

Best
Lawyers

The
African
Legal
Awards
2018

The
LEGAL
500

WHO'S WHO
LEGAL
WXL

IFLR
1000

RANKED IN
GLOBAL
CHAMBERS
2018

BBBEE Level 1

Understanding the **value for money** proposition to alleviate procurement risks – Ricardo Pillay



LNP
ATTORNEYS

SONA2018 v SONA2019 – Is infrastructure development still a priority?

- 2018
 - Poor project implementation as a challenge to achieving the country's infrastructure development goals
 - Cost overruns and project delays
 - Improving budget spend, and monitoring systems to improve project integration, and build a broad compact on infrastructure between the private sector and organized labour
 - A year later, are those commitments still a priority?

SONA2018 v SONA2019 – Is infrastructure development still a priority?

- 2019
 - Establishing of an inter-governmental rapid response technical team, supported by specialist professionals, to intervene in areas with severe water shortage
 - Expansion and collaboration
 - A deeper partnership with communities towards planning, building and maintaining infrastructure
 - A major area of concern was the technical capacity in government to ensure project delivery
 - A comprehensive integrated nation plan

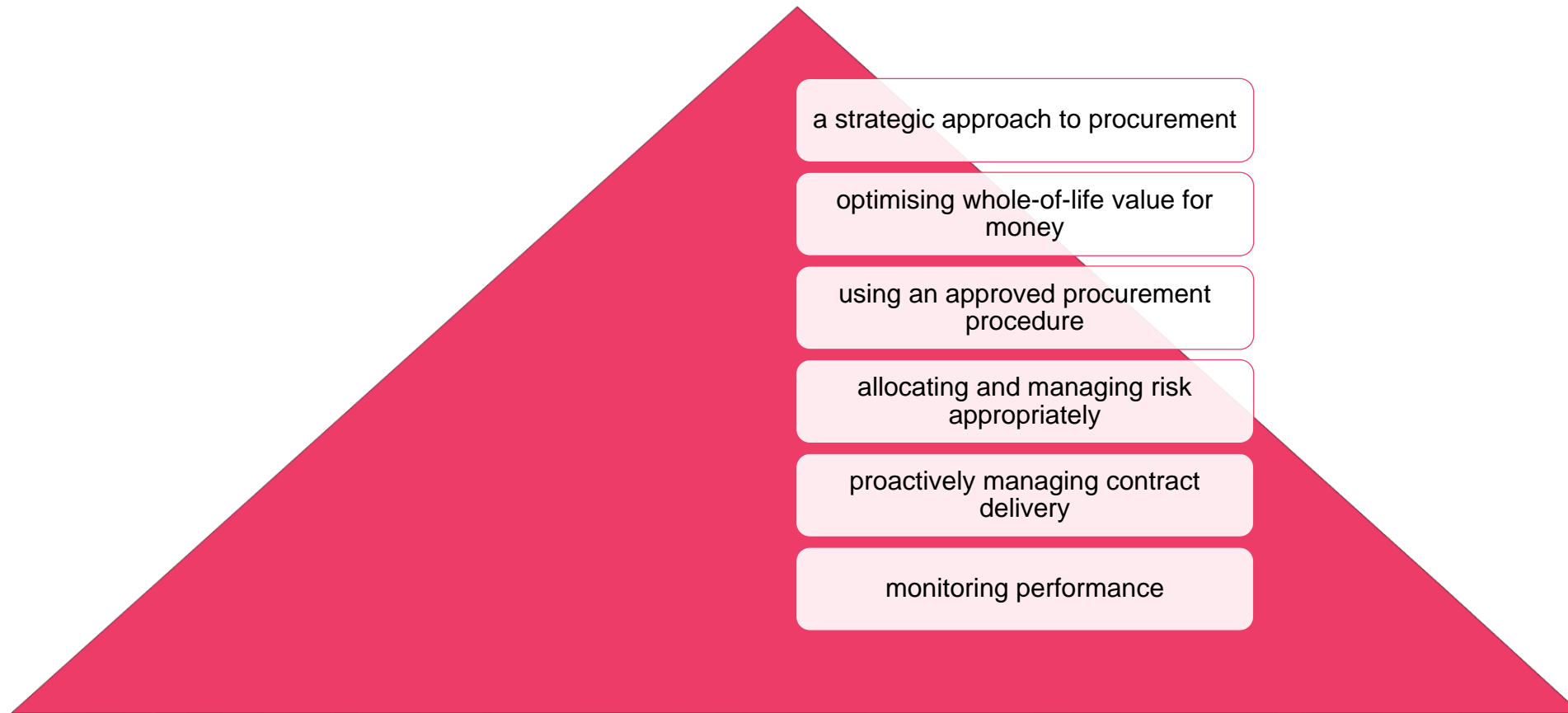
SONA2018 v SONA2019 – what's missing?

- 2019
 - Infrastructure initiatives were fragmented and not fully integrated
 - A new infrastructure implementation model
- But what's missing?
 - What is required to achieve government's infrastructure development objectives and to alleviate procurement risks?

Defining value for money

- *“The effective, efficient, and economic use of resources, which requires the evaluation of relevant costs and benefits, along with an assessment of risks, and of non-price attributes and/or life cycle costs, as appropriate. **Price alone may not necessarily represent VfM**”* – World Bank, Achieving VfM in investment projects financed by the World Bank, July 2016
- 1) Benefits derived from procurement-related activities can be maintained or enhanced through the procurement process.
- 2) Cost alone is not a reliable indicator.
- 3) Economic, social and environmental costs and benefits inform the procurement whole-of-life value assessment.

The process for maintaining or enhancing value for money through procurement



A strategic approach to procurement

understanding the role of procurement in realising value for money spent

developing and maintaining knowledge of the supplier market

encouraging a sustainable supplier market and minimising barriers to competition

using a combination of procurement approaches and capabilities

adopting performance and success measures for the procurement strategy

Whole-of-life assessment: what is required?

- Upfront costs (including procurement process costs)
- Firmness of cost estimates
- Provision for cost containment
- Installation and commissioning costs
- Costs and benefits of acceleration or delay of delivery
- Servicing and maintenance costs
- Decommissioning and disposal costs
- Value of non-monetised benefits and costs

An approved procurement procedure will achieve:

- Appropriate level of competition in the procurement process
- Efficiency by avoiding unnecessary process costs
- Encouraging competition by purchasing in a way that maintains the long-term sustainability and competitiveness

An approved procurement procedure requires:

- Appropriate delivery model
 - Staged
 - Design and build
 - Shared risk
 - Partnering
 - Supplier panel
- Choice of supplier selection method
 - Aligned to the delivery model
 - Realising the right combination of price and quality
 - Using competition and encouraging innovation through procurement

An approved procurement procedure requires:

- Optimal supplier selection
 - Choosing the right supplier is critical to obtaining value for money spent
 - A mechanism to determine whether or not the lowest price proposal should be accepted
 - A robust supplier selection method to boost competition

Suggested selection criteria

Assess the
activity against
the following:

- Complexity and uncertainty
- Scale
- Timing and urgency
- Innovation potential
- Risk management
- Supplier market

Risk management

- When is risk identified in the procurement process?
 - Scope and scale
 - Use of (or failure to follow) procurement procedures
 - The contract and the parties
 - Termination and transition
- How is risk managed?
 - Effective dialogue
 - Determined who is best placed to manage and mitigate risk
 - Appropriate risk transfer mechanisms
 - Establish a risk management programme

Managing contract delivery

- Is there sufficient contractual flexibility?
- Performance monitoring
- KPIs for innovation
- Collaboration
- Technological advancements
- Contract management skills to ensure value for money

Monitoring performance

- Inputs in support of improved decision making
- Outputs on efficient, cost-effective project delivery
- Ongoing dialogue towards a shared understanding
- Identify the reasons for any losses or gains
- Benchmarking performance

The process for maintaining or enhancing value for money through procurement



a strategic approach to procurement

optimising whole-of-life value for money

using an approved procurement procedure

allocating and managing risk appropriately

proactively managing contract delivery

monitoring performance

Is there scope within the existing legal framework to explore the use of value for money in public procurement?

- Current procurement procedures
 - Not conducive to the promotion of innovation and value for money
 - The general rule is that no negotiations may take place between procuring entities and bidders
 - Timescales for the existing procurement procedures around 21 – 30 days

[PFMA SCM Regulation 16A6.3(c) and MFMA SCM Regulation 22(1)(b)(i) read with Regulation 22(2)]

Is there scope within the existing legal framework to explore the use of value for money in public procurement?

- Exceptions?
 - Doing away with competitive bidding procedures if doing so is impractical, as in the case of “emergencies” or a “sole supplier”

[Para 4.4 of National Treasury Practice Note SCM 2; PFMA SCM Regulation 16A6.4. MFMA SCM Regulations 36(1)(a)(iii) and 36(1)(a)(iv)]

Two-stage bidding process

- Stage 1:
 - Technical proposals on conceptual design or performance specifications should be invited
- Stage 2:
 - Final technical proposals and priced bids should be invited

[Source: Bolton P "Public Procurement as a Tool to Drive Innovation in South Africa" *PER / PELJ* 2016(19)]

The evaluation of quality and functionality

- Functionality:
 - “The measurement according to predetermined norms, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, among other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer”

[Source: 2015 Public Sector Supply Chain Management Review; Regulation 1(k) of the PPPFA, 2011]

- 2017, amendment to Regulation 7 in PPPFA 2011
 - An additional sub-regulation has been added states that if an organ of state intends to use objective criteria in terms of section 2(1)(f) of the Act, the organ of state must stipulate the objective criteria in the tender documents.

The award criteria

- The 90/10 and 80/20 points system
- No mention of value for money
- Is an “objective criteria” present to justify such an award
- *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape ZAWCHC 3 (6 February 2013)*
- The 2011 PPPFA Regulations are very precise on the award of points for preference

The award criteria

- The applicable points that will be utilized when scoring each sub-criterion should be objective.
- The minimum qualifying score that must be obtained for functionality in order for a tender to be considered further should not be generic.
- It should be determined separately for each tender on a case by case basis.
- The minimum qualifying score must not be prescribed so low that it may jeopardize the quality of the service required nor so high that it may be restrictive to the extent that it jeopardizes the fairness of the SCM system.

[Source: Implementation Guide: Preferential Procurement Regulations, 2017]

Is there scope within the existing legal framework to explore the use of value for money in public procurement?

- There are a number of regulatory and non-regulatory obstacles that hinder South Africa's use of public procurement to drive value for money
- Limited provision is made in the existing legal framework
- Although government's primary objective is to meet BBBEE requirements, using the value for money proposition will make strides towards achieving quality and efficiency in meeting infrastructure goals
- It starts with ensuring that the government's procurement strategy identifies where its value for money opportunities are, and using that proposition to promote project delivery for the full project life cycle

Ricardo Pillay

Director

Team Leader

Construction | Infrastructure | PPP's



ricardo.pillay@lnpinc.co.za
061 377 3623



Thank you for the
opportunity.

