2004 is pertinent therefore. Arising from this constitutional and legislative requirement is that certain stages of the procurement cycle[575] must uphold the right to administrative justice.[576] According to the Administrative Justice Act, an administrative action is defined as follows:[577]

> any action taken or decision made by an administrative authority, and the words "act", "acting" and "actions" shall be construed and applied accordingly; "administrative authority" means any person who is—
>
> (a) an officer, employee, member, committee, council, or board of the State or a local authority or parastatal; or
>
> (b) a committee or board appointed by or in terms of any enactment; or
>
> (c) a Minister or Deputy Minister of the State; or
>
> (d) any other person or body authorised by any enactment to exercise or perform any administrative power or duty; and who has the lawful authority to carry out the administrative action concerned; "empowering provision" means a written law or rule of common law, or an agreement, instrument or other document in terms of which any administrative action is taken;

Pursuant to the tenets of good governance, an administrative authority is enjoined to make an administrative decision that is lawful, reasonable, and fair.[578] Therefore, a natural or juristic person aggrieved with the administrative decision, made in accordance with the applicable procurement laws, must be furnished with written reasons.[579]

3.5.2. *Right to Challenge Proceedings*

The right to challenge public procurement proceedings is an integral part of ensuring that

(Cambridge University Press, UK 2019)2.

[573] Elisabetta Morlino *Procurement by International Organisations* A Global Administrative Law Per spective (Cambridge University Press 2019)12.

[574] Constitution of Zimbabwe, s 68.

[575] Such as invitation for bids, bid evaluation and award of the tender.

[576] Laing Deviations and (In)discretions in the Governance of South African Public Entities in Nyeck S N (*ed*) *Public Procurement Reform and Governance in Africa Contemporary African Political Economy* (n 526) 158.

[577] Section 2 (1) of the Administrative Justice Act 2004.

[578] Administrative Justice Act 2004, s 3 (1) (a).

[579] Section 3(1) (1) (c) of Administrative Justice Act.

the procurement activities are conducted in a fair and transparent atmosphere.[580] The PPDPA Act has provision to challenge proceedings if a bidder alleges that public pro curement proceedings were in breach of the law, and that the supplier is likely to suffer, or has actually incurred a loss.[581] Such a bidder is required to submit a written complaint to the procuring entity.[582]

To cure the defect alleged by a bidder, the procuring entity may take remedial actions in the form of concessions and other material actions to ameliorate the breach. Admittedly, this is a laudable approach to ensure that disputes in public procurement processes are resolved amicably without recourse to the courts. The foregoing bears the hallmarks of alternative dispute resolution (ADR). Litigation is a dispute resolution pathway that is extremely lengthy, cumbersome and financially burdensome.

The use of ADR in resolving public procurement disputes has gained international recognition due to expeditious resolution of disputes as opposed to the unpleasant nature of litigation.[583] However, as the African Procurement Law Unit (APLU) opined that the independence of the public procurement regulator is crucial if disputants and stakeholders are to have confidence in ADR facilitated by it. [584] By the same token, once PRAZ is perceived as government controlled, the outcome of its alternative dispute mechanism will be the object of ridicule and litigation will be the default grievance settlement mechanism.[585] As the adage goes, justice must be done and seen to be done, the public procurement governance architecture must endeavour to be procedurally and substantively fair.

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[580] This position is tandem with the provisions of Art 9(1)(d) of the United Nations Convention against Corruption (UNCAC) enjoining member states to institute effective and functional domestic review mechanisms in their public procurement regimes.

[581] PPDPA Act 2017, s 73(1).

[582] ibid.

[583] John R Miller, 'Alternative Dispute Resolution (ADR): A Public Procurement Best Practice that has Global Application' (2003) *International Public Procurement Proceedings: 654*.

[584] APLU Comments on the South Africa Draft Public Procurement Bill 2020: *4* http://africanprocurement law.org/wp-content/uploads/2020/06/APLU-Submissions-on-the-Draft-Public-Procurement-Bill-2020- South-Africa-Final.pdf. APLU is multi-institutional research housed within the Faculties of Law at the universities of Stellenbosch and University of South Africa. Its thrust is on public procure ment within the African context. Researchers affiliated with APLU are drawn from academic institutions across the continent of Africa.

[585] ibid.

3.5.3. *Judicial Review*

The dispute resolution pathway for parties to public procurement proceedings is multi-layered. It has statutory safeguards to ensure fairness, while in the process promoting the right to administrative justice. The provision for the adoption of alternative dispute resolution mechanisms is delightedly welcome given that it is quiet and not acrimonious in nature. As noted in this chapter, the legitimacy of PRAZ facilitated disputes will largely depend on its functional independence from the government as the stockholder across all public procurement activities.

It is trite that public procurement decisions fall within the administrative law domain. The courts have without number underscored the importance of administrative law in the post 2013 legal order.[586] Concerning the exercise of public power *Mathonsi* J (as he was then) had this to say:[587]

'Administrative law provides the skeletal infrastructure within which all manner of public power affecting individuals must be exercised (rephrased)'

Lawfulness, reasonableness and procedural fairness are the basis for instituting judicial review in public procurement procedures.[588] Resultantly, public procurement disputes are likely to find their way before the Administrative Court.[589] The Administrative Court has jurisdictional powers to entertain an appeal from the review panel. [590] The Administrative Court can award patrimonial damages to the aggrieved party in public procurement proceedings as guided by equity and justice.[591]

In the *Oswell Security* case, the Administrative Court invalided a tender awarded under the Procurement Act, predecessor to PPDPA Act.[592] The tender had been awarded to a

[586] *Gondora & Anor v ZIMSEC* (HH 438 of 2019, HC 2833 of 2018, REF SC 779 of 2018); *Paridzira v Minister of Lands & Rural Settlement & Anor* (HC 14094 of 2012) [2015].

[587] *Telecel Zimbabwe (Pvt) Ltd v POTRAZ & Ors* (HC 3975 of 2015).

[588] *Telecel Zimbabwe (Pvt) Ltd v POTRAZ & Ors* (HC 3975 of 2015); Phoebe Bolton, 'Public Procurement in South African: Main Characteristics Public Contract Law' Journal Vol 37 No 4 Summer 2008 781-802 (802) <https://0-www-jstor-org.oasis.unisa.ac.za/stable/pdf/25755688.pdf?refreqid=excelior%3Af54dfc410431b80a3dd3386ccf93c3de> accessed 10 January 2022.

[589] The Administrative Court is a constitutional creature of similar status with the High Court borne out of the provisions of section 173 of the Constitution.

[590] PPDPA Act 2017, s 77(1).

[591] PPDPA Act 2017, s 77(2).

[592] *Oswell Security (Pvt) Ltd v State Procurement Board and Others* Case No. P100/11.

supplier with an irresponsive bid. It is submitted that a party aggrieved with an administrative decision pursuant to procurement proceedings may approach the High Court in interlocutory proceedings or on urgent basis for an appropriate relief.[593]

3.6. *Constitutional Organs*

Without strong and independent safeguards, the efficacy of public procurement governance systems is extremely doubtful. The role of constitutional beings such as the Auditor-General (AG) is of paramount significance in a constitutional democracy.[594] In keeping with its constitutive function, the Auditor-General has a crucial part in auditing public accounts, financial architectures, and financial management systems to ensure that public procurement is not one of the avenues through which public funds are misused.[595]

A functional and adequately resourced Office of the Auditor General of Zimbabwe (OAGZ) is fundamental in entrenching effectiveness and efficiency in public procurement. It is a statutory obligation for the OAGZ to scrutinise whether expenditure of public funds was done in an economic, efficient, and effective manner.[596] To a certain extent, the foregoing auditing function is critical ensuring that public procurement principles outlined in section 315(1) are realised.

The tentacles of the OAGZ are sufficient to cover all state institutions, government agencies, provincial and metropolitan councils, as well as local municipal councils.[597] Moreover, the Constitution confers the Auditor-General with the powers to make appropriate remedial orders to hedge public funds against misuse.[598]The tenure, independence, and remuneration of the Auditor-General are constitutionally guaranteed.[599]

Notwithstanding, an omission of a constitutional provision making it mandatory for the Auditor-General to directly submit audit reports to Parliament would fortify this vital constitutional creature.[600] Despite the central feature that the OAGZ stands to play in the

[593] Preamble to the High Court Act 1981.
[594] Section 309.
[595] Section 309 (2) (a).
[596] Auditing Office Act 2009, s 6(b).
[597] ibid.
[598] Section 309 (2) (c).
[599] Sections 310, 311 and 312.
[600] Whereas sections 10 and 11 of the Audit Office Act makes it a legal requirement for that annual reports of the OAGZ must be transmitted to Parliament, a constitutional provision on the same matter

establishment and maintenance of public finance management systems envied by the Constitution, there is nothing in the Auditing Office Act that points to the binding nature of its reports. This glaring anomaly should be quickly remedied through legislative means. Given that the reports are factual, legislation must provide for corrective measures to be swiftly taken, while violators of the law must be prosecuted. Additionally, restitution and compensation orders can be sought against public officers who negligently and criminally abuse public resources through public procurement activities.[601]

The Constitution sets out the two principal institutions for fighting corruption in the form of the ZACC and National Prosecuting Authority (NPA) and the judiciary.[602] For present purposes, the role of the first two will be given much prominence. In spite of the fact that public procurement corruption[603] is not specifically spelt in the Constitution, ZACC is legally tooled to fight it.

The Special Anti-Corruption Unit (SACU)[604], housed in the Office of the President and Cabinet (OPC), is another organ that is part of the anti-corruption crusade. It is respectfully submitted that the constitutionality of SACU is doubtful. While ZACC is a constitutional offspring, SACU has no statutory origins. This flawed foundational genesis lends credence to its perceived lack of independence, and ultimately, its efficacy and robustness to discharge its constitutive mandate. Owing to the fact that SACU is located in the citadel of governmental power, it stands to unduly benefit from the financial and positional authority that is rightfully reserved for ZACC. The institutional rivalry that could emanate from this arrangement is naturally inimical to the fight against corruption in Zimbabwe.

will further signify the extent of the significance of the reports to the legislative assembly.

601 Section 365 of the Criminal Procedure and Evidence Act empowers a judicial officer to make a resti tution and compensation orders where appropriate.

602 Chapter 13 of the Constitution.

603 In terms of section of the Criminal Law Reform and Codification Act corruption is sections 17(2)(a).

604 <http://www.theopc.gov.zw/index.php/303-president-mnangagwa-establishes-a-special-anti-corruption-unit>accessed 01 February 2021.

The strong link between corruption and the violation of fundamental rights is a well-known phenomenon.[605] As a result of this confluence, global attention has been stratospherically increasing on the subject matter.[606] Against this perspective, contracting between corporations and states with a checkered human rights record ranging from forced child labour, suppression of freedom of communication and association, dehumanizing working conditions and abnormally long working hours, is discouraged.[607]

Noting the interconnection between public procurement and human rights, the role of the Zimbabwe Human Rights Commission (ZHRC) cannot be trivialized.[608] Hence, the ZHRC can play a pivotal part in protecting the public against abuse of power and maladministration in the public sector.[609] Furthermore, the ZHRC can also undertake some advocacy on the deleterious relational link between public procurement and abuse of public power and its net effect on the erosion of human rights.

The Zimbabwe Anti-Corruption Commission is conferred with wide and sweeping powers to combat corruption in the public sector. Also, ZACC is constitutionally empowered to spread its anti-corruption fighting tentacles to the private sector.[610] This is vital in the sense that it enables ZACC to extend its functions to both the private and public sector in its quest to eradicate and curb public procurement corruption.[611] In most cases, public procurement corruption and other public procurement related crimes[612] involve public officials and private persons or corporations, as parties to procurement activities. As explained above, the ZACC has broad range of powers. Some of them are mentioned hereunder.

a. Conduct investigations;[613]

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[605] Olga Martin-Ortega and Claire Methven O'Brien, 'Public procurement and human rights: interrogating the role of the state as a buyer' in Olga Martin-Ortega and Claire Methven O'Brien (*eds) Public Pro curement and Human Rights; Opportunities, Risks and Dilemmas for the State as Buyer* (Corporations, Globalisation and the Law series) (Edward Elgar Publishing 2019)3.

[606] UN Guiding Principles on Business and Human Rights (UN GPs) Principle 6.

[607] Olga Martin-Ortega and Claire Methven O'Brien Public procurement and human rights: interrogating the role of the state as a buyer in Olga Martin-Ortega and Claire Methven O'Brien (*eds) Public Pro curement and Human Rights; Opportunities, Risks and Dilemmas for the State as Buyer* (Corporations, Globalisation and the Law series) (Edward Elgar Publishing 2019)3.

[608] Established as per the provisions of section 242 of the Constitution.

[609] Constitution of Zimbabwe, s 241(1).

[610] Section 255(1) (a).

[611] It is common knowledge that it takes two or more persons to commit the crime of corruption.

[612] Such as collusion, bid rigging.

[613] ibid.

b. Combating corruption;[614]
c. Promote honesty, financial discipline, and transparency in the public and private sectors;[615]
d. Receive and consider complaints from the general public;[616] and
e. To advise the Government of Zimbabwe, (GoZ) on curbing corruption.[617]

Furthermore, legislation elucidates additional powers conferred on ZACC.[618] Having noted the above, the question that comes to the fore is: Are there adequate safeguards to ensure the functional or operational, financial, and institutional or structural independence of ZACC? This study identifies a structural defect of ZACC that may impede its independence. Firstly, the appointment of the Chairperson is vested in the state president after consulting the Parliamentary Committee on Rules and Standing Orders.[619]

It is submitted that this arrangement is not rigorous as the president has colossal powers to decide the ultimate occupant of the office of the Chairperson. This morphological aberration could impair the operational liberty of the anti-corruption body (ZACC) and corrode its dignity in the sight of the public. Indeed, the way ZACC is perceived by the public and transacting business community has a serious bearing, if Zimbabwe entertains any hopes of eradicating public procurement corruption. Hence, a constitutional amendment would be welcome in which the state President selects the Chairperson from a list of names recommended by the Committee on Rules and Standing Orders. This amendment would be in synchrony with the appointment process for the rest of the ZACC commissioners. A brief outline of the selection and appointment process for the commissioners is provided below.

The Committee on Rules and Standing Orders invites applicants to fill positions of commissioners, and thereafter conducts public interviews.[620] The Committee then transmits a record of the proceedings to the state president who then selects from the list of successful

[614] Section 255 (1) (b).
[615] Section 255 (1) (c).
[616] Section 255(1) (d). Embracing the public either in the form of private citizens, and the civic society is fundamental in fighting all forms of corruption.
[617] Section 255 (1) (h).
[618] Anti-Corruption Commission Act 2004, s 12.
[619] Constitution of Zimbabwe, section 254(1) (a).
[620] The Committee on Rules and Standing Orders is a supreme administrative arm of the Parliament con stituted in terms of section 151 of the Constitution.

candidates.[621] As already noted, prosecutorial authority is vested in the NPA.[622] In accordance with the tradition in adversarial legal systems, the NPA institutes criminal proceedings[623] upon receipt of dockets from the police and the ZACC, in the case of corruption-related crimes,[624] and other crime tracking agencies.

The 2013 dispensation in Zimbabwe has led to a broad approach to *locus standi*.[625] A wider approach to *locus standi* must be favoured to guarantee a generous gratification of constitutional rights.[626] Possibly, could have a positive impact on the anti-public procurement corruption drive in Zimbabwe. The wide range of actors that can approach the courts in terms of the Constitution has ramified implications, in the pursuit of building a Zimbabwean society with impeccable integrity. The civic society can play a lively and active role through litigation in public procurement corruption-related suits. Regionally, the civic society has been instrumental in public procurement litigation.[627] The question which comes to the fore is: To what degree does Zimbabwe's public procurement law embrace non-state actors, private citizens and corporations to litigate in public procurement corruption-related suits.[628]

It is observed that the Constitution lays a firmly strong foundational framework against all forms of corruption. It would be delightful to have the accompanying legislation enacted to provide for a legal path for non-state actors, private persons, and corporations to institute criminal proceedings and make civil claims on behalf of the general public in

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[621] Constitution of Zimbabwe 2013, s 254 (1) (b).
[622] Constitution of Zimbabwe 2013, s 258.
[623] Criminal proceedings are instituted on behalf of the state.
[624] Constitution of Zimbabwe 2013, s 255(1) (f).
[625] Section 85 provides :

(1) Any of the following persons, namely—
(a) any person acting in their own interests;
(b) any person acting on behalf of another person who cannot act for themselves;
(c) any person acting as a member, or in the interests, of a group or class of persons;
(d) any person acting in the public interest;
(e) any association acting in the interests of its members.

In *Telecel (Zimbabwe) (Pvt) Ltd v Attorney-General* S-1-2014, the Supreme Court of Zimbabwe ruled that companies can undertake private prosecutions. The foregoing is contrary to the South African case of *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* 1990 (4) SA 720 (A). The legislator intervened by inserting 16(2) (a) (iii) of the Criminal Procedure and Evidence Amendment Act [Chapter 9: 07] hereafter 'CPEA' ostensibly squashing the Supreme Court ruling; Private prosecution is permissible in Zimbabwe as the provisions of section 13 of CPEA.

[626] *Ferreira v Levin NO* 1996 (1) SA 984 (CC).
[627] *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v Presi dent of the Republic of South Africa and Others* 2015 2 SA 1 CC.
[628] The term non-state actors can be used interchangeably to refer to civil society organisations.

public procurement. Does the existing legal framework provide adequate protection of witnesses and whistleblowers? This leads to further proliferation of questions. Is there a legal provision for public interest litigation, especially in cases where public procurement corruption is alleged to have taken place? What sort of remedy or reward could be availed to incentivize public interest litigation for public procurement corruption cases? Can *Qui tam* be a solution to encourage public participation in the crusade against corruption? The questions posed above are beyond the scope of this study.

Admittedly, there are inherent difficulties for the prosecution to discharge the burden of proof in corruption-related cases. As a result, the classical anti-corruption combating methods[629] have, over the years fallen out of favour in many jurisdictions.[630] Hence, administrative, and non-criminal measures such as disqualification or debarment of corrupt firms from participating in public procurement activities have gained prominence.[631] In addition, expenditure of public resources must be constantly subject to parliamentary oversight as a means of entrenching accountability.

In tune with global trends, Zimbabwe has adopted the administrative method as a classical methods of fighting public procurement corruption. Suppliers that violate public procurement principles frustrate competition, transparency, openness, fairness, as well as honesty, and are consequentially barred from participating in public procurement activities for varying periods, depending with the nature and gravity of transgression,[632] while criminal sanction is also available should circumstance warrant.

3.7. *Conclusion*

Findings from this chapter show that Zimbabwe has a consolidated and comprehensive public procurement legislation. Public procurement legislation for goods and services and construction works, and infrastructure procurement is regulated by the Zimbabwe Development Agency Act (ZIDA) to a larger extent is packed in PPDPA Act. Broadly speaking, the public procurement legislation matches the constitutional standard articulated in

[629] Criminal prosecution is the traditional method of fighting public procurement corruption. Indeed, it an insurmountable task for the prosecution to discharge the burden of proof in corruption-related cases since this crime is committed in secrecy.

[630] Sope Williams- Elegbe *Fighting Corruption in Public Procurement: A Comparative Analysis of Dis qualification or Debarment Measures* (Hart Publishing Oregon USA, 2012) 3.

[631] ibid.

[632] PPDPA Act 2017, s 99 (1) (b), empowers PRAZ to bar declare a person (supplier) ineligible to be awarded procurement contract for a period not exceeding three (3) years.

section 315(1). Indeed, a litany of legislation available serves to fully elasticise the principles enunciated in the Constitution. Worrisomely, few public procurement disputes have so far come before the courts. Recognising that public procurement law had not been, until 2013, granted constitutional status, there is a ray of hope that through incremental judicial scrutiny, Zimbabwe will develop its own public procurement jurisprudence as has been the case in other jurisdictions.[633]

In synch with its needs as a developing state, public procurement laws in Zimbabwe have been crafted with a view to achieve collateral objectives such as economic emancipation of women and promotion of domestic suppliers. Deductively, Zimbabwean public procurement legislation signals an inherent predilection for the use of public procurement to achieve of socio-economic ends. However, it is not yet clear as to when this is to be put in practice since legislation is silent on the scoring to be awarded for foregoing categories of suppliers. Modalities on the actual weight to be awarded for the realisation of collateral objectives is left to individual public entities to work out. This lack of a unified approach creates inconsistencies in the execution of the public procurement policy on aforementioned aspect.

What is undeniably clear is that the PPDPA Act has deferred the modus operandi for the attainment of collateral objectives of public procurement policy. The PPDPA Act provides that modalities are to be crafted by the regulator, PRAZ, which then, will in due course, advice the government for implementation. This is further compounded by the fact that Zimbabwe has limited competent professional public procurement professionals to preside over procurement activities in public entities. Simply put, the professionalisation of public procurement profession is still in infancy.

It is an insurmountable task for the regulator, PRAZ to play a dual role of being the regulator and also be a pathfinder in the professional education of practitioners. The only way out of this quagmire, might be to unbundle this dual function by creating a statutory professional body to regulate the education and professional standards for procurement

[633] The Republic of South Africa is one such country in the SADC region. It recently consolidated its public procurement legislation in the form of a Draft Public Procurement Bill.

practitioners. However, the suggested body for the professional development of practitioners should symbiotically and synergistically work with PRAZ for the continuous maturation of skilled and knowledgeable public procurement professionals.

The promulgation of the PPDPA Act partially decentralised public procurement activities in that procurement requirements beyond prescribed amounts can only be done through a statutory committee, SPOC on behalf of government-controlled entities. The inherent danger in this arrangement is that SPOC, by virtue of being committee made up of senior government officials, can be subjected to political pressure to award tenders in favour of economic operators that are connected to political elites. It follows therefore that in the event of SPOC succumbing to pressure, constitutional principles on public procurement will be surely violated. On a sad note, it has been observed in the chapter that the usurpation of this function by SPOC, creates an administrative quandary for accounting authorities who are vested with powers to account for the public resources committed to their trust.

Observations made in the chapter paint a gloomy picture in that the PPDPA Act permits public accounting authorities to meekly submit to manifestly unlawful directives from higher ranked officials, to conduct public procurement activities in parallel to legal prescripts. The import of the foregoing is that it creates a legal route for public procurement not to be executed in conformity with constitutional principles set out in section 315(1). It is respectfully submitted that a legally tenable position would to be to strike out the provision in *toto*, and the substitution of this impinged provision that permits the recipient of the unlawful directive to report to law enforcement agencies for prosecution in courts.

It was also explained that public procurement is exceedingly susceptible to corruption if not clearly regulated in accordance with constitutional principles stated in section 315(1) of the Constitution and as supplemented by the dictates of the PPDPA Act. Regrettably, the PPDPA Act contains some provisions that confer the state president with legislative functions through a proclamation, to designate unspecified categories of procurement to be carried out at tangent with generally acceptable norms expressed in public procurement legislation under the guise of pursuit of national interests.

This chapter noted gravitas of the foregoing, in that it could pose a serious challenge towards the accomplishment of a public procurement regime that yields fairness, openness, transparency, honesty, efficiency and cost-effectiveness. An amenable way would have been to specify such categories through a legislative provision as opposed to leaving the characterisation of categories to a presidential determination. The lawfulness of this legal position would be doubtful, it is submitted. The constitutionality of the above position will be certain once this provision of the PPDPA Act is subjected to judicial scrutiny.

Competitive bidding as articulated in the PPDPA Act is concise and straightforward. This procurement path encompasses disclosure of contractual opportunities, having predetermined rules that restrict the discretionary whims of public official, timely revelation of canons to be observed during proceedings, and the means for monitoring and adhering to the applicable laws. [634] Procedures and processes laid down for competitive bidding strive to meet the constitutional standard on transparency throughout the procurement cycle commencing at identification of procurement requirement to contract award, and debriefing of unsuccessful bidders.

Notwithstanding, transparency in the Zimbabwean public procurement is somewhat lagging in that e-procurement is still to be embraced fully. This is testified by the fact that the bid submission and opening are manifestly paper-based. Presumably, the legislator took notice of the fact that Zimbabwe was still developing its information communication technology infrastructure to fully support e-procurement. Thus, the legislator delegated the formulation of guidelines for e-procurement to the regulator, PRAZ.

Surprisingly, despite the PPDPA Act having numerous provisions to promote sustainable procurement, it is disheartening to note that the actual regulations for it are yet to be crafted. In fact, rulemaking function is delegated to PRAZ, the regulator, in the form of policy directives for public entities. A constitutionally compliant scenario would have been to have explicit rules for sustainable procurement articulated in the PPDPA Act or at the very least ministerial regulations. Succinctly put, the provisions of the PPDPA Act on green procurement are scanty and need to be elaborated further to give effect to constitutional requirements on environmental sustainability.

[634] Sue Arrowsmith, *The Law of Public and Utilities Procurement* (2nd edn Sweet and Maxwell 2005) 9.

What can be inferred from this chapter is that public procurement legislation in its current form, does not adequately address environmental sustainability. Environmental aspects must not be traded off with other public procurement goals such as cost-effectiveness. The PPDPA Act only tries to address this matter by delegating public entities to take environmental considerations when evaluating tenders without a clear roadmap on the actual execution. The Zimbabwean public procurement legal framework employs a three-way method to enforce compliance with the PPDPA Act for supplies.

It is observed that the methods are meant to promote high ethical standards and deterring suppliers from engaging in underhand dealings in public procurement activities. An attempt was made in this chapter to establish whether public procurement legislation conforms to constitutional dictates as itemised in terms of section 315(1) as read with section 195(2). Having carefully examined the legislation, it can therefore be concluded that by and large, legislation endeavours to ensure that public procurement is conducted in a transparent, fair, honest, cost-effective, competitive, and open manner.

However, there remains several issues which at times are conflictual, and opaque. To begin with, in the spirit of devolution, the statutory autonomy of public entities and the function of SPOC need to be addressed. Secondly, the immense quasi-legislative powers on PRAZ require further scrutiny with a view to reduce it and have some of the issues the PPDPA Act purportedly conferred upon it being directly addressed and dealt with comprehensively by the legislator. This chapter recommends the unbundling of functions of PRAZ with a view to make it more efficient. This means that PRAZ would only play an oversight role, while a separate body is created for the professionalisation of public practitioners. The foregoing could be made possible by amending the PPDPA Act.

Like any member state of the COMESA regional trade bloc, Zimbabwe has rights and corresponding duties to other state parties. Consistent with that, the following chapter will examine the COMESA Public Procurement Regulations with a view to enumerate the obligations and responsibilities for member states such as Zimbabwe. This is very important from a constitutional perspective. The tone is set right from the onset, in that the state has to pursue foreign policy in accordance with international law, and the pursuit of international relations that espouses the Pan-African philosophy.

CHAPTER 4: COMESA PUBLIC PROCUREMENT REGULATIONS

4.1. *Introduction*

4.1.1. *Overview*

In essence, this chapter examines the public procurement regulatory framework of Common Market for East and Southern Africa (COMESA).To accelerate inter-trade among member states, a legal framework in the form of COMESA Public Procurement Regulations (Public Procurement Regulations) was adopted.[635] Thus, Zimbabwe, as a state party to the COMESA Treaty (hereinafter referred to as the 'Treaty') has an obligation to uphold COMESA Public Procurement Regulations.

4.1.2. *Background about COMESA*

The constitutive provisions of COMESA as a regional trading block is outlined in the Treaty.[636] Prior to its incorporation, most of the COMESA founding states had coalesced under the umbrella of Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States (PTA). Put differently, the PTA was the cradle of a more organised regional economic grouping that crystallised into COMESA.[637] The driving force behind the establishment of COMESA was to stimulate and encourage economic integration through improved trade among member states. [638] The harmonisation of laws for the creation of a single regional market economy market region became pertinent.[639]

It follows that member states were inspired by their economic homogeneity and discerned that greater co-operation could ultimately enable them to play a greater geopolitical role. This amplified their (member states) stature on the global arena. In territorial, demographic and economic terms, COMESA is the largest trading zone on the African continent.[640] The COMESA trading bloc has more than twenty-one (21) member states, with

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635 COMESA Legal Notice No. 3 of 2009, COMESA Official Gazette vol 15, No. 3, 9 June 2009.

636 The COMESA Treaty came into force December 1994 when heads of states and government of the founding member appended their signatures to the constitutive charter. The founding members to the Treaty are Angola, Burundi, Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Ma lawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Somalia, Sudan, Tanzania, Uganda, Democratic Republic of Congo (*formerly, Zaire)*, Zambia and Zimbabwe. By territorial, demography and economic size, COMESA is the largest trading zone on the African continent.

637 art 29 of the PTA laid down the legal framework upon which COMESA as an economic community founded.

638 Paragraph 6 of the preamble to the COMESA Treaty.

639 ibid.

640 African Development Bank Group 2012: COMESA Public Procurement Reform and Capacity Building

a combined population of more than five hundred and sixty million (560) and a GDP USD768 billion.[641] COMESA has a staggering export-import balance sheet of three hundred and twenty-four billion United States Dollars (USD324 billion). [642]In terms of spatial dimensions, member states occupy more than two thirds of the African continent, which is approximately twelve (12) million square kilometres.[643] From an economic perspective, the foregoing figures are a testament of the importance of COMESA as a monumental regional economic bloc. Potentially, member states stand to gain from intra-trade. Cognisant of the above, therefore, public procurement has, a fundamental impact on the regional economy.[644]

4.2. *COMESA Public Procurement Regulations*

4.2.1. *Introduction*

Article (10) (1) of the Treaty confers the Council with the powers to regulations that are binding on COMESA member states. [645] The Public Procurement Regulations are a typical example of such regulations. Public procurement reform that culminated in the adoption of Public Procurement Regulations was made possible thanks to a grant advanced to COMESA by the African Development Bank hereafter (AfDB).[646] This was not the first time that the AfDB was financing the harmonisation of the public procurement regime in COMESA.[647] More than two decades ago, the AfDB disbursed funds through a grant

Projects Project Performance Evaluation Report https://www.afdb.org/fileadmin/uploads/afdb/Documents/Evaluation-Reports-_Shared-With-OPEV_/COMESA_%20Project%20Performance%20Evaluation%20Report_web.pdf>accesed 1 June 2021.

641 <https://www.comesa.int/quick-facts-about-comesa-2/ > accessed 30 May 2021. Members that joined the block after its formation include, Egypt, Esatwin (formerly, Swaziland), Libya, Tunisia, and South Sudan (seceded from the greater Sudan after holding a referendum in 2011. A civil war between the predominantly Arab north and indigenous African south had protracted for more than more than two decades of fighting came to an end after the conclusion of peace deal in 2005).

642 ibid.

643 ibid.

644 Robert D. Anderson and Sue Arrowsmith WTO 1.

645 art 9 establishes a Council of Ministers made up of ministers from respective member countries. The Council is conferred with the powers in terms of Art 10 to issue directive, regulations, and recommend dations for the implementation of the Treaty. The Council issued the Public Procurement Regulations at its twenty-fourth meeting held in from the 2nd to the 4th of June 2009, in the resort city of Victoria Falls in Zimbabwe.

646 Stephanus S de la Harpe PROCUREMENT UNDER THE UNCITRAL MODEL LAW: A SOUTH ERN AFRICA PERSPECTIVEPER / PELJ 2015(18)5 http://dx.doi.org/10.4314/pelj.v18i5.11>accesed 4 August 2021.African Development Bank Group 2012: COMESA Public Procurement Reform and Capacity
Building Projects Project Performance Evaluation Report https://www.afdb.org/fileadmin/uploads/afdb/Documents/Evaluation-Reports-_Shared-With-OPEV_/COMESA_%20Project%20Performance%20Evaluation%20Report_web.pdf>accesed 1 June 2021.

647 ibid.

for a pilot study for the crafting of non-binding public procurement framework for COMESA.[648]

The adoption of the Public Procurement Regulations reaffirms the commitment by member states to make trade opportunities accessible to fellow member states and to both public and private entities.[649] The Model Law as the universal bible for public procurement, was instrumental in the adoption of the Public Procurement Regulations.[650] Notably, COMESA Public Procurement directives seek to attain principles of economy, efficiency, transparency, fairness and non-discrimination.[651] The terms, 'Public Procurement directives' and 'Public Procurement Regulations' are used interchangeably in the study.

The scope of application for the Public Procurement Regulations is limited to regional competitive bidding.[652] Regional competitive bidding covers procurement requirements that fall under the regional financial thresholds. [653] Member states were granted the prerogative to determine the regional competitive thresholds for up to five (5) years from the date of commencement of the Public Procurement Regulations. Therefore, member states had the liberty to designate the respective threshold for financial value of goods and services as well as Public-Private Partnerships (PPP). Implicitly, bids from eligible suppliers from the COMESA region must be considered for contractual opportunities by member states, subject to the proviso that, the cost of the procurement requirements fall within the agreed threshold as set by each member state.

As mentioned above, Public Procurement Regulations were promulgated with the objective of encouraging the purchasing of goods and services as well as infrastructure from suppliers within the COMESA regional and economic hub.[654] In summary, the Public Procurement Regulations were adopted to provide preferential access to public procurement markets to suppliers operating within the COMESA region. Unsurprisingly, Public

[648] (Paper presented at Joint WTO-World Bank Regional Workshop on Procurement Reforms and Trans parency in Public Procurement for English Speaking African Countries) <https://www.wto.org/english/tratop_e/gproc_e/wkshop_tanz_jan03/karangizi1_e.doc>accessed 2 June 2021.
[649] art 62(a).
[650] Karangizi 2003 <https://www.wto.org/english/tratop_e/gproc_e/wkshop_tanz_jan03/karangizi1_e.doc>accessed 4 August 2021.
[651] art 3 2 (2).
[652] art 2 (1).
[653] art 6 (1).
[654] art 151(2) (d) of the Treaty.

Procurement Regulations bear striking resemblance to Model Law. However, the ambit of the COMESA Public Procurement Regulations is not limited to goods and service and works, but, includes PPP.[655]

Congruently, the spirit and the letter of the public procurement law of Zimbabwe must comply with the Public Procurement Regulations. In the same vein, the application of the law is expected to follow suit. The Public Procurement Regulations have been operative since promulgation in 2009.[656] It is trite that Zimbabwe overhauled its public procurement legislation recently after public procurement was accorded a constitutional status.[657] Consequentially, significant weight was accordingly supposed to be attached to the Public Procurement Regulations in the reform agenda. The preceding opinion is premised on the constitutional obligation placed on the state to pursue foreign policy in accordance with international law.[658]

4.2.2. *Limitations for the Applicability of Public Procurement Regulations*

In implementing the Public Procurement Regulations, this study does not lose sight of the fact that states remain sovereign and multilateral agreements must be pursued in terms of international law.[659] In line with the above, the fulfilment of obligations emanating from regional trade agreements is completely based on mutual co-operation of the parties.

Emphasis must be made that the regulations issued by the Council are binding on all member states.[660] Therefore, Public Procurement Regulations are binding on Zimbabwe, as a member state. Member states are encouraged to make progressive public procurement reforms that capture the spirit and purports of the Public Procurement Regulations, in line with the principle of variable geometry.[661] The contours of the Public Procurement Regulations is restricted to regional competitive bidding only. Essentially, this means that in practice, member states are required to uphold the entire provisions of the Public

655 Interpretation clause designated at art 1 and art 33(2).
656 Whereas art 38 of the Public Procurement Regulations states that they would come into force on date stated in the Official Gazette of COMESA. The Regulations were published in Volume 15 No.3 of the Gazette published on the 9th of June 2021.
657 Previous chapters.
658 Section 12 (1) (b) of the Constitution.
659 Paragraph 8 of the preamble to the Treaty.
660 art 10 (2) of the Treaty.
661 art 33 (4).

Procurement Regulations in public procurement insofar as it relates to regional competitive bidding.[662]

There are numerous definitions of the principle of variable geometry. For the purposes of this study, the definition propounded by Gathii is given hereunder. [663]

> Variable geometry means rules, principles, and policies agreed upon in trade integration treaties that give member states, particularly the poorest members:
>
> (i) policy flexibility and autonomy to pursue at slower paces time-tabled trade commitments and harmonization objectives;
>
> (ii) mechanisms to minimize distributional losses by creating opportunities such as compensation for losses arising from implementation of region-wide liberalization commitments and policies aimed at the equitable distribution of the institutions and organizations of regional integration to avoid concentration in any one member; and
>
> (iii) preferences in industrial allocation among members in regional trade agreements and preferences in the allocation of credit and investments from regional banks.

The provisions of Article 5(2) of the Treaty obliges member states to domesticate regulations crafted by the Council in their municipals laws. The import of the foregoing cannot be emphasized. The onus lies with the member states to institute steps that will ultimately lead to the domestication of the Public Procurement Regulations into their laws.[664] Interestingly, member states are encouraged to desist from any behaviour that would militate against the realisation of the procurement directives.[665]

Clearly, member states are advised to undertake practical measures to ensure that suppliers within the COMESA region are given opportunities to participate in public activities, while deliberately shunning suppliers that are not from member states.[666] Furthermore, the Public Procurement Regulations forbids member states from enacting legislation that blatantly violate the directives,[667] while extolling states that adopt legislation that is in unanimity with the regional public procurement directives.[668] Public Procurement Regulations are not an international treaty or convention. However, the Regulations emanate from the Treaty and has equal force of law as international agreement or convention.

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[662] art 2 (1).

[663] James Thou Gathii 'African Regional Trade Agreements as Legal Regimes' (2011) Volume 35 (3) at 35 North Carolina Jouranl of International Law 608. < https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1903&context=ncilj> accessed 23 November 2021.

[664] art 5 (1) of the Public Procurement Regulations.

[665] art 5(2) of the Public Procurement Regulations.

[666] Foreign suppliers mean suppliers that are from outside the COMESA.

[667] art 5 (3).

[668] art 5 (3).

4.2.3. *Rationale and Principles*

Beyond doubt, the principles articulated in the Public Procurement Regulations were adapted from the Model Law. These are succinctly captured in COMESA public directives as follows:

a. inculcation of competition, and openness, in public procurement processes;[669]
b. promotion of accountability, transparency for national development;[670] and
c. ensuring uniformity of public procurement laws increased inter-trade among member states.[671]

The Public Procurement Regulations are crucial in two ways. Firstly, the Regulations serve as a benchmark for public procurement legislation of member states. Indeed, there is a directive for member states to reform legislation in compliance with Public Procurement Regulations.[672] This means that public procurement laws of member states must broadly capture the salient features of the Regulations.[673] Article 4 compels public procurement legislation to incorporate principles of competition, openness, accountability, transparency, value for money as well as aspects relating to procurement oversight and transmission of crucial information to COMESA Secretariat.

Given that the Regulations are there to provide the skeletal framework, some measure of autonomy is granted to member states to define the scope, nature, and spectrum of the substance of the foregoing principles. Secondly, members are required to have specific provisions in their respective public procurement laws that incorporate what is outlined in the Public Procurement Regulations. These laws must not be discriminatory against economic operators from COMESA member states.

In fact, there must be preferential policy in favour of public procurement of suppliers from within the COMESA trading region. In other words, the COMESA procurement directives are crafted to ring-fence the regional market against encroachment by suppliers from jurisdictions of non-member states. COMESA had set an ambitious deadline of

669 art 3 (b).
670 art 3 (c).
671 art 3 (c).
672 art 33 (3).
673 art 4.

coming up with workable financial thresholds for regional competitive bidding by 2014.[674] Regrettably, it would appear that member states have not met that deadline.

4.2.4. *Regional Preferences*

Consistent with the founding objectives of building a self-sustaining and strong regional trading bloc, the COMESA Public Procurement Directives advocate for the promulgation of public procurement laws that favour regional suppliers in competitive bidding.[675] Therefore, public procurement legislation must provide for a margin of preference for goods and services by suppliers from the COMESA region, while those (suppliers) from outside the regional bloc are frowned upon.[676] The Public Procurement Directives grant member states the power to determine the margin of preference of their choice and remit the information to the Secretary General of COMESA (Secretary).[677]

Public procurement legislation is required to designate goods and services from COMESA region in the same category as that of the most favoured nation.[678] Implicitly, state parties to the Treaty are not permitted to use the most favoured nation criteria in a way that would prejudice suppliers from the COMESA region. Understandably, had the Public Procurement Regulations not ousted the use of the most favoured nation principle, it would have been difficult to operationalise the Public Procurement Regulations.

The drafters of the Public Procurement Directives were vigilant and alive to the fact that foreign suppliers could set up warehouse companies in the COMESA region to benefit from the regional public procurement opportunities. Alert to this perceived threat, Public

[674] art 6 (5).
[675] art 7 (1).
[676] art 7 (2).
[677] art 7 (3). The powers and the appointment of Secretary General is set out in terms of Art 17 of the Treaty. The Secretary General is the head of the Secretariat and the chief administrative officer of the COMESA Secretariat.
[678] art 8 (1). The Most Favoured Nation (MSN) principle has its roots in the art 1 of The General Agree ment on Tariffs and Trade (GATT 1947). The principle has been re-enacted in Article 2 of the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). In terms of the MSN principle, nations can segregate between their trading partners or grant special status (such as lowering tariffs on certain products to the exclusion of the products from other member countries). GATT is a precursor to the World Trade Organisation (WTO). In simple terms, the MSN principle means that once a nation puts barriers or favourable terms on products and services from another nation, the same terms are to be uniformly applied to the rest of its trading partners. Notwithstanding, exceptions, are allowable wherein a trading block can discriminate against suppliers outside the jurisdiction of member states. Also, a prohibition can be made against goods and services that are deemed to be traded unfairly. WTO came into force on the 15th of April 1994. Its constitutive function is to promote international trade by creating rules and regulations for legal certainty in across member states without the goal of reducing potential disputes in international trade transactions. <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm> accessed 28 July 2021.

Procurement Regulations permit state parties to exclude the application of these rules to regional suppliers, if suppliers are controlled by a foreign supplier. For instance, a regional supplier might be legally operating in a member state but with insignificant business operations consistent with their mandate.[679] This is an untenable scenario. This has serious repercussions for multinational corporations that have subsidiaries in the COMESA region.

Suppliers that are not traditionally associated with certain goods and services suddenly prowl for underhand public contractual opportunities to the detriment of suppliers with long standing proven track record in certain sectors. The advent of the COVID 19 virus, ostensibly confirmed what regulations sought to curtail.[680] Furthermore, Article 9 prohibits the application of rules of origin.[681] Member states are obliged to file with the Secretariat procurement opportunities in the form annual procurement plans.[682]

4.3. Procurement Cycle

4.3.1. *Procurement Requirement*

Article 8 of the Public Procurement Regulations governs the aspects pertaining to procurement requirements. This applies to goods, services, and works falling within regional thresholds. It is a necessity that member states make a provision in their legislation for safe record keeping throughout the entire procurement cycle.[683] The Regulations only apply to regional competitive bidding for a procurement requirement falling in the regional threshold.[684]

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679 art 8 (4) (a).

680 Covid-19: PPE scandals that crippled South Africa's fight against Covid-19. <https://www.news24.com/news24/southafrica/news/covid-19-ppe-scandals-that-crippled-south-africas-fight-against-covid-19-20210305> accessed 21 September 2021. This is typical example of a supplier that went beyond its line of business to procure personal protection equipment for use during the outbreak of COVID 19 for the South African Polices Services under unclear circumstances. The article reports that one of the senior police officials apparently had a business connection with the supplier.

681 Rules of origin. As the name implies the nation where goods and products originate. Rules of origin is fundamental in the sense that it enables nations to craft laws against dumbing of products and related measures, the application of the Most Favoured Nation principle, and formulation of national procurement laws, among other aspects.< https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm>accessed 28 July 2021.

682 art 10.

683 art 8 (1).

684 art 2 (1). Regional competitive bidding is defined as 'any public procurement procedure that is within the threshold set by a Member State for procurement within the Common Market'.

Member states are warned against permitting procuring entities to divide procurement requirements into lots with the intent of avoiding a specific procurement method.[685] National laws must make a provision for public procurement activities through regional competitive bidding to be undertaken subject to availability of funds.[686] While this is commendable from a regulatory perspective, the splitting of a procurement requirement has the potential of encouraging SMMEs to partake in the national economy through public procurement.[687]

The European Union Public Procurement Directives, where practicable, favour the partition of public contracts into lots that match the capacity of SMMEs to discharge the obligations arising from those contracts.[688] This could further enhance competition leading to the attainment of value for money. To that end, it is respectfully submitted that the Public Procurement Regulations be amended to confer member states with the discretion to determine the appropriateness of the division of public procurement into lots to embrace SMMEs.

Provision has to be made for regional competitors to respond appropriately to procurement requirements that are fit for purpose and of high quality standards.[689] This information has to be noticeably stated in the tender documents.[690] On technical specifications, aspects on performance, narrative traits and conformity with international benchmarks needs also to be included. Again, there is a prohibition on the inclusion of trademarks; however, in some cases this would be impractical to exclude it, and the expression 'equivalent' must be added.[691] Member states are to pass legislation setting forth conditions amenable to the Public Procurement Regulations which regional suppliers are to uphold. Some of these conditions are, history of tax, environmental compliance, and social security contributions in their jurisdiction.[692]

685 art 12 (2).
686 art 8 (2).
687 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC 28.3.2014 Official Journal of the European Union L 94/65 para 78 to the Preamble.
688 ibid.
689 art 8 (2).
690 ibid.
691 art 8 (5) (a)-(d).
692 art 6(2)(c).

4.3.2. *Open Tendering Systems*

Regarding bidding documents, member states are obliged to use only documents issued by Council for regional competitive bidding.[693] Functionally, this creates uniformity on regional competitive bidding documents for the entire member countries. It is incumbent upon member states to enact laws encapsulating well-articulated rules and systems pertaining to public procurement proceedings;[694] precise description of procurement requirement; [695] and the envisaged morphological and substantive features of the contract and conditions thereon.[696] Notwithstanding, regional competitive bidding has to be executed pursuant to domestic laws on public procurement.[697] Tenders falling within the ambit of the prescribed regional threshold are to be submitted by member states to the Secretariat for publication on the COMESA website.[698] This is tailor-made to operationalise the provisions of Article 141 of the founding Treaty enjoining members to share trade information.

In determining the bidding period for regional competitive bidding, public entities within COMESA are directed to make an allowance for adequate time for regional suppliers to file responsive bids pursuant to the tender notice.[699] As a risk mitigating measure, member states must compel regional bidders to provide bid security as per the procurement rules issued in terms of the public procurement legislation of respective member states.[700] Moreover, regional bidders are required to provide a written undertaking vouching that they have not been barred from participating in public procurement activities, from their country of origin or other jurisdictions. Bidders are further required to furnish procuring entities with a written statement to the effect that they would not engage in corrupt and fraudulent activities.[701]

[693] art 13 (1).
[694] art 13 (2) (a).
[695] art 13 (2) (b).
[696] art 13(2) (c).
[697] art 14 (1).
[698] art 22 (3).
[699] art 14 (1) (a).
[700] art 14 (4).
[701] art 15 (1)(a) -(b); Art 15 (2) (b).

4.3.3. Bid Reception

The deadlines for the submission of bids must be clearly outlined, while late submissions are to be rejected.[702] Beyond doubt, the general outline for the reception of bids is mechanically manual.[703] Additionally, public entities are to maintain strict confidentiality during bid reception and the process has to be conducted openly.[704] Sadly, this paper driven modus operandi impedes the achievement of transparency. Embracing information communication technologies will undeniably transmogrify the execution of procurement activities in a world full of uncertainties such as global pandemics, as with the case of the Corona virus.

4.3.4. Qualifications of Suppliers

Member states are to legislate on suitability and appropriateness of regional bidders to qualify for public procurement opportunities in their jurisdictions.[705] Criteria for regional suppliers include their experience, financial and technical resources; [706] legal capacity; solvency and not under judicial management;[707] untainted criminal record, such as unethical conduct and corruption;[708] and so forth.[709] Public procurement legislation may also provide for certification of suppliers by authorised bodies to confirm the veracity of the matters set out above.[710] Indeed, the foregoing is an appropriate mechanism, at the very least of ascertaining the credence of the qualifications of regional suppliers.

4.3.5. Bid Evaluation

Public Procurement Regulations confer member states with authority to determine the evaluation policy for bids as informed by the nature of the required procurement.[711] Evaluation criteria for regional competitive bidding must be indicated in the tender documents.[712] To entrench fairness and equity, bids are to be evaluated against the criteria communicated beforehand.[713] Interestingly, domestic legislation must provide for a post

[702] art 17 (1).
[703] art 17 (2) (a).
[704] arts 17 (2) (b) and 18.
[705] art 19 (1).
[706] art 19(1)(a).
[707] ibid.
[708] art 19(1) (d) (i) and ii.
[709] art 19 (1) (d) (ii).
[710] art 19 (2).
[711] art 20 (1).
[712] art 20 (2).
[713] art 20 (3).

qualification evaluation to determine the capacity of the highest ranked bidder to effectively discharge contractual obligations.[714]

4.3.6. Contract Award and Notification

Legislation governing public procurement in each respective jurisdiction has to provide for the publication of an award notice for an award of a public procurement contract.[715] The notice is to be dispatched to all bidders that are parties to proceedings.[716] However, the actual award is suspended pending the launch of an intervening challenge by aggrieved bidders for a period to be specified in legislation for each member state.[717] Member states are mandated to make progressive efforts to harmonise the standstill periods within five (5) years after the promulgation of the Public Procurement Directives.[718]

Pertaining to regional competitive bidding, member states bear the responsibility of enacting laws, which categorically outline the procedure to be followed in awarding public procurement contracts. [719] Perplexingly, Public Procurement Regulations are bent on disempowering public entities by directing that public procurement decisions need to be validated by the public procurement regulator.[720] Suffice to mention that such approvals inherently entrench bureaucracy by centralising government contracting and are inimical to the principles of efficiency and effectiveness.

Deferring to the authority of the public procurement regulator unduly violates the statutory autonomy of government-controlled entities. The role of the regulator is central in the coherent functioning of the national public procurement system. Conversely, excessive interference by the regulator can impede administrative inefficiency and stall smooth implementation of procurement activities through increased turnaround times. In other words, the regulator should not unduly entangle itself with the procurement activities of public entities as this entrenches bureaucracy.

[714] art 20(3).
[715] art 21 (1) (a).
[716] ibid.
[717] art 21 (2).
[718] art 21 (2).
[719] art 22 (1).
[720] art 22 (2) (a).

4.3.7. Debriefing

Recalling that public procurement encapsulates principles of natural justice and administrative law, member states are directed to debrief unsuccessful bidders with sufficiently detailed information setting out the reasons as to why the bid would have been rejected.[721] The foregoing has to be succinctly couched in domestic legislation stating the period within which the debriefing is to occur.[722] Related to the above, is an onerous duty on member states to legislate on scrutiny of failed, or irresponsive regional bids.[723] This assessment must be conducted twice a year.

In assessing unsuccessful bids, legislation must set guidelines for the following:

a. whether adequate time is availed to suppliers to prepare bids;[724]
b. conditions articulated in the bid document do not prohibit competition and potential ambiguities emanating therefrom;[725]
c. the capacity of the regional bidders to discharge the obligations of the procurement requirements;[726]
d. amendments made to the bidding documents in order to encourage submission of regional bids;[727]
e. the prevalence of exceptional happenings that discourage the submission of regional bids;[728]
f. whether the evaluation has been done as expected in the Public Procurement Regulations and the applicable domestic legislation and taking into account the adequacy of the evaluating personnel;[729]
g. allegations of collusion by bidders; [730] appropriateness of the procurement method;[731]
h. any recommendation by a procurement authority/regulator on other matters.[732]

[721] art 23.
[722] ibid.
[723] art 28 (1).
[724] art 28 (2) (a).
[725] art 28(2) (b).
[726] art 28 (2) (e).
[727] art 28 (2) (f).
[728] art 28 (2) (g).
[729] art 28(2) (h).
[730] art 28 (2) (i).
[731] art 28 (2) (j).
[732] art 28 (2) (k). The recommendation could be on the deployment of different procurement route among others.

As monitoring mechanism to the above, member states are required to file with the COMESA Secretariat and post regional public procurement opportunities on their web-sites.[733] Thereafter, the Secretariat disseminates the assessment reports to other member states within fourteen days (14) of receipt.[734]

4.3.8. Contract Management

Despite the drafting, execution and monitoring of public contracts being at the end of the procurement progression, this segment of the procurement cycle can potentially reverse the gains accrued thus far. In view of the above, Public Procurement Regulations make it mandatory for member states to legislate on financial and manpower resources to be availed for contract management. Variation to a public procurement contract must only be done in accordance with the value of the initial contract.[735]

4.3.9. Records Management

An effective records management system is one of the bedrocks of transparent and effective public procurement regimes. In line with that, procuring entities within the COMESA region are compelled to keep a record of the procurement proceedings for period to be specified in each member state's public procurement legislation.[736] The proceedings must meticulously record every stage of the procurement cycle and incidental happenings.[737] Moreover, public procurement contracts are to be subjected to oversight through auditing.[738] What is crystal clear from the Public Procurement Regulations is that member states are to adopt legislation incorporating the afore-stated.[739] The records can be submitted to the Secretariat on request and subject to the proviso that legitimate commercial proprietary details are eviscerated therefrom.[740]

4.3.10. Review and Appeals

According to the Public Procurement Regulations, the challenge and review of public procurement proceedings can only be instituted in cases of disputes pursuant to a regional

[733] arts 6 (4) and 22 (3).
[734] ibid.
[735] art 25.
[736] art 29 (1) (a) and (b).
[737] art 29 (2). See the provisions of paragraph a-k.
[738] art 29 (1) (b)
[739] art 29 (3).
[740] art 29 (4) and (5).

competitive bidding.[741] Implicitly, the application of this aspect once embodied in domestic legislation is restricted to regional bidders only. Sadly, the directives are silent on the need for the existence of the same relief for domestic suppliers. Domestic legislation must provide for an independent, impartial, and fair administrative route for bidders alleging procedural irregularity to get an appropriate relief.[742]

The salient features of the review system must be captured in the legislation for every stage of the competitive bidding as outlined hereunder.[743]

a. The proceedings must be carried out transparently and be on record and predict able;[744]
b. Make it mandatory for government controlled entities to promptly respond to queries in writing;[745]
c. Right of audience prior to a decision;[746] and
d. Reviews must be done within ten (10) from the day of award.[747]

Crucially, provision must be made for an impartial body with the powers to vary, and amend tender documents, if they violate the regional competitive bidding template document agreed upon by member states.[748] In other words, this statutory organ should also set aside decisions of the procuring entity and provide equitable and just relief to aggrieved bidders.[749] Furthermore, a provision needs to be made in domestic legislation for suspension of proceedings pending the determination of a disgruntlement, subject to the proviso that:

a. continuance of proceedings cannot be stayed if the balance of convenience is in favour of protecting the interest of the public;[750]
b. reasonableness and timely decision making as informed by the peculiarity of each

[741] art 31 (1).
[742] ibid.
[743] art 31 (2) (a).
[744] art 31 (2) (b).
[745] art 31 (2) (f).
[746] art 31 (2) (g).
[747] art 31 (2) (c).
[748] art 31 (2)(d).
[749] ibid.
[750] art 31 (2) (h).

case;[751] and

c. an effective means of the enforcement of decisions made in appeals and review proceedings.[752]

This requirement for legal certainty and predictability is delightedly welcomed.

4.4. *Governance Architecture*

4.4.1. Introduction

Public Procurement Regulations outlines the numerous ethical standards domestic legislation must cater for. These standards are to be complied with by domestic, regional, and foreign suppliers and public officials.[753] These standards are tailor-made to achieve principles underpinning public procurement such as economy, efficiency, transparency, fairness, and non-discrimination. In addition, a provision for curtailing, investigating, and prosecuting the misuse of public procurement related activities for personal gain must be provided in domestic legislation.[754]

4.4.2. Ethical Conduct

Practice of good ethical standards for public officials is one of the key elements in the governance of a robust effective and proficient public procurement regime. Cognisant of this, Public Procurement Regulations enjoin member states to pass legislation meant to deter unethical behaviour by public officials.[755] Among other fundamental aspects to be included in legislation are:

a. fairness and impartiality when dealing with suppliers;[756]
b. actual and perceived conflict of interest;[757]
c. withholding of relevant and crucial information to the detriment of suppliers;[758]
d. regard for confidentiality;[759] and
e. facilitating an honest and transparent conduct in public procurement activities through dissuading acceptance of gifts inspired to sway public officials.[760]

[751] art 31 (2) (i).
[752] art 31 (2) (j).
[753] art 32 (1) and (3).
[754] art 32 (4).
[755] art 32 (3).
[756] art 32 3) (a).
[757] art 32 (3) (b).
[758] art 32 (3) (c).
[759] art 32 (3) (d).
[760] art 32 (3) (e).

In a nutshell, the directives seek to create public procurement systems untainted with corruption wherein financial resources are put to proper use for the benefit of the public. Indeed, it is obligatory for each respective state to create a conductive atmosphere for the prosecution of corruption cases emanating from public procurement.[761]

4.4.3. Institutional Regulation

Public procurement regulators play a pivotal role in overseeing and providing requisite technical support to public economic operators and capacity building to the public procurement professionals.[762] Therefore, every member state is required to establish such an oversight body for the constant evolution of public procurement regulatory framework in line with the relevant legislation and as informed by international best practice.[763] The regulators are also mandated to report to COMESA on public procurement activities within their jurisdiction.[764]

Debarment serves as a deterrence to bidders for violating public procurement principles, and the period of debarment varies depending on the nature of transgression and circumstances.[765] For example, failure to discharge contractual obligations can lead to debarring. In essence, barring protects the public who are owed fiduciary duties by public officials against financial prejudice.[766] Simply put, member states must institute a transparent, fair, and actionable process for suppliers to participate in public procurement activities, while suppliers have corresponding duty of abiding by the rules.

4.4.4. Dispute Resolution

Member states can make enquiries from each other on any matters set out in the Public Procurement Regulations with a view to settle ongoing or possible disputes amicably.[767] Principally, the settlement of disputes arising from public procurement in case of regional competitive bidding is to be done in not in acrimony and non-litigious manner.[768] This resonates with foundational principles underpinning a single regional market which are

[761] art 34 (1) (b).
[762] art 34 (3).
[763] art 34 (1) (a).
[764] art 34 (1) (b).
[765] art 34 (2).
[766] ibid.
[767] art 36 (1).
[768] art 36(1) (a).

mutual co-operation and assistance.[769] Should peaceful resolution of disputes fail, a dissatisfied party has recourse to the Court of Justice for arbitration.[770]

After diligent search, the researcher could not find a report case of a procurement dispute arising from Public Procurement Regulations. So far up to now, it would appear that foregoing Court has never heard any such a case. This is quite telling. There could possible two explanations. Firstly, it could be a signal that public procurement legislation in most jurisdictions are COMESA are quite advanced and neatly interwoven with the obligations imposed on member states. If that is so, any disputes that arose were amicably settled. Lastly, perhaps most member states have not yet domesticated the Public Procurement Regulations. Hence, suppliers from COMESA region still faces the same huddles in trying to penetrate and accessing public procurement markets in member states.

As a way of curtailing public procurement disputes arising from regional competitive bidding, member states are directed to share information comprehensively.[771] This relates to exchange of information in matters pertaining to legal and policy developments, electronic communication technologies developments and other related fields bordering the domain of public procurement to facilitate the realisation of the Public Procurement Regulations.[772] Member states are to transmit the same information to the Secretariat.[773] Furthermore, the Regulations charge the Technical Committee of Procurement Experts,[774] with the responsibility of formulating procedures to give effect to public procurement directives.[775] It is hoped that through seamless operational guidelines in member states, few disputes can arise.

4.6. Conclusion

This chapter sought to explain COMESA Public Procurement Regulations. In doing so, the core features of the Public Procurement Regulations were identified. The chapter identified the key issues which public procurement legislation of member states had to incorporate. Before a thorough examination of the Public Procurement Regulations was

[769] 6th Paragraph and Art 3 to the Treaty and art 37(1).
[770] art 36 (a). The COMESA Court of Justice is established in terms of art 19 of the Treaty.
[771] art 37 (2).
[772] art 37 (2) (a) - (i).
[773] ibid.
[774] The COMESA Council is authorised in terms of art 15(3) of the Treaty to institute technical committees for the furtherance of the objectives of the Treaty. Hence, Technical Committee of Procurement Experts is one such committee.
[775] art 35.

made, the historical background of COMESA was given. As noted above, the constitution of the regional bloc was meant to increase economic integration. This had to be made through harmonization of laws that directly impact trade.

The chapter revealed that the Public Procurement Regulations are obligatory on member states. Public Procurement Regulations must be incorporated into domestic public procurement legislation to be operative. It was further noted that the application of the Public Procurement Regulations was restricted to competitive bidding insofar as it is within the regional threshold set by member states. The Public Procurement Regulations clearly seek to ring-fence the public procurement activities for suppliers based in the COMESA region.

This chapter outlined the procurement cycle contemplated in the Regulations. The procurement cycle is practically meant to fulfil to the public procurement principles enumerated in the Regulations. Deductively, the formulation of the principles was extensively framed along the tapestry of the Model Law. The procurement cycle is very elaborate endeavouring to guarantee the conduct of public procurement activities to ensure accountability, transparency, fairness, competitiveness, openness, and value for money. The articulation for public procurement processes largely gives effect to the principles set out in Article 4.

Member states are ensure that provision is made in public procurement law for competitive bidding to be conducted through a series of stages. The stages occur in the following order, identification of procurement, drafting of the bid documents, publication of the tender notice, receipt of bids, bid opening and evaluation, contract award and notification, and debriefing. Fundamentally, administrative decisions must be subjected to judicial review in terms of administrative law. In line with that norm, the Public Procurement Regulations direct member states to incorporate a provision for a review of public procurement decisions by a judicial body or an independent body.

Public Procurement Regulations demand that member states institute a firm governance structure for public procurement. This relates to ethical conduct of both public officials and suppliers and institutional mechanisms to superintend over the public procurement activities in each member state. These aspects are to be captured in unambiguous terms

through legal means. Public Procurement Regulations confer the regulators in member states with the duty to collate and transmit opportunities for public contracts to its Secretariat for distribution to regional suppliers. In other words, Public Procurement Regulations impose stringent reporting obligations on regulators. Furthermore, it has been shown in this chapter that emphasis is made for member states to leverage on information communication technologies to conduct public procurement activities for the purposes of fostering transparency and promoting administrative efficiency.

In conclusion, Public Procurement Regulations can be operative in member states provided that each member state has elected to designate that required financial threshold for regional competitive bidding. By implication, only suppliers from COMESA are eligible for participation in regional competitive bidding. Mutual respect and co-operation constitute the backbone for the effective domestication and functioning of the Public Procurement Regulations. Moreover, the underlying philosophy of variable geometry permeates across the Public Procurement Regulations. Accordingly, each member state is to domesticate the Public Procurement Regulations at its own pace considering its economic and social circumstances.

The next chapter will examine the degree to which the Zimbabwe's public procurement legislation conforms to Public Procurement Regulations. As indicated above, Zimbabwe overhauled its public procurement regulatory framework in 2017. Precisely, this is seven (7) years after the adoption of the Public Procurement Regulations. It stands to reason that Zimbabwe's public reform agenda was required to conform to Public Procurement Regulations. The above is premised on the constitutional demand on the Zimbabwean state to uphold international law.

CHAPTER 5: COMPARATIVE ANALYSIS

5.1. *Introduction*

This chapter measures the degree to which Zimbabwean public procurement regulations conform to COMESA Public Procurement Regulations (Public Procurement Regulations). In crafting this chapter, regard will be given to the binding nature of Regulations on member states including Zimbabwe. Moreover, the researcher is fully aware of the constitutional bidding on Zimbabwe's national executive to uphold and respect international law. Section 34 of the Constitution of Zimbabwe reads:

'[T]he State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law'

The wording of the abovementioned constitutional provision places an obligation on the state to domesticate the spirit, purport and objectives of the Public Procurement Regulations. In terms of section 327 (2) (a) of the Constitution, an international treaty binds the state upon its domestication into a national law.[776] Therefore, parliament is required to pass legislation incorporating the treaty. In essence, parliament must move in step with the provisions of section 34 to incorporate the Procurement Regulations into a statute.

An in-depth look at the Public Procurement Regulations points to a number of inescapable conclusions. Firstly, the Public Procurement Regulations are couched broadly to provide a skeletal framework for member states to draw inspiration and guidance when enacting their respective laws on public procurement.

The objective of this chapter is to determine whether the Zimbabwean public procurement regulatory framework is compatible with obligations set out in the Public Procurement Regulations. In other words, this chapter will try to answer the question: "To what extent does the Zimbabwe public procurement regulatory framework conform to the Public Procurement Regulations"?

Secondly, the Regulations are littered with clear-cut obligations which member states are demanded to comply with, insofar as regional competitive bidding is concerned. This position has been extensively brought to light in the previous chapter. As a testament of the seriousness of these obligations, there are time limits attached thereon. Inferentially, one can gauge the spirit of commitment to regional integration that imbued the Council

[776] This constitutional provision provides:
'[a]n international treaty which has been concluded or executed by the President or under the President's authority does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament'.

of Ministers when adoption of the Public Procurement Regulations was made more than a decade ago.[777] Thirdly, the Public Procurement Regulations do not forbid domestic suppliers submitting bids pursuant to a call for regional competitive bids. It follows therefore, it is only the financial thresholds that are crucial in establishing whether suppliers from foreign jurisdictions (COMESA region) are permitted to participate alongside domestic suppliers.

What is concisely clear is that the tenor of the Zimbabwean public procurement regime must be reflective of the bar set in the Public Procurement Regulations. In other words, Zimbabwean public procurement law, is at minimum, required to capture the spirit, objective, and purport of the Public Procurement Regulations. Recalling, that the Treaty enjoins member states to institute policy realignments that are favourable to the survival of COMESA, as a regional trading bloc, and the realisation of its objectives.[778]

The harmonisation of public procurement laws is one such avenue. Another paradigm that emerges in examining the above sub-regional public procurement framework and the national law is that of compliance on the part of Zimbabwe, as a member state. As stated above, obligations from the Public Procurement Regulations were enumerated. Therefore, this chapter evaluates the extent to which Zimbabwean public procurement legislation conform thereto. With respect to the foregoing, the Constitution provides that foreign policy must be pursued in accordance with international law.[779] This is further fortified in section 12 (2) which reads:

'The State must promote regional and pan-African cultural, economic, and political cooperation and integration, and must participate in international and regional organisations that stand for peace and the well-being and progress of the region, the continent and humanity'

The afore-stated constitutional provision is indicative of the aspirations of the people of Zimbabwe to be part of community of African nations. Surprisingly, there is no definition of pan-African in the Constitution. Perhaps a clearer definition could have been sought for had the continent been highly integrated economically. However, it is instructive that the drafters of the Constitution were of the view that the Zimbabwean state must pursue

[777] art 3 of Treaty.
[778] art 5 (1).
[779] s 12 (1) (b).

a course of action that collectively resonates with the common position of other fellow African states.

In pursuit of the above, the Government of Zimbabwe (GoZ) must take reasonable and appropriate mechanisms, including legislative means, to attain this constitutional goal. Consequentially, there is an undeniable constitutional obligation to honour what is prescribed in the Public Procurement Regulations through the adoption of conformable public procurement legislation. Furthermore, it needs no emphasis that the application of the Public Procurement Regulations is to a large extent, limited to regional competitive bidding. Hence, the Public Procurement Regulations only relate to regional competitive bidding for suppliers operating within COMESA member states. In a nutshell, the thrust of this chapter to compare the public procurement regulatory framework with the Public Procurement Regulations.

5.2. *General Obligations of the Regulations on Zimbabwe*

5.2.1. *Introduction*

COMESA Public Procurement Regulations serve as a plumb line upon which public procurement legislation in member states must be measured. The Public Procurement Regulations were crafted with a view to promote fundamental principles underlying the establishment of COMESA.[780] These principles include among others, accountability, regional interdependence and unity, mutual co-operation, and economic justice.[781] The ambit of the Public Procurement Regulations is restricted to regional competitive bidding method for respective regional thresholds for each member state.[782] The implied meaning of the above is that over and above reforming public procurement legislation to capture the substance of the Public Procurement Regulations, member states have an obligation to set the regional thresholds on regional procurement requirements.[783]

The formulation of the Public Procurement Regulations presaged a call for good governance and public procurement reform at the behest of multilateral financial institutions and development banks.[784] Hence, member states are enjoined to seamlessly frame their

[780] art 6 of the Treaty.
[781] ibid.
[782] Para 5.2.1 above.
[783] ibid.
[784] La Chimia above.

public procurement legislation in consonance with the fashion set out in the Public Procurement Regulations. The functionality and prosperity of the regional trading bloc is anchored on the good faith and mutual co-operation of member states for reciprocal dividends.

What this means is that states are to fully enact legislation that conforms to the Regulations subject to exceptions allowable therein. It is submitted that the level of economic integration within COMESA member states is still in its infancy and poses a serious challenge to the degree of the operationalization of regulations issued by Council. Simply put, COMESA is still politically and economically fragmented to guarantee full co-operation of member states when it comes to the domestication of Public Procurement Regulations and the full execution thereof. The absence of substantial economic and political incentives for member states to accelerate the domestication of laws that are friendly to the cause of COMESA as regional trading block is also worrisome.

Arrowsmith also propounds the impediments to the opening of domestic public procurement markets.[785] These restrictions are there to insulate domestic suppliers against foreign competition, unlawful practices such as corruption, connected dealings (nepotisms) and patronage, protection of the local industry, and inflexible domestic laws crafted to attain efficiency in procurement processes. Notwithstanding this, this chapter seeks to establish whether the Zimbabwean public procurement regulatory framework adheres to the Public Procurement Regulations. Public Procurement Regulations contains the public procurement principles which member states must uphold as shall be explained below.

5.2.2. *Public Procurement Principles*

In crafting the Regulations, the Council of Ministers of member states were extensively guided by the universally accepted principles governing public procurement regimes.[786] In line with that tradition, six principles are enumerated in the Public Procurement Regulations, namely,[787]

a. Competition;

[785] Sue Arrowsmith Government Procurement in the WTO (Kluwer Law International The Hague 2003) 11; Robert D Anderson and Sue Arrowsmith The WTO regime on government procurement: past, pre sent and future In 'The WTO Regime on Government Procurement: Challenge and Reform Anderson and Arrowsmith (eds) (Cambridge University Press 2011) 3.

[786] EU 2014 Directives and the UNCITRAL Model Law on Public Procurement are founded on the same principles as the Public Procurement Regulations.

[787] art 4; para 5.2.3 above.

b. Openness;
c. Fairness;
d. Transparency;
e. Accountability; and
f. Value for money

Public procurement legislation in member states must give effect to the preceding principles. The projections were that once member states had unified public procurement regulatory frameworks broadly capturing these principles, this would then lead to increased inter-regional trade, social and economic development, good governance, and regional integration.[788] Admittedly, the above principles are overlapping and where applicable and possible, closely linked ones will be simultaneously discussed.

The substance of the foregoing principles will be analysed to determine the level to which the Zimbabwean public procurement regime mirrors them. In calibrating the Zimbabwean public procurement regulatory framework against what is dictated in COMESA Public Procurement Regulations, this chapter will not examine individual provisions of the two regimes; instead, an overarching view will be given.

In Zimbabwe, section 315 (1) of the Constitution, is the primary provision governing public procurement in Zimbabwe. Public procurement legislation falls and rises on section 315(1), if it does not uphold the principles articulated thereat. Section 315(1) provides that:

'An Act of Parliament must prescribe procedures for the procurement of goods and services by the State and all institutions and agencies of government at every level, so that procurement is effected in a manner that is transparent, fair, honest, cost-effective and competitive'

This is further solidified in section 195(2) which reads:

'Companies and other commercial entities under the control of the state must establish transparent, open and competitive procurement systems (rephrased)'

The procurement systems of government-controlled entities, municipal councils at both provincial and local levels are subject to the above constitutional provisions as fleshed out in public procurement legislation. Principally, the PPDPA Act is the foremost statutory authority on public procurement in Zimbabwe. To a restricted extent, the Public Finance Management Act (PFMA) is another statute which governs the exercise of public power on the public procurement turf. COMESA Public Procurement Regulations are

[788] Preamble to the Regulations.

apply to regional competitive bidding method for procurement requirements of specified financial value. Mindful of this, aspects of the legislative framework for public procurement insofar as it is relevant to the competitive bidding method will be discussed.

5.2.1.1. Competition and Economy

The principles of competition and economy are intertwined and inseparable. Accordingly, the two principles will be discussed together. The core function of competition in public procurement is to gain value for money on the part of the purchaser, the public entity. The true competitive nature of a public procurement system is manifested in the methods that are used to engage suppliers. Competition facilitates unhindered access to public procurement contracts by potential suppliers of all sizes and this is essential if the principle of value for money is to be realised.[789]

Suppliers must compete to offer affordably priced high quality goods and services.[790] In vying for public procurement opportunities, suppliers will have to make good offers to public entities.[791] It needs no emphasis that the Public Procurement Regulations caution member states against discriminating foreign suppliers (regional) and giving preferential treatment to local suppliers.[792] In other words, public procurement activities must be conducted in a fair atmosphere to guarantee the participation of as many regional suppliers as possible.[793]

Public Procurement Regulations provide that member states are to draw up an elaborate evaluation criterion to be published together with the tender pursuant to the prescriptions of local legislation.[794] The evaluation methodology is *inter alia*, required to encapsulate the manner in which the best offer made to public entities is to be identified and selected.[795] The publication of the evaluation criteria is truly admirable and in keeping with the best international practice and legitimises the process.[796]

[789] <https://www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf>accessed 23 July 2021.
[790] Kenneth Lysons and Brian Farrington, *Procurement and Supply Chain Management* (Pearson Educa tion Limited, 2016) 17.
[791] Para 2.2.2.5 above.
[792] art 8 (2) (b).
[793] art 32 (2).
[794] art 20.
[795] art 20 (4).
[796] art 11 (5) of the Revised Model Law 2011; art 58(1) of EU 2014 Directives.

The objectives of the Zimbabwe public procurement policy are stated in the PPDPA Act.[797] Among these objectives is the need to promote competition among bidders and treat them equally. Competition inspires public and supplier confidence in the public procurement system. Indisputably, the PPDPA Act elevates competitive bidding as the foremost method of procurement.[798] However, where circumstances permit, public entities in Zimbabwe may use other methods such as restricted method, direct method, and the request for quotation method.[799] The provision for choice of procurement that meets different demands and situations is praiseworthy for the realisation of the principle of economy. Public entities should strike a delicate balance between the procurement requirements in proportion to the costs associated with the procurement path, nature of procurement, and circumstances necessitating the procurement requirement.

The PPDPA Act goes further to prescribe the qualifications of members of the adjudicators for tenders. The members are to possess qualifications in law and finance, among others, and personnel from the user department with the technical knowhow for the procurement requirement.[800]The underlying philosophy for the above is risk mitigation on the part of the public entities and achievement of value for money.[801]

Observably, the Zimbabwean public procurement framework is a step ahead and this is a laudable legal posture. Regrettably, it falls short in that there is no provision for the disclosure of the evaluation criteria and it is up to the individual public entity to do so. A unified approach through legislating the practice would go a long way in entrenching competition and economy of the Zimbabwean public procurement regime.

Admirably, public procurement regulation in Zimbabwe incorporates elements of social, economic and environment sustainability in synch with the aspirations of the Treaty.[802] This aspect is given prominence in the Treaty and has gained irreversible momentum over the past two decades.[803] Thus, there is reasonable prospect that suppliers of goods

[797] Para 3.2.1 above.
[798] Section 30 (1) of PPDPA Act.
[799] Para 2.4.1 above.
[800] Section 18 (2) (b) (ii).
[801] Para 2.3.3 above.
[802] art 122 (1) of the Treaty.
[803] Para 3.2.2.2. COMESA member state are parties to the Paris Agreement of 2016 that has set ambitious targets for parties thereto to minimise carbon emissions by 50%. Implicitly, the Regulations need to be amended to capture that contemporary aspect.

and services that are not environmentally friendly stands to lose business opportunities with government controlled entities in Zimbabwe. However, this will gather pace, once a comprehensive public procurement environmental policy is operative.[804] As mentioned before, the policy is yet to be formulated.[805]

Public Procurement Regulations have a provision for the post-award assessment of failed bids regardless of whether such bids would have been responsive or not.[806] It can be inferred that the purpose of this exercise is to create an avenue for suppliers to receive feedback from procuring entities. This stands to entrench transparency and openness, thereby curbing the possibility of bidder fatigue. Sadly, there is no definition of a non-responsive bid. Perhaps, a non-responsive bid means an offer that is materially at variance with the criteria outlined in the bid document.

In contrast, non-responsive bids are defined as bids that do not conform to the procurement requirement sought for in the Zimbabwean legislative framework.[807] By extrapolation, the same definition is supposedly implied and assigned the same meaning in the Public Procurement Regulations. A definitive meaning of a bid that is not responsive in the Public Procurement Regulations will bring much needed legal clarity and comprehensiveness to the COMESA public procurement directives. In terms of the Public Procurement Regulations, potential parties to public contracts are evidently obliged to come out clean regarding their historical records on debarment and aspects of corruption, such as collusion.[808]

5.2.1.2. Accountability

Practice has revealed that the third phase of the procurement cycle (selection of tenders) is most susceptible to corruption.[809] The pursuit of transparency and accountable public

[804] ibid.
[805] Para 3.2.2.2 above.
[806] Para 5.3.8 above.
[807] PPDPA Act, section 1.
[808] art 15 (1) (a) and b.
[809] Andrea Appolloni, 'Public Procurement and Corruption in Africa: A Literature Review in Public Procurement in the World's Place The Charge Towards Sustainability and Innovation' in Francesco Decaloris and Marco Frey and Gustavo Piga (eds), *Central Issues in Contemporary Economics and Policy General* (Pelgrave MacMillan 2014) 189.

procurement is one of the indices of good governance.[810] Suffice to say that public procurement is government's economic transaction most affected by corruption.[811] Therefore, institutional and regulatory means are of utmost importance to guard against improper use of public resources.

Mismanagement of public funds is manifested chiefly, through embezzlement, favouritism, extortion, fraud and bribery.[812] Mindful of this, public procurement must be carried out in an accountable way. Conversely, lack of accountability promotes corruption in public procurement and is an indicator of bad governance, something that runs counter to the COMESA Treaty and the Zimbabwean Constitution. Surely, accountability is one of principal pillars and objectives of Public Procurement Regulations.[813] Therefore, Zimbabwe's public procurement legislation must conform.

The Zimbabwean regulatory framework provides for several institutional and legal means to promote accountability. From an auditing perspective, public entities as recipients of public revenue are absolutely required to be subjected to annual audits. Through comprehensive audits, cases of financial recklessness, leakages, and other forms of public expenditures, improprieties can easily be identified and curtailed in public procurement activities. The aforementioned is central to the establishment of accountable public procurement regime.

Public Procurement Regulations demand that public procurement records be preserved for audit trail purposes.[814] This is mirrored in the PPDPA Act which requires that all documentation related to procurement activities be safely kept for up to six years for audit purposes.[815] Moreover, a call for confidentiality and non-disclosure of proprietary information codified in the Public Procurement Regulations, is echoed in the PPDPA Act.[816]

Whereas the internal audit function is carried out by the Public Service Commission (PSC) for government ministries and departments, the Auditor General's Office fulfils

[810] Preamble to the Regulations.
[811] Sope Williams-Elegbe and Geo Quinot, 'Public Procurement and Corruption: The South African Re sponse South African' *Law Journal* 341.
[812] ibid.
[813] arts 3 and 4.
[814] art 29 (1) (c).
[815] Section 69 (4); art 30 (4).
[816] Section 69 (3) (iii).

the external audit responsibilities.[817] The position is somewhat different for the remainder of the public entities and constitutional bodies. These are to establish their own internal audit units.[818] For external auditing purposes, public entities are to be audited by qualified and registered persons in accordance with the applicable laws.[819] Parliament through the Public Accounts Committee (PAC) also keeps an eye on the expenditure of public revenue in government-controlled entities. The non-binding nature of the reservations made by the PAC is noted with great concern.

Moreover, in terms of PECGA, boards of public entities are to constitute audit committees.[820] In adherence to good corporate governance norms, the audit committees, where appropriate are to be composed of executive and non-executive members of boards and with a clearly defined terms of reference.[821] Chairpersons of boards are barred from being part of the audit committees.[822] This functional demarcation is essential in promoting the efficacy of audit committees.

Regulations make it mandatory for member states to establish an oversight body to provide guidance to public entities. In Zimbabwe, public entities are institutionally answerable to the PRAZ. The functions of PRAZ are well articulated as already indicated.[823] Despite the misgivings on excessive quasi-legislative functions conferred on PRAZ as previously discussed, its role in providing strategic and technical directions to public entities cannot be belittled.[824]

In a way, it can be deduced that there is a sense through which public procurement regulation in Zimbabwe endeavours to conform to the requirement for accountability as demanded by the Public Procurement Regulations. Public entities are dually accountable to the public procurement oversight body, PRAZ and the parliament, as the ultimate reservoir of public trust. Functionally, public officials are always under the scrutiny of the

[817] PFMA 2009, sections 80 and 81.
[818] Public Finance Management (General) Regulations, SI 2019/135, reg 50(4).
[819] Public Entities Corporate Governance Act 2009, s 36(b).
[820] Section 92 of the Second Schedule (National Code on Corporate Governance Zimbabwe hereafter 'Code on Corporate') to the Public Entities Corporate Governance Act.
[821] ibid.
[822] Code on Corporate Governance, s 119(a).
[823] Para 3.3.2 above.
[824] ibid.

Office of the Auditor-General and external auditors. Hence, the principle of accountability in the Zimbabwean public procurement regulatory framework can be achieved. The segment below examines the extent to which the principle of transparency is articulated in the Zimbabwean public procurement regulatory framework.

5.2.1.3. Transparency

Predictability lies at the heart of transparency in public procurement proceedings. Consistent with the principle of sovereignty in international law, the Council of Ministers delegated the powers to make legislative provisions on transparency to member states. As a result, Public Procurement Regulations are silent on the specifics regarding transparency. However, the requirement for transparency reverberates across the COMESA public procurement directives.

As stated in previous chapters, competitive bidding is the foremost procurement method for the Zimbabwean public procurement regulatory framework.[825] There is a statutory obligation for public entities to submit their annual procurement plans to the regulator, PRAZ.[826] By virtue of its central location in the Zimbabwean public procurement system, PRAZ serves as a repository of all public procurement opportunities. In accordance with the transparency principle, public entities are forbidden from splitting up procurement requirements to avoid the default procurement method.[827] The PPDPA Act has a similar provision prohibiting the division of procurement requirement to avoid certain financial threshold.[828]

Notably, transparency could be enhanced by the electronic accessibility of the libraries of public procurement opportunities under the custody of PRAZ. This could be made operative through legislative intervention making it compulsory for PRAZ to publish the public procurement opportunities on its website. The obligation to publish annual procurement opportunities of member states falling under the regional threshold category is well detailed in the Public Procurement Regulations.[829]

[825] Para 2.4.1 above.
[826] PPDPA Act, s 22 (1) (a).
[827] art 12(2).
[828] Section 25 (2) (a).
[829] Art 32. Transparency is a key foundational principle upon which the Public Procurement Regulations.

The broadcasting of tenders through the print and electronic media such as the *Government Gazette* and widely circulating newspapers signifies some measure of transparency in the Zimbabwean public procurement regime.[830] The call for public entities to sufficiently describe public procurement requirements in tender notices and documents further entrench transparency.[831]

Technical features, operational efficiency and performance, as well as the quality and quantities of the procurement requirement must be fully particularised.[832] There are legislative guidelines for the conduct of public procurement proceedings for bids received through the competitive bidding method. This process commences with an entity having a procurement need, preparation of tender documents, publication of the tender notice, receipt of bids, opening, evaluation, contract award, and standstill period, execution of the contract, and termination of contract.[833] Appallingly, the PPDPA Act is mute on the publication of the evaluation criteria, a scenario that presents a chance for corruption-penchant public officials to exploit. This silence is absolutely opposite to the directive requiring member states to legislate on that subject in the Public Procurement Regulations.[834]

It is submitted that PRAZ is encumbered with ensuring that public procurement system imagined in section 315(1) see its day. Incontestably, its ability to effectively monitor public entities for compliance levels with the provisions of the PPDPA Act on transparency is cast in doubt for reasons mentioned below. Firstly, lack of professionals to steer the public procurement not only in Zimbabwe, but Africa as indicated above remains a challenge.[835]

The above could be attributable to a number of issues. One of these is that the field of public procurement has, save for the past two decades, remained in oblivion in comparison to other fields that have evolved at a tremendous pace. Therefore, there is a restricted pool of professionals to recruit from and it is obvious that PRAZ might not be in good financial standing to offer competitive remuneration offered by the private sector. In

[830] PPDPA Act 2017, s 38 (2) (a).
[831] PPDPA Act, section 27.
[832] ibid.
[833] Para 2.3.1 to 2.3.4 above.
[834] art 20 (2).
[835] Para 3.2.2 above.

terms of the PPDPA Act, provision is made for funds to be allocated by Parliament for PRAZ to be effectively fulfil its mandate.[836] In reality, little moneys are disbursed to PRAZ. This is so because of lack of fiscal space, and the need to avail the limited financial resources to more pressing issues such as health. Stated differently, the allocation of state resources requires polycentric decision making.[837] This is a functional territory of the executive acting through the presidential appointee responsible for the collection and expenditure of public funds. In tandem with the foregoing, due deference should be made to the national executive to exercise discretion in that regard.

Owing to poor remuneration, the few highly professional individuals gravitate towards the private sector in search of highly rewarding financial and material packages. Secondly, PRAZ, suffers from financial incapacity synonymous with all entities leaning on government for their operational expenses. To survive from the harsh economic and unpredictable environment characteristic of Zimbabwe, PRAZ is only limited to meagre funds in the form of levies imposed on suppliers for certification to do business with government-controlled entities.[838] This financial handicap has a grave bearing on its functions to oversee Zimbabwe's public procurement system.

The demand made in the Public Procurement Regulations for the evaluation of failed bids is strikingly commendable. It is submitted that under this arrangement, public entities have an opportunity to introspect and draw lessons. This ultimately improves the functioning of public procurement systems in member states. The rationale for this exercise is to do an in-depth study of the reasons for failure of the bids to attain to the expected bar. Hence, member states, such as Zimbabwe, whose public procurement regulatory frameworks have previously been condemned as corruption-laden can, through embracing such practices, extricate themselves from a league of nations known for public procurement corruption.

Public procurement is potentially grievance-laden, and disgruntled parties can either be suppliers or public entities. Cognisant of this, Public Procurement Regulations direct member states to craft legislation that is transparent in the way grievances are settled.

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[836] Section 16 of the First Schedule.

[837] *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) para 68; *Soobramoney v Minister of Health (KwaZulu-Natal) 1998* (1) SA 765 (CC).

[838] PPDPA (General) Regulations, SI 2018/5, reg 4(2).

The procedure for settlement of disputes and punishment of inappropriate conduct must be objectively fair and transparent. Suppliers that transgress public procurement law stand to lose business opportunities with public entities through debarment. To legitimize this government-controlled dispute resolution process, proceedings for debarment must accordingly be conducted transparently, openly, and fairly.

By and large, the resolution of public procurement disputes is conducted fairly in Zimbabwe, with each party accorded the right to make presentations before a decision is made, in harmony with the values of natural justice.[839] The pathway to dispute settlement is multi-layered, with the aggrieved bidder and the procuring entity first being afforded an opportunity to settle the dispute between themselves (suppliers and procuring entities).[840] If the two fail to amicably settle the dispute, the aggrieved bidder reserves the right to escalate the issue to PRAZ for settlement by the review panel.[841] As indicated above, the manner in which PRAZ is perceived by suppliers and the general public as an independent organisation is critical in protecting the integrity of the dispute outcome it facilitates.[842] Grievances can further be escalated to the Administrative Court for determination.[843] The part played by the regulator, PRAZ, in settling disputes is duly noted. This dispute settlement mechanism is in line with what is envisaged in the Public Procurement Regulations.[844]

In view of the susceptibility of government contracting to corruption, the PPDPA Act sets the professional and ethical standards for public officials, particularly procurement officers, and suppliers.[845] Procurement officers are further required to uphold a code of conduct to entrench transparency and integrity in public procurement.[846] Rejected bidders have a right to be furnished with the written reasons for the rejection in terms of the Zimbabwean law in line with dictates of administrative law.[847] Public Procurement Regulations retain a stringent requirement for the post-evaluation of failed bids and provides

[839] PPDPA Act 2017, s 76(2).
[840] PPDPA Act 2017, s 73.
[841] PPDPA Act 2017, s 76.
[842] Para 6.2.1.4 above.
[843] PPDPA Act 2017, s 77.
[844] Para 5.5.4 above.
[845] PPDPA Act 2017, s 70 and s72.
[846] Para 3.3.3 above.
[847] PPDPA Act 2017, s 67(1).

a list of reasons that could be attributed to the failure.[848] To a large extent, the public procurement regulatory framework for Zimbabwe is transparent and compares favourably with COMESA Public Procurement Regulations.

Few aspects fall short of the standard set in the Public Procurement Regulations as indicated above. Suffice to that say that the adoption of the Public Procurement Regulations preceded Zimbabwe's public procurement law reform by close to a decade. One would have hoped that public procurement regulatory frameworks for member states such as Zimbabwe would be amenable to the Public Procurement Regulations. As stated above, the principles of openness and transparency in practice are almost similar.[849] A discussion on openness follows hereunder.

5.2.1.4. Openness

Attention is drawn to the foundations laid out in Chapter Two where it was highlighted that a permanent feature of an open public procurement regulatory framework is the absence of convoluted and deliberate legal tools to exclude categories of suppliers from participating in it. Pointedly, the Public Procurement Regulations oblige member states to enact legislation that embraces regional suppliers in their respective jurisdictions.[850] In other words, Public Procurement Regulations forbid member states from discriminating regional suppliers in competitive bidding, if the financial value of procurement requirement falls within the scope of regional threshold.

In harmony with the Public Procurement Regulations, the PPDPA Act enjoins public entities to accept bids from all eligible and qualified bidders in competitive bidding.[851] The exclusion of bidders can only be done subject to the limits imposed by law relating to non-responsive bids.[852] The bids can be rejected at the bid opening stage.[853] The PPDPA (General) Regulations provide an exhaustive list of grounds for non-eligibility. The grounds are mentioned hereunder.

[848] art 28(2).
[849] Para 2.2.2.5 above.
[850] arts 8 and 32(2).
[851] Section 31(1) (b).
[852] PPDPA Act 2017, s 47.
[853] ibid.

In terms of Zimbabwe's public procurement regulatory framework, the grounds for barring bidders at the bids opening stage include, but are not limited to:

a. failure to comply with social security and tax obligations; [854]
b. suspension of business operations in any country;[855]
c. legal incapacity;[856] identifiable conflict of interest;[857] and
d. insolvency [858]

The above stated grounds resonate with the provisions of Article 19 of the Public Procurement Regulations setting forth the qualifications of bidders. With regard to eligibility of bidders, it appears the Zimbabwean public procurement regulatory framework conforms to the Public Procurement Regulations. It is accepted that the grounds enumerated in the PPDPA Act for disqualification from participating in competitive bidding are in consonance with international practice geared towards legitimising the public procurement process. Therefore, it can be summed up that the Zimbabwean public procurement system is largely open.

Unfortunately, the reservations expressed earlier on regarding the power conferred on the state President to order certain procurement activities to be done outside the provisions of PPDPA Act, will once again, stain the principle of openness.[859] Such reservations are predicated on the possibility of the abuse of that provision for underhand public procurement dealings in violation of the transparency and openness principles.

5.2.1.5. Fairness

The requirement for fairness must extend to the entire phases of the procurement cycle.[860] The continuance of public procurement processes is anchored on the sustained participation of economic operators. Suffice to say that public procurement proceedings must be objective and perceived to be fair. Otherwise, unfairness will lead to bidder fatigue. Since public procurement is a classic example of the application of public power, it is fundamental that public officials make decisions with due regard to fairness. Indeed, fairness is one the indices of good governance yearned for in the Treaty.

[854] PPDPA (General) Regulations, SI 2018/5, reg 28(1) (e).
[855] PPDPA (General) Regulations, SI 2018/5, reg 28(1) (c).
[856] PPDPA (General) Regulations, SI 2018/5, reg 28(1) (a).
[857] PPDPA (General) Regulations, SI 2018/5, reg 28(1) (f).
[858] PPDPA (General) Regulations, SI 2018/5, reg 28(1) (b).
[859] Para 3.2.6 above.
[860] Para 5.2.1.5 above.

It is notable that the philosophical foundations for the creation of COMESA was to foster good governance[861] and that the driving force behind the adoption of Public Procurement Regulations was to inculcate a culture of good corporate governance in public entities that provide vital goods and services for the betterment of lives.[862] In view of so great an aspiration, public procurement legislation in member states must therefore, in all respects, be procedurally and substantively fair.

Public Procurement Regulations encourage the passage of legislation that describes the operational performance of a procurement requirement as opposed to mentioning a precise brand.[863] Correspondingly, the PPDPA Act provides that the technical specifications of procurement requirements must not be distinctively linked to specific brands, unless it is impossible to do so.[864] If it is impracticable to identify a procurement requirement without mentioning a specific brand, provision is made for suppliers of goods of the same functional equivalence to respond to a bid.[865] In that way, the legislation is deemed to be not discriminatory.

Public procurement notices must be published in various forms of media with a view to capture a wide spectrum of bidders over a large geographical space for the purposes of reaching to a large audience.[866] Responses to queries pertaining to the tenders must be in written form and addressed to all bidders as a matter of courtesy and fairness.[867] The bidding period must be reasonable to enable bidders to file responsive bids and provide for an allowance for the review of the period in cases of amendment of tender notice.[868] In determining the bidding period, regard is to be given to the complexities of the bids, the need to prepare for site visits and pre-bid meetings,[869] and the stipulation for bidders to file authenticated documents.[870]

[861] Fundamental Principles of the COMESA Treaty set out in Art 3.
[862] art 33.
[863] art 11 (5).
[864] Section 38 (3) (2).
[865] ibid.
[866] PPDPA Act 2017, s 38.
[867] PPDPA Act 2017, s 36.
[868] PPDPA Act 2017, s 39.
[869] PPDPA Act 2017, s 41 (2) (a).
[870] PPDPA Act, s 41 (2) (c).

Public Procurement Regulations require that the evaluation of bids be made in accordance with predetermined criteria.[871] The PPDPA Act dictates the criteria upon which the evaluation of bids shall be based.[872] Public entities are to be guided by what is articulated in the PPDPA Act in the bid evaluation process. The lack of inclusion of the list of evaluation criteria in bid documents to curb arbitrary decision is regretted. In evaluating the bids, public entities are to absolutely rely on the submitted bids without room for negotiation.[873] The integrity of the bids is to be maintained throughout the process. However, arithmetic errors and omissions are amendable.[874]

Article 21 of the Public Procurement Regulations provides that member states are to domesticate a provision for an intervening challenge to be launched by an aggrieved bidder pursuant to the award of a public contract. Consistently, the Zimbabwean public procurement legal framework provides for the same.[875] The Zimbabwean legislation has a stacked grievance settlement mechanism as noted above.[876] The grounds for the challenging proceedings are unlawfulness, unreasonableness, and procedural unfairness.[877]

South African courts have upheld the foregoing grounds as legally valid.[878] The basis for judicial review are lawfulness, reasonableness, and fairness.[879] The process commences with aggrieved bidder lodging a complaint with the public entity.[880] If unsatisfied with the explanation and reasons given by the entity, the bidder can escalate the matter to the regulator, PRAZ, which in turn causes the matter to be heard by the review panel.[881]

The review panel is selected from a standing list of experts in the fields of law and procurement and members of the civil service. As indicated earlier on, the integrity of the review proceedings depends on the independence of the review panel. Quinot submits that once the appointment process of the panellists is centrally controlled, it might be

[871] art 20.
[872] Section 50.
[873] PPDPA Act 2017, s 52.
[874] PPDPA Act 2017, s 51.
[875] PPDPA Act 2017, s 55 (2) (a).
[876] Paras 2.2.2.2; 2.3.3 and 2.5 above.
[877] PPDPA Act 2017, s 73(1)
[878] *Road Accident Fund v Smith* 2007 1 SA 172 (SCA) para 7.
[879] Administrative Justice Act 2004, s 3(1) (a).
[880] PPDPA Act 2017, s 73.
[881] Section 74.

perceived as compromised and unable to deliver justice.[882] The regulator must be independent in character and in deed and not be a stooge of the political elite.[883] The dispute can be brought to the attention of the Administrative Court and presumably, the Constitutional Court since public procurement has been granted constitutional status in terms of section 315(1). During the entire process, aggrieved parties are afforded an opportunity to make their presentations in accordance with the principle of *audi partem*.[884]

To cushion contracting authorities from risks associated with suppliers that are incapable of discharging contractual obligations, member states are directed to legislate on the requirement for suppliers to provide indemnity in the form of bid security.[885] This provision is reincarnated in section 44 of PPDPA Act. There are varying ranges of bid securities to be furnished by suppliers depending on the financial value of the procurement requirement.[886]

5.2.1.6. Value for money

Value for money is the principal objective of public procurement.[887] By opening the public procurement process to competitive bidding, an avalanche of offers are made to public entities for them to select the most economically advantageous tender.[888] A competitive public procurement process must promote the achievement of economy.[889] Similarly, the core principle of economy can be used interchangeably in the place of the principle of

[882] Para 3.5.3 above; Geo Quinot An Institutional Legal Structure for Regulating Public Procurement in South Africa Final Report 2014: A Research Report on the feasibility of specific legislation for National Treasury's newly established Office of the Chief Procurement Officer. Funded by the Delegation of the European Union to the Republic of South Africa under LOT Nº 11: Macro economy, Statistics, and Public Finance management REQUEST Nº DCI-AFS/2013/330-767) 111.

[883] ibid.

[884] The *audi partem* rule is a Latin phrase meaning, 'listen to the other side'. The rule is a fundamental legal principle in proceedings for promoting fairness.

[885] Para 5.3.3 above.

[886] ibid.

[887] Para 2.2.2.4 above.

[888] art 21 (1) (a). The EU 2014 Directives provides that the most economically advantageous tender must among other things embrace the following:

> (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental, and innovative characteristics and trading and its conditions; and
>
> (b) organisation, qualification, and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

[889] Sue Arrowsmith, *The Law of Public and Utilities Procurement* Volume 1 (2nd edn Sweet & Maxwell) 8.

cost-effectiveness.[890] Member states are directed to enact legislation that ensures that public procurement is conducted efficiently, economically, and honouring the principle of obtaining value for money.[891]

From a Zimbabwean regulatory perspective, the full measure for the principle of value for money is not easy to formulate. Bids are evaluated pursuant to the convention set out in terms of section 50 of the PPDPA Act, as highlighted above. Weightings are allocated for a wide array of aspects encapsulating the bid price;[892] payment terms and delivery schedules;[893] transportation and insurances expenses;[894] accessibility and affordability of spare parts;[895] operational efficiency;[896] environmental and social benefits;[897] whole life cycle costs;[898] and maintenance and rehabilitation[899] among others. In a nutshell, it can be inferred that the Zimbabwean public procurement regulatory framework uses a hybridized system of attaching value to goods and services and other considerations. The first one pertains to monetary value of a procurement requirement and the second relates to the collateral benefits of public procurement, mainly environmental and social benefits. Simply stated, the procurement regulatory framework of Zimbabwe aims to use public procurement as a social policy instrument.

5.2.1.7. Conclusion on the Principles

The principles outlined in the Regulations are sufficiently mirrored in the public procurement legislation of Zimbabwe. To a higher degree, public procurement legislation in Zimbabwe complies with the obligations imposed on member states. This is despite the fact that Zimbabwe has not categorically assimilated the regulations through statutory means; neither has the nation signalled the intention to move in that direction in the proposed amendment to the PPDPA Act.[900]

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[890] Para 2.2.2.4 above.
[891] arts 3, 4 (e) and 32 (2) of Public Procurement Regulations.
[892] PPDPA Act 2017, s 50 (2) (a).
[893] PPDPA Act 2017, s 50 (3) (b) and (c).
[894] PPDPA Act 2017, s 50 (3) (a)
[895] PPDPA Act 2017, s 50 (3) (e).
[896] PPDPA Act 2017, s 50 (3) (d).
[897] PPDPA Act 2017, s 50 (3) (o).
[898] PPDPA Act 2017, s 50 (3) (g).
[899] PPDPA Act 2017, s 50 (3) (h).
[900] Clever Ruswa, 'Why we are reforming and refining public procurement system' *Sunday Mail*, (Harare, 29 August 2021)< https://www.sundaymail.co.zw/why-we-are-refining-our-public-procurement-system>accessed 21 September 2021.

5.3. *Institutional Oversight*

Article 34 of the Regulations reiterates the need for the existence of institutional means to regulate public procurement activities. The Public Procurement Regulations further codify a wide range of regulatory functions to be performed by the regulator, which include, but are not limited to issuance of practice notes[901] and act as interface between governments of member states and the Secretariat for public procurement related activities;[902] professional development of practitioners;[903] and investigation and prosecuting malpractices as well as meting out punishments such as debarment of unscrupulous suppliers.[904] The regulatory framework to a larger extent complies with the above regulation in that the PPDPA Act confers PRAZ with regulatory powers.[905] However, there are some deficiencies that require attention to bring it at par with the aspirations of the Public Procurement Regulations.

5.4. *Deficiencies of the Zimbabwean Public Procurement Regulatory Framework*

5.4.1. *Introduction*

Zimbabwean public procurement legislation strives to measure up to the dictates of the Public Procurement Regulations. Regard should be given to the fact that the scope of the Public Procurement Regulations is limited to competitive bidding. Furthermore, member states have the discretionary power to determine the regional threshold that is to be used as the basis for the unrestricted acceptance of bids from suppliers operating in the COMESA region. As noted above, the substance of the competitive bidding as articulated in the PPDPA Act agrees with the Public Procurement Regulations in many respects.

Notwithstanding this, public procurement legislation in Zimbabwe needs to be brought in line with the Public Procurement Regulations in light of the outstanding issues that are blatantly missing therein. In proffering the suggestions made hereunder, it must be recalled that the Public Procurement Regulations are binding on all member states. Therefore, member states are required to act in accordance with all the provisions of the Public Procurement Regulations. Fortunately, most of the legislative deficiencies observed in Zimbabwe's public procurement regulatory framework relates to administrative issues that are to be carried out by the regulator, PRAZ. These administrative responsibilities

[901] art 34 (1) (a).
[902] art 34 (1) (b) and (c).
[903] art 34 (1) (d).
[904] art 34 (2) and (3).
[905] Sections 6 and 7.

are mainly fulfilled to the COMESA Secretariat as part of the obligations of the Government of Zimbabwe, as a state party to the Treaty.

5.4.2. *Financial Thresholds*

The PPDPA Act sets financial thresholds within which procurement methods may be selected.[906] The monetary thresholds are to be prescribed by ministerial regulations fixed by a statutory instrument. Provision is made for a financial threshold within which public entities may only invite suppliers of Zimbabwean origin.[907] In international competitive bidding, foreign suppliers compete alongside domestic ones as determined by the prescribed financial threshold set from time to time.[908] Apparently, suppliers can only submit bids either as domestic or foreign suppliers. Therefore, the Zimbabwean public procurement legislative framework is silent when it comes to the regional threshold as required by the Public Procurement Regulations. Tacitly, suppliers in the COMESA must have to fight for public contracts against suppliers from non-member states.

Clearly, member states are required to undertake legislative reforms to incorporate what is set in the Public Procurement Regulations.[909] The provisions of the PPDPA Act of section 3(2) (a) are instructive and read:

'To the extent that this Act conflicts with an obligation of Zimbabwe under or arising out of any convention, treaty or agreement between Zimbabwe and one or more foreign states or governments, the requirements of the convention, treaty or agreement shall prevail'

It is trite that the Public Procurement Regulations are binding, and member states must comply with the provisions.[910] Therefore, public procurement must be carried out with due regard to Zimbabwe's international obligations. The requirement for member states

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[906] Section 14 (1) (a).

[907] Para 3.2.3 above.

[908] Presently, set in Public Procurement and Disposal of Public Assets (General) (Amendment) Regula tions,
2020 (No. 2) SI 219/2020, reg 4(a)-(c) 2020 as follows:

(a) the equivalent of five million (5 000 000) United States dollars; in the case of construction works; or
(b) the equivalent of three hundred thousand (300 000) United States dollars; in the case of goods; or
(c) the equivalent of one million (1 000 000) United States dollars; in the case of consulting and non-consulting services.

[909] Para 5.2.3 above.

[910] Para 5.2.2 above.

to designate the regional threshold for regional competitive bidding exclusive to suppliers from the COMESA region is one such obligation.

Given that the PPDPA Act is largely agreeable with the provisions of the Public Procurement Regulations, minor amendments would therefore be desired for full compliance. This can be made possible through setting a threshold designated as COMESA regional threshold through a parliamentary amendment of the PPDPA Act. The Constitution of Zimbabwe dictates that the domestication of an international treaty, convention, agreement, or protocol gets parliamentary approval.[911] In light of the constitutional bidding, it is submitted that the amendment of the PPDPA Act should not be effected through ministerial regulations, neither can it be done through a circular issued by PRAZ.

5.5. *Conclusion*

It was the aim of this chapter to examine the degree to which Zimbabwean public procurement legislation resonates with Public Procurement Regulations. When carrying out a comparative analysis of the two frameworks, it had to be kept in mind that the Public Procurement Regulations were only applicable to the domestic public procurement legislation insofar as it related to competitive bidding of a regional nature. What can be inferred from this chapter is that public procurement legislation in Zimbabwe succinctly captures the dictates of the Regulations in a number of ways. Unfortunately, there is no differentiation between suppliers from other jurisdictions and those within the COMESA region. Consequentially, suppliers from within the COMESA and beyond are technically regarded the same. In the absence of a codification of regional threshold, this means that bids tendered by suppliers from COMESA member countries are regarded the same as bids from non-member states. Hence, there is no preferential treatment of suppliers from COMESA member states as required in the Public Procurement Regulations. The lack of legal framework to embrace suppliers from COMESA scuttle efforts to accelerate regional integration.

[911] Section 327(2) of the Constitution read as follows:
'An international treaty which has been concluded or executed by the President or under the President's authority—
a. does not bind Zimbabwe until it has been approved by Parliament; and
b. does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament'.

To begin with, competitive bidding as outlined in the PPDPA Act is seamless with requirements envisioned in the COMESA public procurement directives. Secondly, the public procurement principles set out in the Public Procurement Regulations broadly capture the manner in which negotiation and conclusion of public contracts are done in Zimbabwean public procurement laws. Critically, Zimbabwean public procurement legislation is devoid of the legal means for PRAZ to fulfil obligations articulated in the Public Procurement Regulations.

This chapter gave an insight into the levels of regional integration of the COMESA region. Inferentially, most member states had not domesticated the Public Procurement Regulations at the time Zimbabwe repealed its old public procurement laws. If that was so, Zimbabwe would have naturally infused the demands from the Public Procurement Regulations. However, one must not lose sight of the fact that regional integration is premised on cooperation and the principle of variable geometry.

In concluding, worrisomely, Zimbabwe still has to formally accept the responsibilities and obligations enshrined in the Public Procurement Regulations. This legal posture is inconsistent with the constitutional demand to uphold international law. As a state party to the Treaty, the onus lies with Zimbabwe government to incorporate the missing provisions of the legislation in its public procurement legislation.

CHAPTER 6: CONCLUSION

6.1. Introduction

This study sought to address three main objectives. The research objectives were as follows:

a. To determine whether the Zimbabwean procurement regulatory framework fit in to the foundational procurement principles laid down in the Constitution?
b. To establish the constitutional standard for public procurement law in Zimbabwe; and
c. To determine the extent to which the Zimbabwean procurement regulatory framework upholds, fulfils, and promotes COMESA Procurement Regulations?

The main purpose of the study was to measure the level of conformance of the public procurement regulatory framework to the constitutional standard demanded in terms of section 315(1) together with section195(2) of the Constitution. To achieve this, the public procurement regulatory framework of Zimbabwe had to be juxtaposed against COMESA Public Procurement Regulations as a subsidiary aim of the study. In adherence to academic tradition, the first chapter was introductory and articulated the justification for carrying out the study. The constitutional foundations of public law in Zimbabwe were identified. A historical background which led to the constitutionalisation of public procurement law was also discussed.

From the outset, it had to be determined whether public procurement legislation conforms to the constitutional standard. The scope of public procurement as defined in the PPDPA Act encompasses the procurement of goods and services as well as construction works. It was stated that the procurement of PPPs in Zimbabwe falls within the ambit of public procurement. The constitutional principles governing public procurement are outlined in terms of section 315 (1) as read together with the provisions of section 195 (2) of the Constitution. In other words, this study had to determine whether Zimbabwe's public procurement regulatory framework complies with constitutional principles underlying public procurement. Secondly, this study sought to establish the degree to which sustain-

able procurement is given effect in Zimbabwe's public procurement regulatory framework. It must also be mentioned that this was not a thorough examination of sustainable procurement.

To achieve the above, principles underlying public procurement were identified and comprehensively explained. This was further engrained by making an in-depth analysis of the legislation that directly and indirectly impacts public procurement. As a developing state, Zimbabwe's public procurement regulatory framework is tailor- made to achieve socio-economic objectives. The need to pursue sustainable procurement is motivated by the constitutional requirement to use financial and natural resources to meet present needs without jeopardising future generations.

Over the past three decades, there has been a universal call to action to use resources sustainably in view of the insidious effects of climate change and constrained financial resources.[912] Lastly, the chapter examined Zimbabwe's obligations in the context of Regional Trade Agreements. To be specific, the study sought to determine the extent to which Zimbabwe's public procurement regulatory framework fits into the COMESA Public Procurement Regulations. The shortcomings of Zimbabwe's public procurement regime in relation to its obligations to COMESA were also discussed in this thesis. The summary of findings of each chapter is given hereunder. A critique of findings follows thereafter, the way forward, possible areas for further study and the final remarks.

6.2. Main findings

6.2.1. Chapter One – Introduction

This chapter introduced the study. Moreover, it constituted the basis for carrying out the research. Procurement activities are defined as the acquisition, by any means, of goods, construction works or services in the PPDPA Act.[913] Public procurement seeks to attain four important functions. Firstly, through public procurement, the constitutive functions of public entities are fulfilled.[914] Secondly, the legitimate purposes of government and quasi-government are also realised.

[912] Indeed, over the past three years, the global economy has been under sustained pressure emanating from COVID 19 induced recession. Turbo-charging the catastrophic consequences of the global pan demic was the Russian of Ukraine that significantly global supply chains, particularly, the energy sec tor.

[913] Para 1.2.

[914] Para 1.1.

Thirdly, through public procurement an avenue for the provision of goods and services is created for the benefit of the public. Public procurement is a conduit for business transactions between the government and the private sector. Needless to state is the fact that commercial transactions also take place between government-controlled entities via public procurement. Public procurement lies central in meeting the socio-economic aspirations of the general public, especially in developing countries.[915] The centrality of public procurement and the system of democratic governance through the notion of social contract was outlined in Chapter One. The fact that public procurement law reform in Zimbabwe needed attention was discussed in the introductory chapter.

The previous legal framework governing public procurement was outdated. Additionally, it was explained that the framework was behind in addressing 21st century issues such as the use of public procurement as a vehicle to tackle socio-economic challenges and fighting corruption. One aspect that was extensively discussed was the operational closeness of the SPB, the previous regulator, to the national executive. Such perceptions had the effect of eroding its image before the suppliers and the general public.

Government controlled entities are required to conduct procurement activities in terms of the public procurement legislation. Stated differently, public procurement or public contracting is regulated by administrative law. Execution of public procurement decisions must not be arbitrary, but, be guided by a wide variety of statutes to achieve an orderly pattern of governance as contemplated in the Constitution.[916]

It was observed in Chapter Three that the legislature responded to the call made in section 315(1) of the Constitution by enacting the PPDPA Act. This piece of legislation is a handbook of public procurement law in Zimbabwe and is further augmented by the PFMA and ZIDA.[917] The scope and application of the foregoing statutes clearly defined as public entities, while a government-controlled entity is defined in the Constitution. Furthermore, it was explained that a proper understanding of the obligations imposed on public officials to execute public procurement as envisaged in the Constitution, required

[915] Para 1.1.
[916] Constitution of Zimbabwe, Preamble.
[917] The bulk of the content of ZIDA applies to infrastructure procurement, while PPDPA Act principally finds meaning in the procurement of goods and services as well as construction works.

an examination of the Constitution as a whole. This led to the discussion of contemporary issues in public procurement such as sustainable procurement, economic empowerment and the advancement of other social causes, which are also given much prominence in the Constitution.

Public procurement is a conduit for the provision of basic necessities, such as electricity, water, healthcare and public transportation. This function is more pronounced in developing countries such as Zimbabwe.[918] A substantially large proportion of the public funds (more than 14%) defrays public procurement expenses in developing countries.[919] Prior to 2013, there had been incessant calls for Zimbabwe to reform its public procurement laws. The chapter also demonstrated that public procurement reform in developing countries was extensively spearheaded by international development banks such as the World Bank and the AfDB. This study further sought to determine whether public procurement legislation gives practical effect to constitutional principles anchoring public procurement stated in section 315(1). Therefore, public procurement laws fall and stand on the bar set by the Constitution.

Chapter One noted that Zimbabwe's domestic policy has to be pursued in accordance with Zimbabwe's international obligations. To this end, public procurement policy is required to be in resonance with COMESA Public Procurement Regulations. The choice to compare Zimbabwe's public procurement regulatory framework to COMESA Public Procurement Regulations is inspired by constitutional dictates. Ironically, COMESA is the only regional economic group, to which Zimbabwe is a member, with public procurement directives that are binding on member states.

From the onset, it was discussed in Chapter One that Zimbabwe undertook public procurement law reform almost ten years after the promulgation of COMESA Public Procurement Regulations.[920] This paradox formed the basis for a comparative analysis that would follow in later chapters.[921] The drafters of the Constitution were alive to the fact that Zimbabwe does not exist in isolation, but that it belongs to regional economic groups

[918] Para 1.1.
[919] Para 1.1.
[920] Para 1.6.2.
[921] Chapters five and six.

and has international obligations to fulfil. Indeed, Zimbabwe's domestic and foreign policy must be pursued in accordance with international law.

6.2.2. Chapter Two - Constitutional Standard for Public Procurement in Zimbabwe

(a) Introduction

In essence, Chapter Two sets the tone by outlining the constitutional standard which public procurement law must be built upon. The constitutionalisation of public procurement law marks a paradigm shift in Zimbabwe's modern history. The bold step made by constitutional framers to elevate public procurement to a constitutional status is praiseworthy. It came to light that public procurement must be done in a transparent, fair, honest, cost-effective, and competitive and open manner as required by the Constitution. These foundational constitutional principles constitute the basis for public procurement.

The seamless relationship between these constitutional principles and other foundational principles underpinning democratic governance, such as accountability, financial probity, competency, personal integrity and efficiency for public officials was also analysed. What is fundamentally important is the imperative for public officials to exercise statutory authority in observance of the abovementioned constitutional principles. A short history of the background leading to the adoption of the Constitution was provided. This facilitated a discussion on the governance issues which accorded public procurement a constitutional status. Some of the enumerated issues that came to the fore in elucidating principal foundations of public procurement law in Zimbabwe are, constitutional primacy, accountability and the rule of law, among others.[922]

In short, the discussion centred on the supremacy of the Constitution and the need for public power to conform to constitutional dictates. Moreover, it was brought to light that issues pertaining to the accountability, transparency, prudence, economy and cost-effectiveness in public finance management are echoed across the entire Constitution. These formed the backbone for the public procurement regime envisaged by the Constitution. Section 315(1) of the Constitution is clear in that it mandates the legislature to enact legislation to guarantee that public procurement is fair, transparent, competitive, cost-

[922] Para 2.1.2.

effective, and honest. It was also revealed that section 195 (2) mentions an additional principle in the form of openness.

Having laid a foundation on constitutional governance, an extensive elucidation on constitutional principles outlined in section 315 (1) was given in Chapter Two. Importantly, public procurement legislation had to pass the constitutional standard. Mindful of the broad spectrum nature of the field of public procurement, other constitutional provisions impacting the principles were identified and discussed. The discussion on the fiduciary duties owed to the public by the public officials was not left out.

To delineate the application of the PPDPA Act, the study zeroed on the procurement of goods and services. Indeed, the constitutional standard for public procurement dictates that the provisions of section 315 (1) applies to goods and services. The constitutional pillars set out in the afore-stated provision had to be identified in public procurement legislation. The legitimacy of the public procurement activities pivots on the foundational constitutional principles. The pillars are mentioned hereunder. The requirement for public procurement legislation to conform to the constitutional principles is absolute. What became apparent was that the reasoning behind the enactment of the PPDPA Act was to ensure that public procurement must be effected in a transparent, fair, honest, cost-effective, and competitive manner.

The thrust of the chapter was to sufficiently explain the meanings of the constitutional principles and how they are reflected in public procurement legislation. The principles were individually discussed. A transparent public procurement regulatory framework is one whose rules or prescriptions are openly known to suppliers and contractors.[923]

(b) Transparency

Transparency is premised on the need to promote accountability of the public officials and maintain the confidence of the general public and suppliers.[924] Public procurement

[923] Phoebe 'Bolton Public Procurement System in South Africa: Main Characteristics' Public Contract Law Journal, Summer 2008, Vol. 37, No. 4 (Summer 2008), 785 <: https://www.jstor.org/stable/25755688>accessed 7 December 2021; Phoebe Bolton 'The regulatory framework for public procurement in South Africa' In Khi V Thai (ed) International Handbook of Public Procurement (Taylor and Francis 2009) 362; Anoeska Buijze, 'The Six Faces of Transparency' (2013) 23 Utrecht Law Review, 9 (3). < https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.233/>accesed 3 March 2021.

[924] Para 2.2.2.1.

law demands that the procurement requirement must be sufficiently detailed for suppliers to file bids that are appropriate.[925] The characteristics of the specifications are to capture aspects encapsulating, quality, quantity, function and purpose, performance, and aspects relating to safe disposal.[926] The PPDPA Act has numerous provisions to give effect to the constitutional requirement on transparency. These provisions relate to the following;[927]

a. publication of procurement opportunities;
b. disclosure of rules applicable to the procurement activities;
c. prior determination of procurement requirements;
d. publication thereof and the manner of consideration of submissions;
e. conduct of procurement according to the rules and procedures; and
f. an existing mechanism to monitor compliance with the foregoing outcomes and the means to enforce them

Public procurement conducted in violation of the foregoing equally impair the bar set by the Constitution in terms of s 315(1). The availability and the practical application of the afore-stated provisions create a symmetrical platform for supplies to compete for business opportunities with public entities. Transparency enables public procurement activities to be carried in an atmosphere free of corruption. In other words, lack of transparency breeds corruption. There is international consensus that transparency in public procurement can play a pivotal role in the fight against corruption.[928]

The advent of information communication technologies and their application in public procurement stands to immensely entrench transparency. To a greater extent, the PPDPA Act promotes the usage of electronic communication technologies to conduct public procurement activities. Besides enhancing transparency, the use of e-procurement is not cumbersome and capital intensive as paper-based procurement. The lack of fastidiousness and precision in the PPDPA Act with regards to the e-procurement was lamented with a great deal.

Regrettably, the PPDPA Act falls short of making it mandatory for public entities to use electronic communication technologies. Public entities are manned by public officials

[925] PPDPA Act 2017, s 27.
[926] ibid.
[927] Para 2.2.2.1.
[928] Para 2.2.1.

that are not keen to embrace change by migrating to digital technology hinder procurement transparency. The pitfalls of adopting the e-procurement regime for developing countries like Zimbabwe were mentioned. E-procurement stands to favour established suppliers with huge operating capital while competitively excluding Small, Medium and Micro Enterprises (SMMEs). The enactment of legislation to govern electronic transactions will foster transparency in public procurement in Zimbabwe. Once a public procurement regulatory framework is viewed as transparency, the next stage will be then to determine whether it is fair. The absence of fairness, along with other constitutional principles erode confidence in the public procurement regulatory framework of Zimbabwe.

(c) Fairness

Fairness is one of the constitutional ingredients articulated in terms of section 315(1). In simple terms, fairness entails equal treatment of all categories of suppliers.[929] The field of public procurement is governed by public law and has constitutional genesis. Therefore, this means that supplies have equal benefit and protection of the law. Unless there are justifiable reasons for the discrimination of suppliers, otherwise all suppliers must not be differentiated from each other.[930]

Fairness has many sides to it. From the outset, suppliers are to be treated equally. Accordingly, the procurement requirements of bid opening, evaluation, contract award and the grievance handling mechanism must be conducted in the spirit of fairness.[931] Consequently, a regulatory framework that permits procuring entities to discriminate suppliers without a justifiable cause offends the principle of fairness.[932] Importantly, conflicts emanating from public procurement activities are to be resolved with due regard for justice and equity. In other words, the substantive and procedural elements in the settlement of disputes must be just.[933] In accordance with the constitutional requirement, public procurement legislation must strive to have an independent and impartial dispute resolution platform for aggrieved suppliers.

[929] Para 2.2.2.3.
[930] Constitution, s 46 (1) (b).
[931] Guide to Enactment Guide to Enactment of the UNCITRAL Model Law on Public Procurement 5:31.
[932] PPDPA Act 2017, s 31 (1) (b).
[933] Sope Williams-Elegbe, 'The Evolution of the World Bank's Procurement Framework: Reform and Coherence for the 21st Century Framework' (2016) Volume 16 (1) 28 Journal of Public Procurement < http://www.ippa.org/images/JOPP/vol16/issue-1/Article_2_Williams-Elegbe.pdf>accessed 10 February 2021.

A procurement requirement must not be described in such a way that it singles out a supplier to the exclusion of others.[934] Should it be that there is no other way the procurement requirement can be described without a trademark or brand name, the words "or equivalent" must be included in specifying the requirement.[935] Mindful of the requirements of section 195 (2), the regulatory framework on public procurement must uphold the honesty principle. The research revealed that the other five constitutional principles are enumerated in terms of section 315 (1), and the principle of honesty appears separately in section 195 (2).

(d) Honesty

As one of born before the due season, the honesty principle is a valuable additional principle intended to fortify the other principles. Indeed, the totality of the constitutional principles form the basis upon which Zimbabwe's public procurement law is anchored. These principles resonate with each other in order in attempt to form a legal framework envisaged by the framers of the Constitution for purposes of building a transparent, equitable, accountable and ordered society.[936] A summary of what was explained in relation to the principle of honesty follows hereunder. The brevity is informed by the inextricable relationship between the principles on transparency and honesty as was highlighted in Chapter Two.

Legislation envisaged in terms of section 315(1) must create provision for honesty in the manner in which public entities execute their public procurement activities. What this means is that the integrity of the entire procurement cycle must not be questionable.[937] Public entities and suppliers alike, have to be honest when performing a public procurement transaction. The research exposed that the principles of honesty and transparency overlap and are strongly linked to each other. The result of failure to realise the principles stated in section 315 (1) of the Constitution translates to poor service delivery by public entities due to corruption and mismanagement of public assets.[938]

[934] PPDPA Act 2017, s 27 (2).
[935] ibid.
[936] Fifth paragraph to the Constitution.
[937] Para 2.2.2.4.
[938] Guide to Enactment Para 85.

Public officials should, therefore, recuse themselves in cases where their fair-mindedness and impartiality may be impaired. Stated differently, the inability to declare conflict of interest by public officials severely impairs the principle of honesty. Thus, honesty is one of the indispensable ingredients in sustaining public confidence in public procurement. Dishonesty breeds bidder protest and has an inherently delegitimising effect.[939]

(e) Cost-effectiveness

The definition of cost-effective was extensively explained. In simple terms, cost-effectiveness strives to strike a delicate balance between the value of outcomes and a cost that is economical or acceptable.[940] The cardinal function of public procurement is to obtain value for money. Central to cost-effectiveness are two inseparable twins, namely efficiency and economy.[941] To achieve cost-effectiveness, public entities are required to select suppliers whose goods and services meet the specifications and are competitively priced.[942] To realise cost-effectiveness, public procurement must be strategically accomplished. A highly trained public procurement cadre not given to arbitrary decision is critical in the achievement of this principle. The fundamental question was whether public entities are sufficiently resources to attract professionals.

6.2.3. Chapter Three – Legislative framework for public procurement in Zimbabwe

(a) Introduction

The thrust of the third chapter was to examine the public procurement standard visualised in the Constitution. In analysing the standard fixed in the Constitution, it had to be borne in mind that constitutional provisions must be interpreted in relation to another.[943] Before a comprehensive analysis of the legislation had been done, a brief history of the constitutional making process was provided.[944] Without controversy, the Lancaster House Constitution had outlived its lifespan.

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[939] Sue Arrowsmith, Understanding the purpose of the European Union's procurement directives: the lim ited role of the European Union regime and some proposals for reform in Västra Aros AB (edn) The Cost of Different Goals of Public Procurement (Swedish Competition Authority 2012) 47.

[940] OECD POLICY ROUNDTABLES *Collusion and Corruption in Public Procurement* 2010.

[941] Quinot Geo and Sue Arrowsmith, 'Introduction', Geo Quinot and Sue Arrowsmith (eds), Public Pro curement Regulation (Cambridge University Press 2017) 8; Sue Arrowsmith, John Linarelli and Don Wallace Jr. Regulating Public Procurement: *National and International Perspectives* (Kluwer Law International 2000) 28-31; Public Procurement 28-31, Guide to Enactment Para 3.

[942] PFMA 2009, s 45(b).

[943] *Musa Kika v Minister of Justice and Others HC 2021-2166; Prosecutor-General v Telecel Zimbabwe Ltd 2015 (2) ZLR CC at para 42H; S v Makwanyane and Another 1995 (6) BCLR 665 para 10.*

[944] Para 2.1.2.

The old constitution was adopted for the purposes of bringing peace to Zimbabwe after close to two decades of a protracted armed struggle against the white colonial rule. Consequently, that constitution was in many respects not compatible with established democratic traditions of the 21st century. As noted, the adoption of the Constitution in 2013 ushered a ray of hope for democratic governance in Zimbabwe.[945] This is confirmed by the inclusion of the public procurement clause, among others, which is meant to entrench public accountability and stamp out corruption in the public sector. The constitutionalisation of public procurement is therefore premised on the need to promote good governance.

The PPDPA Act is a direct parliamentary response to the provisions of section 315 (1) of the Constitution. In its entirety, the PPDPA Act, tries to provide a comprehensive path towards the realisation of the principles hallowed in section 315(1). In terms of the constitutional supremacy doctrine, any provision of the PPDPA Act that does not seek to fulfil the public procurement constitutional principles must be declared unconstitutional to the extent of the inconsistency. Apart from addressing constitutional principles, the PPDPA Act also endeavours to provide answers to social, economic and environmental issues through public procurement.

Commendably, the use of public procurement to accomplish collateral objectives is at *par* with the constitutional call to use economic resources in a sustainable manner. This is also in synch with the international consensus to adopt technologies that mitigate climate change.[946] In other words, public entities encouraged to take into account socio-economic and environmental considerations when performing public procurement activities. Succinctly put, through the PPDPA Act, the government intends to use public procurement as a socioeconomic tool.[947] However, it was noted with considerable regret that the socio-economic and environmental aspects are still blurred in public procurement legislation. Inferentially, the use of public procurement as a socio-economic and environmental tool will take place at a measured pace.

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[945] Para 2.1.2.

[946] The communique of the 27th session of the Conference of the Parties (COP 27) to the UN FCCC that took place in Sharm El-Sheikh, Egypt.< https://sdg.iisd.org/events/2021-un-climate-changeconference-unfccc-*cop-27/#:~:text=The%2027th%20session%20of%20the,November%202020%20to%20Novber%202021.*>accessed 23 September 2021.

[947] Bolton 'Public Procurement as a Tool to Drive Innovation in South Africa*' PER / PELJ* 2016 (19) (n 315).

Disincentives for adopting a full spectrum environmental public procurement policy are many, ranging from capital intensive technologies to the general lack of societal conscientiousness. However, if the whole life costing principle is to be applied at needs analysis stage, the procurement of environment friendly goods and services should be preferred. In view of the foregoing, it is recommendation of this study that government formulates a clear public procurement policy that embraces climate adaptation technologies and socio-economic paradigm. The policy should plainly enumerate financial and other forms of incentives to be granted to suppliers whose products and services promote environment sustainability.

Without hesitation, one can boldly state that the public procurement regulatory framework of Zimbabwe is generally open. Undeniably, the regulatory framework attempts to balance the socio-economic demands of Zimbabwe as a developing state. On the other hand, it strives to embrace international suppliers. The repealing of the notorious Indigenisation and Economic Empowerment Act (IEEA) of 2007 bears testimony to this. Notwithstanding, the scepticism expressed regarding conferment of legislative powers on the state President to conduct procurement outside the confines of the PPDPA Act might undermine the principles of transparency, competition and openness.

There is apprehension that corruption may arise on account of unrestrained presidential powers to allow public entities to procure outside the ambit of PPDPA Act. Not that the presidency will directly or indirectly benefit from this anomaly, but, unscrupulous role players in the public procurement ecosystem can capitalise on this aberration for corrupt gains. Hallowing the doctrine of separation of powers, it is recommended that the president be divested of legislative powers contemplated in terms of section 3 (6) of PPDPA Act. Nevertheless, defence and security procurement may be undertaken outside the prescriptions of the PPDPA Act, subject to availability of mechanisms to delicately balance secrecy, transparency and accountability.[948]

Again, with regards to the use of public procurement to achieve socio-economic ends, a broader consultative approach is recommended. The policy should adequately address

[948] The enactment of the Independent Commissions Act 5 of 2022, is a step in the right direction in order bring the conduct and operations of the security services under scrutiny.

the socio-economic disparities within the demographic and spatial spectrum of the society. The recommended legislative amendments should sufficiently differentiate well established suppliers with the following category of suppliers;

a. Small, Micro and Medium Enterprises (SMMEs) ; and
b. Companies with Social Corporate Responsibility (CSR) footprint indexed against their annual financial performance

The researcher further recommends that the policy should be pursued within the broader context of ceding greater financial autonomy to public entities. The school of thought which states that corporate pursuits must advance humanity, has slowly, but surely gained acceptance in board rooms and is gladly received by the general public.[949]

Another paradigm that is not adequately addressed in the current public procurement regulatory framework is the use of public procurement for human rights gains. The Constitution is quite elaborate when it comes to the respect, protection, promotion and fulfilment of fundamental rights and freedoms.[950] Hence, legislation should be passed to exclude suppliers with a tainted human rights history from participating in public procurement activities.[951] The hope is that public procurement could be used as a conduit to promote and fulfil human rights by corporations.

Fortunately, the PPDPA Act does encourage suppliers to fulfil statutory obligations such social security remittances to the authorised body, the National Social Security Authority (NSSA).[952] Public entities have a discretion to enforce the foregoing provision. The recommendation therefore is to re-enact this provision with a view to making it mandatory for suppliers to comply in that regard.

Procuring entities can conduct market consultations for the purposes of determining procurement requirements.[953] The PPDPA Act forbids procuring entities from executing

[949] Olga Martin-Ortega and Claire Methven O'Brien, 'Public procurement and human rights: interrogating the role of the state as a buyer' in Olga Martin-Ortega and Claire Methven O'Brien (eds) Public Pro curement and Human Rights; Opportunities, Risks and Dilemmas for the State as Buyer (Corporations, Globalisation and the Law series) (Edward Elgar Publishing 2019) 8; The United Nations Guiding Principles on Business and Human Rights; The King Code IV.
[950] Chapter 4 of the Constitution.
[951] Such rights as labour rights.
[952] Para 1.2.2.2.
[953] Para 3.1.3.

market consultations with a view to stifling competition. In the spirit of promoting transparency, public entities are obliged to share information gathered during market consultations with other suppliers not consulted. Market consultations can take a variety of forms, ranging from interviews with potential suppliers, open days, and open discussion forums, to transmission of information through electronic means.[954] This is commendable in light of the call for an open public procurement system in the Constitution.

b) Partial centralisation of Public Procurement

The study revealed that Zimbabwe has a partially centralized public procurement regulatory framework.[955] The regulatory framework permits procuring entities to do their own procurement, only if it is below a specified threshold.[956] The determination of the thresholds is a ministerial prerogative. As was stated, SPOC is vested with the powers to grant procuring entities the authority to conduct procurement beyond statutory thresholds. Sadly, the existence and functions of SPOC in Zimbabwe's regulatory framework stands to stifle competition, transparency and openness. Apparently, the function of SPOC as enshrined in the PPDPA Act usurps the administrative and statutory autonomy of public entities and that of the regulator, PRAZ.

The composition of SPOC is made up bureaucratic officials whose security of tenure is not guaranteed in terms of the Constitution. By implication, members of SPOC can be subjected to political and economic pressure to award a tender to an underserving supplier. In other jurisdictions, the susceptibility of lowly positioned public officials to pressure has not gone without notice by the courts.[957] The encroachment by SPOC to perform a procurement function on behalf of public entities flies in the face of PFMA and the spirit of devolution that permeates across the constitutional enterprise.

The research explicitly recommended that part of the PPDPA Act that gave birth to SPOC be eviscerated. Interestingly, that portion of legislation has not been tested by the courts. Surprisingly, close to five years after the PPDPA Act became operative, at the very least, the civic society that is usually vocal in governance issues has not invited the courts to test the legality of SPOC.

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[954] PPDPA (General) Regulations, SI 2018/5, reg 9(3).
[955] Para 3.24.
[956] As stated in Para 3.2.4, there were different thresholds for the procurement of goods, consultancy, and construction works.
[957] *Democratic Alliance v Speaker of the National Assembly and Others* case.

The creation of a statutory entity to regulate public procurement is a step in the direction. Indeed, PRAZ has an immense task of ensuring that public procurement is conducted in accordance with what is laid down in the PPDPA Act. Displeasure was however indicated concerning the apparently unbridled quasi-legislative role PRAZ has in terms of the PPDPA Act.[958] Appreciatively, the legislator was alive to the crucial role PRAZ would fulfil in ensuing practice directions for the effective administration of PPDPA Act. Armed with this legislative strength, PRAZ can be subjected to pressure by powerful elites (both suppliers and political actors) to make interventions that are antagonistic to constitutional foundations on public procurement law. Possibly, the central issue lies in the independence of the governing board of PRAZ. Flowing from the above is the need for greater financial and functional autonomy of PRAZ. Greater financial support from treasury is recommended if PRAZ is to fulfil its mandate satisfactorily.

Public procurement practitioners need to be sufficiently trained as they are a cogwheel in the implementation of an efficient and cost-effective procurement regime.[959] The decorum of public procurement practitioners is calibrated in terms of the PPDPA Act and the General Regulations. In other words, public procurement legislation sets the landmark to guide practitioners. The expectation is to cultivate professional ethics in practitioners. The ripple effect is that practitioners can potentially catalyse the gratification of the foundational principles defined in section 315(1) as read in conjunction with section 195(2).

Good corporate governance is critical if public procurement is to be undertaken in accordance with principles set forth in the Constitution. The promulgation of the Public Entities Corporate Governance Act of 2018, (PECG Act) was a bold step in strengthening corporate governance in public entities. Good financial stewardship is part and parcel of good governance practices. To this end, the PECG Act creates an obligation for each public entity to formulate ethical codes for public employees and board charters. Conceivably, the spirit behind this move is to promote transparency, accountability in the course of duty for public servants and this must be reflected even through the way public procurement activities are done.

[958] Para 3.2.5

[959] Bolton 'Public Procurement as a Tool to Drive Innovation in South Africa' *PER / PELJ 2016(19)*(no 315).

In stark contrast to the other celebrated portions of the PECG Act and PPDPA Act, a provision is made in both foregoing statutes for public employees to acquiescently obey unlawful directives issued by higher ranked public officials.[960] By deduction, procuring entities may be directed (by senior ranked public officials) to award a tender to a supplier with a highly exorbitant price offer and which does not meet specifications set out in bid document. Rhetorically, will such a tender awarded pursuant to an unlawful directive be valid? Until a position has been given by a competent court, this question will remain unresolved. The crux of the matter is whether processes made in awarding such a tender survive the test set in section 315(1).

For the purpose of legal certainty, it is recommended that the provisions of section 16 of the PPDPA Act as read with regulation 23 of Public Entities Corporate Governance (General) Regulations be repealed and substituted with a provision that invalidates such an award and a report be filed with the relevant authorities, possibly the police for criminal investigations to commence, and prosecution, if need be.[961] Moreover, it was suggested that a provision be inserted that would clothe public officials with the authority to disobey a manifestly unlawful directive, in the place of the two similar provisions cited above.[962]

The entire procurement cycle must seamlessly conform to the public procurement constitutional principles. Notably, the regulatory framework for public procurement in Zimbabwe is partially decentralised.[963] The framework is dual, permitting procuring entities to commence and complete processes laid in the PPDPA Act in cases where the procurement requirement is below the prescribed threshold for oversight by the Special Oversight Committee (SPOC). In cases where the value of the procurement requirement is above the threshold, permission must be sought from PRAZ before commencing the process. Once the permission is granted, SPOC has the ultimate authority to select the winning bidder. The reasons advanced against the existence of SPOC and its functions have been mentioned above and need no repetition.

[960] PPDPA Act 2017, s 16; Public Entities Corporate Governance (General) Regulations, SI 2018/168, reg 23.

[961] Such as administrating the PPDPA Act and PECG Act, the police, the Zimbabwe Anti-Corruption Commission (ZACC), Auditor-General, Accountant-General, Minister to which the public entity falls and the Chief Secretary to the Cabinet.

[962] Para 3.3.2.

[963] Para 3.4.2.

Not every public entity is authorised to have a Procurement Management Unit (Unit). The existence of a PMU must be justified by the size and nature of procuring entity. Hence, the procurement activities of such small procuring entities is handled by entities with human resource capacity. This provision is greatly welcome since it alleviates the administrative and financial burden associated with procurement activities for small entities. The PPDPA Act employs a combination of procurement methodologies depending with the situation. The methodology employed in each circumstance should be acceptable. These are, requests for quotations method, restricted bidding method, competitive bidding method, and direct procurement method or open tendering method.[964]

The study revealed that the competitive bidding method is the default method of procurement.[965] But the suitability and usefulness of other procurement methods should not be taken lightly. Practice has shown that the competitive bidding method is transparent, competitive and open. Therefore, this method endeavours to answer to the call made in section 315(1) of the Constitution. Without reservations, if the competitive bidding method is effected in terms of section 31 of the PPDPA Act, it would resonate with the principles articulated in the Constitution.

The evaluation of bids must be conducted by a team of experts knowledgeable in finance, law and the technical information of the procurement requirement, among other experts. Various approaches are used in evaluating the bids. These are least-cost method, fixed budget method, and quality and cost-based selection method. Public procurement is a typical act of exercise of public power. The regulatory framework has a multi-layered system of reviewing public procurement disputes.[966] The review of an administrative action has constitutional roots in terms of Zimbabwe laws.[967]

It is engrained in good governance traditions that an administrative action be lawful, reasonable, and fair.[968] When reviewing administrative acts, a judge must take into account

[964] PPDPA Act, PART VI.
[965] PPDPA Act 2017, s 31.
[966] Para 3.5.3.
[967] Para 3.5.1.
[968] Hoexter *Administrative Law 1;* Elisabetta Morlino, 'Procurement by International Organisations A Global Administrative Law Perspective' *(Cambridge University Press, UK 2019)2.*

the transparency, reasonableness and accountability of the act. Therefore, public procurement decisions are subject to review by the Administrative Court. If it comes to light that the aggrieved bidders had a diminution in patrimony, the Court has powers to make an award that is just and equitable.[969] Before a procurement decision is brought before the Administrative Court for review, it must come for scrutiny before the panel of experts constituted by PRAZ.

Bidders have a right to challenge procurement decisions if they can *prima facie,* prove that they have incurred loss or stand to suffer prejudice or that there has been breach of standing legal norms. The onus of proof lies with the aggrieved party. The regulatory framework permits procuring entities to make amends through remedial actions. Indeed, the thrust of the dispute resolution mechanisms at that juncture is to avoid litigation. This approach is laudable, and it is in line with international trends.[970] It seeks to bring parties together with a view to find an amicable solution to the satisfaction of both parties. As pointed out by APLU, the outcome of the review process is largely dependent on its independence from interference from the procurement regulator.[971] Similarly, a review panel appointed by PRAZ must be characteristically independent to win the hearts and minds of the bidders and the general public.

Lastly, this chapter considered in brief the institutional mechanisms available to ensure that public procurement is pursued according to the principles stated in section 315 (1). The roles of the Auditor-General, Human Rights Commission, the Zimbabwe Anti-Corruption Commission, Special Anti-Corruption Unit, Parliament, and the National Prosecuting Authority came under spotlight. The functions of these institutions were discussed in the context of the value they add to the effective functioning of the public procurement regulatory framework.

The relational link between public procurement and human rights further underscored the importance of these institutions to the effective functioning of Zimbabwe's public procurement regulatory framework.[972] The lack of legislation to protect witnesses against

[969] *Oswell Security (Pvt) Ltd v State Procurement Board and Others* Case.
[970] John R Miller, "Alternative Dispute Resolution (ADR): A Public Procurement Best Practice that has Global Application" *International Public Procurement Proceedings* 2003:654.
[971] APLU Comments on the South Africa Draft Public Procurement Bill 2020.
[972] Olga Martin-Ortega and Claire Methven O'Brien, 'Public procurement and human rights: interrogating the role of the state as a buyer' in Olga Martin-Ortega and Claire Methven O'Brien *(eds) Public Pro*

reprisals and unavailability of an avenue for third parties to pursue and prosecute procurement fraud, and procurement law violations, were noted with great concern. *Qui tam* can be one of the most potent public procurement antifraud legal remedies. The recommendation is that parliament swiftly move to pass legislation that would allow persons and entities with evidence of fraud against public entities to sue the wrong doer on behalf of the public.

In conclusion, the public procurement regulatory framework of Zimbabwe is conformable to the constitutional standard. Yet, there remains a considerable amount of legislative interventions that needs to be done to fully bring the regulatory framework to the full stature of the Constitution. Greater autonomy for procuring entities is recommended as this reverberates with the devolution agenda. Indeed, the preamble to the Constitution, commences with the phrase:

'*We the people of Zimbabwe'*

The people are the ultimate beneficiaries of a well-regulated and functional public procurement framework yeaned for by section 315(1) as read together with section 195(2). Surely, corporate pursuits must advance humanity. Likewise, public entities are there to save the people of Zimbabwe, at all three tiers of government, namely, local, provincial and national. The devolution of power lies at the heart of Zimbabwe's constitutional enterprise. Indeed, Zimbabwe's administrative and political system is constituted of three triers of government, namely, national government, provincial and metropolitan councils, and local authorities.[973] In this administrative and political hierarchy system, the people in the lower strata of this bureaucratic structure (local authorities and public entities) must be legally capacitated determine to their course of life without undue interference.

In *Combined Harare Residents Association & Others v Minister of Local Government, Public Works and National Housing* the Harare High Court Division declared the section 314 of the Urban Councils Act unconstitutional.[974] The basis for the unconstitutionality was that it inherently empowered the Minister of Local Government, Public Works and National Housing to exercise management and governing powers of local councils. By

curement and Human Rights; Opportunities, Risks and Dilemmas for the State as Buyer (Corporations, Globalisation and the Law series) (Edward Elgar Publishing 2019) 3.

[973] Constitution of Zimbabwe 2013, s 5.

[974] *Combined Harare Residents Association & Others v Minister of Local Government, Public Works and Housing* HH-07-23.

the same token, local communities and statutory bodies should as much as possible, and where practicable, be conferred with the powers to chart their course without undue hindrance, interference and extrusive influence from bureaucratic structures.

6.2.4. Chapter Four – COMESA Public Procurement Regulations

The purpose of the chapters four and five was to calibrate the Zimbabwean public procurement regulatory framework against the obligations laid down in COMESA Public Procurement Regulations (Public Procurement Regulations). To begin with, the obligations defined in the Public Procurement Regulations had to be clearly explained. The latter chapter took a comparative analysis approach. In terms of the COMESA Treaty, the Public Procurement Regulations are binding on members. The writers of the Constitution were alive to the fact that Zimbabwe was part of a community of nations. To this end, a provision was inserted which made it mandatory for the government of the day to respect and fulfil international law.

Chapter Four commenced with a short historical note of how COMESA as a regional trading block was created. Thereafter, a concise profile of the COMESA was provided. The collective vision behind the creation of COMESA was to increase the economic clout of member states and amplify its bargaining power in political and economic affairs on the international stage. To cement this economic cohesion, interstate trade had to be promoted through legally binding instruments. One way of fulfilling this objective was the adoption of the Public Procurement Regulations.

The adoption of the Public Procurement Regulations was the culmination of close to a decade long efforts of continuous refinement of a draft model legal instrument for COMESA.[975] The driving theme behind this initiative was to inculcate a tradition of good governance in member states. The tradition was to be punctuated by sense of accountability, openness and transparency in the public administration domain.[976] The striking sameness between the Public Procurement Regulations and the Model Law has not gone without notice by scholars.[977] However, the scope of Public Procurement Regulations extends to public private partnerships. For the present purpose, the procurement of public

[975] Para 4.2.1.

[976] art 3 2 (2) of the Public Procurement Regulations.

[977] de La Harpe S, 'Substantive and Objective Criteria in Preferential Public Procurement: The Case of the 2011 Regulations in South Africa' in Nyeck Sebille Ngo (ed) *Public Procurement Reform and Gov ernance in Africa Contemporary African Political Economy* (Palgrave Macmillan 2016) 141.

private partnership was not considered. This study focused on the procurement of goods and services.

A distinguishing feature of the Public Procurement Regulations is that member states are obliged to designate a threshold for regional competitive bidding.[978] What this means is that member states must create a platform for suppliers from COMESA to compete for procurement opportunities. The Public Procurement Regulations is a preferential policy and legal tool to bar suppliers from non-member states.
This has to be operationalised by designating financial thresholds for goods and services exclusively open to suppliers that are legally operating from member states.

The designation of financial thresholds by member states is fundamental in making the Regulations operative. Projections were that within five (5) years of the adoption of the Public Procurement Regulations, there would be a unified financial threshold for all member states. The research attributed the delay in alignment to the concept of variable geometry. Furthermore, it was established that the regional trading block was economically and politically fragmented.

What is clear is that member states are to undertake public procurement law reform as informed by economic and social considerations. Cognisant of that, a window period of five years had been set for member states to harmonise their public procurement legislation with the Public Procurement Regulations. Moreover, multilateralism is rooted in mutual co-operation of member states.

Member states are discouraged from embarking on institutive, legislative and other means bent on frustrating the COMESA procurement directives. Interestingly, the adoption of the Public Procurement Regulations preceded the public procurement law reform in Zimbabwe by nearly a decade. Yet, an opportunity was lost for Zimbabwe to align its public procurement regulatory framework with the Public Procurement Regulations.

Public Procurement Regulations provide a framework for member states to adopt a comprehensive legislative framework. The crux is that public procurement legislation should unambiguously bring to effect the principles underlying the foregoing Regulations. The

[978] art 2 (1).

competitive bidding method is a method that is naturally fitted to promote and give effect to the principles set out in the Directives. These were enumerated as follows:[979]

a. competition and openness;
b. fairness;
c. transparency, including disclosure of all relevant information for participation in, and oversight over public procurement;
d. accountability; and
e. value for money

The COMESA Public Procurement Directives address the entire procurement cycle, right from the identification of the procurement requirements, bid preparation, evaluation, bid evaluation, contract award, and to post award evaluation of failed bids.[980] The Directives discourage the splitting of procurement requirements into lots. Naturally, this arrangement drives off SMMEs that are limited by their financial, material and technical capacity to undertake projects of enormous financial value. Given the emergence of SMMEs as key economic drivers, a provision for their full emancipation would accelerate economic growth in member states and competition.[981] Open tendering or competitive bidding method is the sole procurement method outlined in the Public Procurement Regulations.[982]

It is incumbent upon member states to give life to the foregoing principles through a broad public procurement legislation. The call made in the Public Procurement Regulations for usage of information communication technologies in public procurement activities is greatly appreciated. Potentially, information communication technology tools promote the realisation of principles such as transparency, openness and competition.

Public procurement governance lies at the heart of Public Procurement Regulations. In tandem with the above, member states are directed to institute a sound administrative mechanism. Debarment is the classical method of dealing with suppliers that are corrupt

[979] art 4 of the Public Procurement Regulations.
[980] Para 4.3.
[981] Para 4.3.1.
[982] Para 4.3.2.

and other forms of violation of procurement law. The administrative apparatus must endeavour to inspire the confidence of the suppliers and inculcate a culture of high professional ethics.[983]

Public Procurement Regulations strongly advocate for a non-litigious way in resolving disputes. [984] This conflict resolution pathway resonates well with one of the founding principles of COMESA, namely mutual co-operation and assistance.[985] Dissatisfied parties can go for arbitration by the Court of Justice. The need for a professional body that reviews public procurement disputes is also provided in the Public Procurement Regulations.

In concluding, Public Procurement Regulations were adopted to accelerate the economic integration of COMESA member states. It is settled that the Regulations have definite obligations. Pursuant to the Treaty, member states are as a matter of principle obliged to fully domestic into national laws the spirit and the letter of the Regulations. Moreover, member states are strongly cautioned not to pursue a path that would jeopardize what the Regulations intend to achieve. The regional competitive bidding method is mentioned as the solitary procurement method. This should be made possible by designating a regional financial threshold for suppliers within COMESA to submit their bids. In conclusion, the Regulations are elaborate with regards to obligations for member states.

6.2.5. Chapter Five – Comparative analysis

This chapter examined the degree to which Zimbabwe's public procurement regulatory framework conforms to COMESA Public Procurement Regulations (Regulations). The chapter was premised on a number of factors. Firstly, the binding nature of the Regulations was adequately laid bare. In other words, member states are to unflinchingly incorporate the skeletal framework outlined in the Regulations into domestic public procurement law.

Secondly, there is a constitutional pointer to the effect that the pursuit of Zimbabwe's foreign policy must be Pan-Africanist in nature. As shown, the public procurement regulatory framework of Zimbabwe compares favourably to COMESA Public Procurement

[983] Para 4.4.2.
[984] Para 4.4.4.
[985] 6th Paragraph and Art 3 to the Treaty and art 37(1).

Regulations. The fact that Zimbabwe's public procurement framework embraces aspects on environment sustainability is appreciated as it is in tandem with contemporary issues affecting the procurement of goods and services across the globe.

The Constitution enjoins the state to take practical measures to ensure that Zimbabwe as nation is integrated politically, socially and economically with other states. Inferentially, there is an obligation on the government of Zimbabwe to give effect to the Regulations. Hence, the chapter was a comparative analysis of the public procurement regulatory framework of Zimbabwe against the obligations imposed on member states in terms of the Public Procurement Regulations. Put simply, the chapter attempted to analyse the obligations imposed on Zimbabwe's public procurement regulatory framework in the context of the COMESA Public Procurement Regulations.

In Chapter Five, the author was alive to the five year grace period given to member countries to designate the financial threshold for regional competitive bidding. Stated differently, an ambitious five year period from the date of promulgation of Regulations, had been set for member states to agree on a common financial threshold for regional competitive bidding. Principles outlined in the Public Procurement Regulations were gauged against Zimbabwe's public procurement legislative framework. Suffice to state that this was not an extensive analysis of the individual legal provisions of the two regimes. But, an overarching view was carried out. Admittedly, some principles are inextricably twined, and these principles where applicable, were discussed together.

(a) Competition and Economy

To fully give effect to the public procurement principles anchoring Public Procurement Regulations, the competitive bidding method is exclusive procurement method. Correspondingly, competitive bidding is the default procurement in Zimbabwe. The goodness of competitive bidding insofar as it gives effect to the principles of competition and economy was discussed. In that regard, the public procurement regulatory framework of Zimbabwe seamlessly fit into the Regulations. Although the foregoing is commendable on the part of Zimbabwe's regulatory framework, the lack of legal provision compelling procuring entities to publicly disclose the evaluation criteria was noted with profound

regret.[986] Public entities have the discretion to publish the evaluation criteria. The recommendation is to legislate the practice in order to compel public entities with regard to the foregoing. The post-award assessment of failed bids is not provided in the regulatory framework of Zimbabwe.

(b) Accountability

It was brought to light that the exercise of public power is regulated by providing mechanisms for public officials to be accountable. This is to ensure that financial and material resources are used for proper purposes, and prudently.[987]A call is therefore made in the Public Procurement Regulations for the existence of institutional apparatus in promoting accountability. There are numerous institutional means to ensure that public officials are accountable. These were enumerated and include, but not limited to, the public procurement regulator, PRAZ, the Parliament through the Public Accounts Committee (PAC), Office of the Auditor-General of Zimbabwe (OAGZ). In addition, the board of directors of commercial entities are required in terms of the PECG Act to incorporate audit committees, among other good corporate governance practices.

At the same time, the constitutive acts of parliament makes it mandatory for public entities to be subject to audit once a year by properly registered auditing firms. The external audit function is done by the Public Service Commission in government ministries and government agencies. Greater accountability can be achieved if the citizenry is capacitated to participate in public affairs. The onus lies on the state to ensure that there is continuous flow of information from public entities to the general public on governance issues in order for the public to substantively contribute to public procurement discourse.

There is a duty placed on the state to educate the general public on the entire provisions of the Constitution.[988]This can only be made possible if there are incremental gains in the broader democratisation process in Zimbabwe. The fundamental question is whether the oversight institutions mentioned above are independent in character as envisaged in the Constitution to effectively fulfil their mandate. The functional and operational independence of the institutions holds the key in pursuit of the constitutional goal of having a

[986] Para 5.2.1.1.
[987] Para 5.2.1.2.
[988] Constitution of Zimbabwe 2013, s 7.

public procurement regulatory framework that is fair, open, transparent, cost-effective, competitive and honest.

(c) Transparency

Transparency along with other principles pulsate across the Public Procurement Regulations. The need for public procurement to be conducted transparently was adequately addressed. The PPDPA Act has numerous overlapping provisions dovetailed towards achieving transparency. The splitting of tenders into lots is frowned upon by the Public Procurement Regulations. The publication of tenders in the print media is mandatory in terms of the PPDPA Act, while it is permissible to use the electronic media.

As noted in earlier chapters, legislating the latter practice would go a long way in inculcating transparency.[989] Public procurement requirements must be sufficiently detailed in terms of the PPDPA Act.[990] Regrettably, the PPDPA Act does not make it compulsory for procuring entities to publish the evaluation criteria. This situation can be exploited for corrupt gains. Legislating this requirement would indisputably foster transparency. From a comparative perspective, it can be summed that Zimbabwe's public procurement framework does not satisfactorily attain to the level expected by the Public Procurement Regulations insofar as it relates to the transparency principle.

The enormous burden that lies upon the regulator, PRAZ was duly noted. The research revealed financial and human resources deficiencies for PRAZ to institute a robust administrative mechanism to fulfil its constitutive mandate. The author further lamented the lack of fiscal space on the part of Treasury, to adequately finance PRAZ. Greater financial support from Treasury can capacitate the regulator PRAZ to efficiently monitor procuring entities.

One of the ways through which transparency is measured is by examining its grievance settlement mechanisms. Indeed, this requirement is underscored in the Public Procurement Regulations. The grievance settlement mechanisms provided in Zimbabwe's public procurement legislation have a considerable measure of transparency and it multi-

[989] Paras 2.2.2.1 and 3.4.5 of chapter two and three, respectively.
[990] Para 5.2.13.

stacked.[991] It was noted that the dispute forums must be independent in character for their verdicts to be respected and received by both disputants and the general public.[992]

Public Procurement Regulations require procuring entities to undertake post-award assessment of failed bids. Admittedly, post-award assessment of failed bids is laudable. This does not take away the administrative burden it imposes on thinly manned procuring entities. The PPDPA Act has no corresponding provision to carter for the kind of assessment contemplated in the Public Procurement Regulations. Unquestionably, the inclusion of the foregoing practice through a legislative amendment is strongly recommended.

In conclusion, Zimbabwe's public procurement regime, to a higher degree, strives to address the transparency principle. The level of transparency set out in the legislation is almost at par with the one advocated for in the Public Procurement Regulations. Suffice to say that e-procurement would without hesitation cement transparency. For all intents and purposes, a transparent public procurement regulatory framework must facilitate open procurement.

(d) Openness

Observations were that Public Procurement Regulations require member states to enact legislation that guarantees inclusion of suppliers from the COMESA region.[993] An open public procurement regulatory framework is envisioned in terms of the Public Procurement Regulations. The regulatory framework should enable the participation of suppliers from member states, subject to the proviso that the procurement requirements falls within the regional threshold.

The choice of the procurement path is significant in the realisation of openness. By its nature, the competitive bidding method fosters competition among bidders. The prominence accorded to the competitive bidding method in terms of the PPDPA was fittingly noted and extolled.[994] To a greater degree, the level of openness considered in the Public

[991] Para 5.2.1.3.
[992] Quinot G, '*An Institutional Legal Structure for Regulating Public Procurement in South Africa Final Report'* (2014).
[993] Para 5.2.1.4.
[994] Para 2.5.

Procurement Regulations is expressed in Zimbabwe's public procurement regulatory framework.[995]

It is regressive to note some portions of the PPDPA Act appear to stain the principle of openness. A typical example is where the PPDPA Act confers the regulator, PRAZ and state President with powers to permit public procurement to execute outside the prescriptions laid down in the PPDPA Act. The faulty line of this provision is its proclivity to abuse it for corrupt ends. In concluding, the evisceration of this provision would be elatedly welcomed. It is respectfully submitted that the determination of procurement routes must be clearly articulated in the applicable legislation. Put simply, the sacrosanct responsibility of deciding the appropriate and suitable procurement method must not be left to chance.

(e) Value for Money (VfM)

The foremost reason for public procurement acquisitions is to achieve value for money.[996] Chapter Five indicated that competition creates an avenue for procuring entities to choose the best offers from suppliers.[997] This positions procuring entities to select the most economically advantageous offers from suppliers. Public Procurement Regulations prefer the term economy, while the public procurement regulatory framework of Zimbabwe uses the term cost-effectiveness. It is submitted that this is a matter of nomenclature. In reality the terms mean the same thing. When evaluating bids, it is a requirement for procuring entities to consider whole life cycle costs in terms of the PPDPA Act.[998] This is geared towards realising cost-effectiveness in public procurement.

The evaluation of bids seeks to achieve value for money while at the same time seeking to meet socio-economic ends. The temptation would be to say that the principle of VfM is not adequately addressed in Zimbabwe's public procurement laws as envisioned in the Public Procurement Regulations. Given the socio-economic homogeneity of member states constituting the COMESA bloc, the function of public procurement law in Zimbabwe is synonymous with the needs of a developing state as identical to other member

[995] Para 5.2.1.4.
[996] *Guide to Enactment of the UNCITRAL Model Law on Public Procurement Paragraph 3*.
[997] Para 5.1.16.
[998] PPDPA Act 2017, s 50 (3) (g).

states. Stated differently, public procurement is a conduit for socio-economic intervention on the part of governments.[999] Arguably, the principle of value for money is satisfactorily addressed in Zimbabwe's public procurement regulatory framework.

Findings from this study are that Zimbabwe's public procurement regulatory framework is not far from the expectations set in the Public Procurement Regulations. In spite of this, the Public Procurement Regulations have not yet been incorporated in Zimbabwe's domestic law. The recommendation is that Zimbabwe swiftly move to domesticate the Public Procurement Regulations in line with its international law obligations. Section 12(2) of the Constitution of Zimbabwe reads as follows:

'The State must promote regional and pan-African cultural, economic and political cooperation and integration and must participate in international and regional organisations that stand for peace and the well-being and progress of the region, the continent and humanity'

This is further fleshed out by the provisions of the section 34 of the Constitution which oblige the states to:

'[T]he State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law'

The constitutional obligations flowing from the two cited provisions are not cryptic, but are clear and need no further emphasis.

6.3. Way Forward

The constitutionalisation of public procurement law in Zimbabwe is delightedly welcomed. The absence of court cases to supplement the findings of this research is quite concerning. Indeed, very few public procurement disputes have been subjected to judicial scrutiny. The constitutional goal on public procurement is fleshed in the PPDPA Act. To a greater extent, the legislative framework on public procurement is constitutionally compliant. Stated differently, constitutional principles underlying public procurement law are largely reflected in public procurement legislation. The PPDPA Act is the starting point. Public procurement law requires further refinement to measure up to the constitutional master articulated in terms of section 315 (1) as read with of section 195 (2).

[999] Bolton, '*Government Procurement as Policy Tool in South .Africa'* (no 317)196.

Notwithstanding, there are a number of grey areas that require bold policy changes. These changes are necessary if the constitutional dream is to become a reality. Firstly, the immense legislative authority conferred on PRAZ needs to be curtailed. Secondly, the legislature needs to swiftly move to properly give clarity to the environmental and socio-economic elements. Simply put, there is lack of definitiveness with regards to sustainable procurement.

It is given that Zimbabwe's economy is highly informal. Amending existing public procurement legislation with a view to grant Small, SMMEs access to public procurement markets will be laudable. This is an area that urgently requires quick intervention by the legislator. Again, there is ambiguity on gender-responsive procurement policies. The government should carry out broader consultations with relevant stakeholders with a view to formulate a policy that adequately captures the needs of women-controlled entities for them to actively participate in public procurement activities.

The PPDPA Act vests the state President with authority to circumvent procurement legislation by permitting certain procurement activities to be carried outside the ambit of this statute. This arrangement is worrisome as it flies in the face of the doctrine of separation of powers, the rule of law and accountability of public officials. The institution of the presidency must not be seen to be at the forefront in violation of constitutional principles.[1000] An amendment to strip the presidency with the legislative authority contemplated in PPDPA Act would be greatly received by adherents of constitutional law.

The statutory autonomy of public entities to undertake public procurement is severely curtailed. Central to this sad scenario is the existence and functions of the Special Oversight Committee (SPOC). This statutory organ is a bureaucratic hurdle that impedes the turnaround time for procurement activities of high financial values. Suffice to say that SPOC in this current form is antithetical to the devolution agenda. At the very least, the legislative text creating SPOC should be re-examined in the context of devolution and its functions be modified.

[1000] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 (9) BCLR 992 (CC) para 100; *Economic Freedom Fighters v Speaker, National Assembly* 2016 (5) BCLR 618 (CC) at para 26; *Law Society of South Africa v President of the Republic of South Africa* 2019 (3) BCLR 329 (CC) at para 30.

The issues raised above hinder the realisation of the constitutional principles that are foundational to public procurement law in Zimbabwe. It is pleasing to note that Zimbabwe's public procurement regulatory framework is largely in synch with COMESA Public Procurement Regulations. Regrettably, the absence of a regional threshold to legitimise the participation of suppliers from COMESA member states remains a challenge.

6.4. Final Remarks

Public procurement has and will remain an aspect of the economy of Zimbabwe. Notably, public procurement law jurisprudence is still in its infancy in Zimbabwe. What is commendable is that the legal framework for public procurement exist and is already in use. With continuous practice, current public procurement legislation can be refined to meet the emerging challenges. It is not enough to have a well-developed legal framework. Crucially, the legal framework needs to be supplemented with a highly motivated and professional cadre. The role of public procurement in poverty alleviation programmes cannot be underestimated. Over the next couple of years, it is without doubt that public procurement law will develop and evolve to meet the socio-economic needs of the people of Zimbabwe. This will create the stage for collateral objectives of public procurement to be met. Projections are that necessary amendments to current legislation will be made to meet international law obligations.

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