

Better value from public infrastructure procurement

Summary

Corruption in public procurement comes at a huge price to government, industry and citizens; it leads to untold costs in terms of the environment, jobs and lives. The infrastructure sector is no exception to this: corruption, alongside mismanagement and inefficiency, is having unprecedented ramifications for stability and progress in the sector.

Based on widespread stakeholder interest and extensive research, in this policy brief we advocate a model for public infrastructure procurement in South Africa that has proven efficient and effective in almost twenty other countries around the world.

Introduction

In recent years, South Africa has been rocked by revelations, made at various commissions of inquiry, of alleged large-scale and widespread corruption involving organs of state and private-sector actors. The appointment of these commissions suggests that fighting corruption is high on the agenda of the Ramaphosa administration. 'State capture' has been especially prevalent in state-owned enterprises (SOEs) such as Eskom, Transnet and the Passenger Rail Agency of South Africa. These SOEs have been engaged in extensive infrastructure expansion but have been

subjected to inappropriate political control and abuse of the tender process, and have become vehicles for patronage instead of service delivery.

The auditor-general (AG) has regularly highlighted the 'fruitless and wasteful expenditure' not only by SOEs, but also by other national entities and provincial and municipal authorities. In his 2017/18 annual report (AGSA 2018), the AG highlighted that fruitless and wasteful expenditure had increased by 200 per cent to R2.5 billion among national entities; while more than half of the auditees had engaged in uncompetitive and unfair procurement processes, amounting to R28.4 billion among SOEs. The previous year's report (AGSA 2017) highlighted the impact of irregularities in procurement arising from supply chain management processes of provincial government, with most provinces not meeting the desired standard.

In addition, black economic empowerment legislation, while vital to address the legacies of apartheid-era discrimination and enable economic transformation, has had unintended consequences for undermining the transparency and accountability of infrastructure procurement and delivery: 'fronting', speculation and tender abuse.

Established interpretations of the local participation requirement under the Preferential Procurement Policy Framework Act of 2000 are increasingly challenged by 'business forums', some of which resort to the use of force or threats of violence against construction companies.

We are also seeing the steady decline of the construction industry because of fewer and less profitable public infrastructure construction contracts coming to market. This has led to several companies (such as Basil Read and Group Five) going into liquidation and others (such as Murray and Roberts) withdrawing from the construction sector.

In recognition of many of these issues, South Africa's National Development Plan: Vision 2030 (NDP) identified the lack of accountability in public institutions as a leading factor undermining the country's ability to deliver not only on its developmental state mandate, but also on the creation of a fair and stable society. Fombad (2013) notes that lack of accountability remains a significant challenge in delivering public infrastructure.

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

for government investment, and the Ramaphosa administration has begun allocating and raising funding for this priority programme.

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

The MTBPS made it clear that infrastructure expenditure is a key element of the plan for economic recovery which can unlock private investment as well as improve the efficiency of public infrastructure expenditure. Commissioned by the Infrastructure Transparency Initiative (CoST),¹ a 2018/19 HSRC scoping study on the level of transparency, accountability and stakeholder participation in delivering public infrastructure with a view to considering the value which CoST could add was therefore timely – particularly in light of the government's commitment to greater infrastructure investment.

About CoST

CoST is a registered charitable organisation based in the United Kingdom. It is a multi-stakeholder initiative with member and affiliate programmes in 19 countries spanning four continents. Launched in 2012, CoST grew out of the lessons learned from a three-year pilot programme which tested the viability of a new transparency and accountability process in eight

1. Previously known as the Construction Sector Transparency Initiative, hence CoST.

countries. CoST promotes transparency by disclosing, validating and using data from public infrastructure investment. This helps to inform and empower citizens, enabling them to hold decision-makers to account. Informed citizens and responsive public institutions can influence the introduction of reforms to reduce mismanagement, inefficiency, corruption and the risks that poor infrastructure pose to the public.

CoST works at the national and international level to facilitate the global exchange of experience and knowledge on transparency and accountability in public infrastructure. In so doing, CoST works closely with other global transparency initiatives like the Open Government Partnership and the Open Contracting Partnership.² CoST reports a track record of helping governments to save money, assisting in the delivery of legal and institutional reforms, and building the capacity of stakeholders. On this basis, the initiative is ideally placed to support this country's efforts to increase transparency and improve accountability and cost-effectiveness in the delivery of public infrastructure.³

Key findings

The HSRC's research found considerable support for the CoST methodology and for its core features of disclosure, assurance, multi-stakeholder working and social accountability. Many respondents were hopeful that the model could offer a practical and systematic platform to increase transparency and accountability and restore mutual trust and cooperation towards the achievement of shared

2. CoST Factsheet (<http://infrastructuretransparency.org/about-us/>). See also http://infrastructuretransparency.org/wp-content/uploads/2018/06/CoST_Programme_Summary.pdf.
3. Adapted from the CoST Factsheet.

national objectives. The key findings are outlined below.

Increasing infrastructure transparency

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

Our analysis indicates that a high proportion of the CoST-Open Contracting for Infrastructure Data Standard (OC4IDS) data points has to be legally disclosed. This information is likely to be proactively disclosed in the procuring entities' required reports to legislatures. However, it is important to note that while this disclosure is welcome, it is far too late in the infrastructure procurement and delivery process for it to be useful to any stakeholder responsible for or interested in enhancing the real-time effectiveness and efficiency of the infrastructure procurement and delivery process.

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

In essence, therefore, while South African law provides for extensive compliance with standards similar to those in the OC4IDS, the point of distinction is that aspects of both law and practice do not collectively constitute a comprehensive standard for the timely disclosure of information to enable more efficient and effective management of infrastructure procurement and delivery.

Mismanagement and corruption are therefore not identified until it is too late to undertake preventive or corrective action.

The wide range of interviews undertaken supported this confusing picture: there was a significant level of lack of awareness, uncertainty and confusion about required information disclosure standards at various stages of the infrastructure procurement cycle, as well as widespread ignorance about what types of information on various stages of the procurement cycle can lawfully be disclosed proactively.

Where some procuring entities have begun to disclose more information, whether reactively or proactively, such disclosure is appreciated by private-sector actors and inspires greater confidence in the credibility and integrity of the procurement process. The in-principle adoption of the OC4IDS, its progressive implementation by procuring entities, and discussion of its impact through CoST's multi-stakeholder working offers the prospect of providing greater clarity and understanding, enhancing mutual trust and delivering more consistent performance.

Increasing the evidence base to improve accountability

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

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

Restoring trust among stakeholders

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

Private-sector professional and industry associations have publicly offered to share their members' expertise to strengthen the government's efforts to improve the integrity of infrastructure procurement processes. At the same time, several civil society organisations are working on open contracting-related research projects, providing further concrete evidence of broad recognition of the urgency of procurement reform in general. This indicates that it will be possible to start a multi-stakeholder initiative (MSI) with mutually shared objectives.

The viability of an MSI was a concern raised by several respondents, who

noted the existing widespread lack of trust between the government, the private sector and civil society in South Africa, as well as the difficulties involved where MSI participants were aligned to private-sector competitors. MSIs (such as South Africa's Open Government Partnership) have not inspired confidence in civil society about the government's willingness to work in a collaborative manner. These concerns will have to be addressed, perhaps through the careful selection of members of the MSI, through the provision of training and initial independent facilitation of the MSI, and through an agreed procedural requirement that a substantial conflict of interest will require recusal in a particular instance. Nevertheless, our research showed that stakeholders were in broad agreement that it is essential to urgently change a situation in which stakeholders have grown apart.

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

Recommendations

Given these findings, it is recommended that the National Treasury considers further discussions with CoST and key stakeholders in the sector. Specifically, the following recommendations are made:

1. The National Treasury should, with the support of CoST and stakeholders from the private sector and civil society, pilot the CoST model to ascertain the true value of the approach in practice in terms of ensuring greater transparency, accountability and efficiencies in the procurement of infrastructure.
 2. The National Treasury should include the OC4IDS
 - in the FIDPM;⁴
 - on the Vulekamali website;⁵ and
 - in the Draft Public Procurement Bill.⁶
 3. The National Treasury should collaborate with CoST and key infrastructure industry bodies to clarify how the features of the CoST model intersect with the legal, regulatory and policy misconceptions abounding in the infrastructure sector.
 4. The National Treasury and the Department of Justice and Constitutional Development, through Parliament, should strengthen and enhance the operationalisation of the PAIA, especially as regards the obligation on public entities in general and procuring entities in particular to proactively disclose procurement-related information in conformity with the OC4IDS.
 5. The National Treasury should convene provincial information sessions with stakeholders from all the relevant sectors to explain information disclosure standards at every stage of the infrastructure procurement cycle, using the OC4IDS as a template.
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4. The FIDPM replaces the Standard for Infrastructure Procurement and Delivery Management.
 5. A joint project of the National Treasury and civil society. This is already linked to the National Treasury's website.
 6. Developed by the Department of Planning, Monitoring and Evaluation.

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