



Conflict of Interest: An Epidemic Dilemma Within the South African Public Procurement System

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Abstract

Background: Challenges of the South African public procurement system continues unabated to make visible footprints in the yearly Auditor-General's reports. At the centre of the challenges is the failure to comply with the legislative framework regulating public procurement resulting in irregular expenditure. Compliance failures are at the root of evil deeds and misconduct in the South African public sector.

Setting: The existence of a plethora of legislative frameworks, policies and standard operating procedures and the yearly reports of the Auditor-General leaves one pondering in relation to the difficulty for procurement officials to adhere to these prescripts.

Aim: It against this notion that this conceptual paper gives an analysis of the impact of conflict of interests as suspect in chief on failure by procurement officials to adhere on procurement regulations. Of essence is to examine causal factors and inherent consequences which in most instances is conflicting interest by public officials.

Method: This paper analyses secondary data with regard to conflict of interest with in the South African public procurement system. This is done by means of literature and government documentation.

Conclusion: This paper concludes that the concept of conflict of interest is not new within the procurement space, yet procurement officials still grapple on how to effectively deal with it whenever it arises. This therefore calls for reform in procurement processes especially in ensuring consequentialism for wrongdoers.

Contribution: The paper contributes towards the shaping of public procurement policies and ethical guidelines in all spheres of government. This paper further contributes to the body of knowledge considering that it will unearth critical dimensions of conflict of interests particularly for the public sector.

Keywords: *Conflict; Interests, dilemma, South Africa; Public; Procurement and System*

Introduction

According to Malan and Fourie (2020), despite the fact that the public procurement has gone through a series of reforms and the reposition of Supply Chain Management (SCM) as a strategic instrument, there are still far-reaching challenges facing the South African public procurement practices. The former Auditor General of South Africa (AGSA), Mr Kimi Makwethu urged governmental leaders to halt the trend of disappointing audit results, to reinstate public accountability and avert further mismanagement of public funds (AGSA, 2022). Similar assertions were made by the Tsakani Maluleke, the current AGSA wherein she called on all role-players in the local government accountability ecosystem to diligently play their part to ensure accountability for government spending, and for ensuring quality service delivery and quality the quality of life for South Africa's citizen (AGSA, 2020). Although the call by Tsakani Maluleke, was directed to municipalities, it is crucial to underscore that such comments from the country's supreme audit institution should be a subject for public service and academic discourse with regard to the management of public funds and accountability therein. In a developing state such as that of South Africa, there is an exponential increase of expectation from ordinary citizens, business fraternity and civil society for government to expedite the delivery of service and more significantly, the delivery of higher standard of integrity (Masiya, Davids & Mangai, 2019). The existence of conflict of interest among procurement officials or any other senior government official including the political office bearers is tantamount to direct betrayal of the civil society expectation of the delivery of higher standard of integrity (Pheto, 2021). This is so as the Constitution of the Republic of South Africa, 1996 places an unavoidable mandate on State institutions to place the socio-economic needs of the citizenry on the high list of priorities especially through effective, efficient and economic use of government's scarce resources. According to the Organization for Economic Co-Operation and Development (OECD) (2005), conflicts of interest in the public sector are critical, and if they are not recognised and controlled appropriately, they can undermine the fundamental integrity of officials, decisions, agencies, and governments. One of the key principles outlined by OECD (2020) is that G20 countries must establish specific, coherent and operational standards of conduct for public officials which will provide a clear and realistic description of what circumstances and relationships that can lead to a conflict of interest situation. This paper argues that such standards must strive to re-awaken the procurement officials' understanding and commitment to serve the public interest, and protect them from any undue influence of private interests that could compromise, or appear to compromise, their procurement decisions, and this must be applicable to stakeholders involved in the value chain of procurement decisions.

Giving context to the South African environment, public procurement is highly regulated, from the 1996 Constitution of the Republic of South Africa and various pieces of legislation on the conduct of public officials in general, and also the code of conduct that has been introduced with regard to procurement officials in particular and also for those officials that have been appointed to serve in the bid committees. Given the plethora of corruption scandals reported daily in the media exacerbated by the findings of the Judicial Commission of Enquiry into State Allegations of State Capture, otherwise known as the Zondo Commission, it is easy to assume that unethical conduct which conflict of interest is the common denominator has become endemic in South Africa. It is on this basis that this paper seeks to give an analysis on conflicts of interest in the South African public procurement system.

Conflict of Interest Unpacked

According to Kováčiková (2020), conflict of interest is a negative phenomenon which is generally forbidden since it results into violation of the principle of equality and principle of non-discrimination, as links between procurer and tenderer provide to related tenderer an uncompetitive advantage over other tendering competitors. According to Chelin (2021), conflict of interest is a dilemma that occurs when an individual has a private or personal interest which seems to influence the objective and impartial discharge of the individual's official duties; the individual can be a public official, an employee or professional. Frier (1969) argues that a conflict of interest exists when a public employee's

public responsibilities clash, or appear to clash, with his or her private economic affairs. Conflict of interest arises when a person holding public position has a private interest that could affect the impartial and objective performance of the powers and duties of his office (Mathebula & Makamu, 2014; Lecheva, 2015). The World Bank (2020) indicates that a conflict of interest arises where a public official has some other interest that could materially interfere with their duty to act impartially. According to Williams (1985), conflict of interest denotes a situation in which an employee has a private financial interest sufficient to influence, or appear to influence, the exercise of his or her public duties and responsibilities.

In order to dissect the concept in a broader perspective, it is important to understand the key words of the concept itself which are conflict and interest. Mafunisa (2003) regards private or personal interest as a phenomenon that includes all those influences, emotions and loyalties that could influence a public functionary and compromise the exercise of his or her competent judgment, whilst conflict involves a clash between influences of this nature and the interests of the public that the functionaries serve. According to the World Bank (2021), conflict in this regard occurs when an individual is subject to two coexisting interests that are in direct conflict with each other. OECD (2004) indicates that interests are not limited to financial and economic interests but other forms of interests such as personal benefits, affiliations with public and private sector organisations, political institutions, religious or ethnic groups, trade unions and other personal interests and relationships. According to Genckaya (2009), the public official's private interest includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organisations with whom he or she has or has had business or political relations. It includes also any liability, whether financial or civil, relating thereto. Williams (1985) holds a view that even if there is no financial gain accruing to employees involved, however the fact that the public official has a multiplicity of outside interests may consume an unduly large amount of the time and energy public functionaries have available to think about and perform their duties.

Although the definitions discussed above are from different authors, there are some notable common variables amongst them which cannot be ignored and are private or personal interest, public interest, position of trust, interference and impartiality. More importantly is their impact on the pulsation of the public procurement system, especially when such private or personal interests tremble over the call of duty for a procurement official or any other public official involved in the value chain of the public procurement system. Furthermore, private interest becomes toxic when it starts to blur the sight and mind of the procurement official and compromise the professional judgment in the execution of the procurement function (Zitha & Mathebula, 2015). Based on the definitions discussed above, it can be argued that conflict of interest by procurement officials who sacrifice, compromise their call of duty due to interests other than that of the state or the public are guilty of conflict of interest. Various conceptualisations above show the broadness of the concept itself which could be linked to the difficulty that government have with regard to curbing this 'epidemic' within the public procurement system. Furthermore, given the discussion, it can further be argued that conflict of interest within a public procurement system is not managed properly, it can affect the whole value chain that starts from demand planning, development of terms of reference, advertisement of bids or request for quotations, evaluation and adjudication of bids or quotations, contract monitoring and payment. To support this assertion, the World Bank (2022) reports that in the pharmaceutical environment, conflict of interest can occur from the marketing phase, selection of companies, inspection of manufacturing facilities, procurement, supply and distribution, prescribing, dispensing and use of medicines. At the centre of the challenge in curbing this epidemic is the fact that declaring conflict of interest lies in the heart and mind of the conflicted person. This implies that it hinges on the ethical nerve and moral compass of the conflicted procurement official to declare such interest to the applicable structures including the bid committees in the event that such procurement official gets appointed to serve either in the bid specification, evaluation or adjudication committee. All public officials have private-capacity interests, such as outside financial holdings, family relationships and friendships, and relationships with past employers and clients (OECD, 2020). Over

time, these interests appear and disappear, change and evolve. In general, the mere existence of these loyalties, commitments, and financial interests are not problematic in-and-of-themselves.

Key Dynamics of Conflict of Interest

In dealing with conflict of interest there are key dynamics which must be considered as they play a critical role in assisting government departments in curbing conflict of interest from decaying the public procurement system. Firstly, is the link between conflict of interest and corruption. According to the Public Protector (2016), a conflict-of-interest situation is not corruption per se but do result in an ethical issue. Therefore, it is only when conflicts of interest are not managed adequately or are left unaddressed that they result in corruption. Trostand and Gash (2008) posits that because of conflict of interest, procurement officials or any officials involved in the value chain of public procurement system tend to neglect their public interest in favour of their private interest by making use of their positions for personal gain and engage in corrupt activities such as extortion, bribery and fraud to achieve their goals. Reed (2008) is of the view that in reality, conflict of interest is properly understood as a situation, not an action, and it is clear that a public official may find him or herself in a conflict of interest situation without actually behaving corruptly. According to World Health Organisation (2022), conflict of interest creates an incentive and increases the risk that an individual's judgement or action may be compromised and can provide an entry point for corruption.

The second dynamic is the linkage between conflict of the interest and the expectation of the civil society from the public procurement officials and those that are involved in the procurement system. OECD (2005) argues that conflict of interest involves a possible breach of trust, which is a breach of the entrusted responsibility not to misuse an official position in order to obtain an improper private-capacity advantage, either for the official themselves or for another private interest. In the South African context, all public servants have an obligation to serve the members of the public within the prescribed ethical conduct as prescribed in the Public Service Regulations as amended. Furthermore, procurement officials and all officials involved in the public procurement system are obligated to comply with the provisions of the section 217 of the Constitution of the Republic of South Arica, 1996. Section 217 requires that when an organ of state contracts for goods and services, it must do so in accordance with principles of fairness, equitability, transparency, competitiveness and cost-effectiveness. Therefore, the issues of conflict of interest if not managed properly have potential to betray not only the recipients of service delivery but also the Constitution itself. To support this assertion the European Dynamics (2016) indicates that conflict of interest is, objectively and in itself, a serious irregularity without the necessity to qualify it by having regard to the intentions of the parties concerned and whether they were acting in good or bad faith. The third dynamic of conflict of interest is the acknowledgement of the fact that all people have interest in one way or another, and in this regard, the procurement officials and those involved in the value chain of the public procurement system are not an exception. According to OECD (2021), all public officials have private-capacity interests, such as outside financial holdings, family relationships and friendships, and relationships with past employers and clients. Over time, these interests appear and disappear, change and evolve. In general, the mere existence of these loyalties, commitments, and financial interests are not problematic in-and-of-themselves. Chelin (2021) indicates that while it is normal for public officials to have or pursue private or personal interests, the issue arises when these interests conflict with the public duty of the official. This implies that it is upon the incumbent to declare such interest and also how such declaration is managed to curb against its negative impact on the procurement decisions.

The fourth dynamic of conflict of interest is the fact that it may occur in any stage of the public procurement system as alluded above by the World Bank (2022). To support this assertion, OECD (2020) outlines the value chain areas that conflict of interest can compromise, the professional judgement of a procurement official which is when taking a decision as to where to spend public funds, when establishing certain specifications for the contract, when conducting the tendering process, when awarding the contract, when overseeing implementation of the contract, and when conducting a final

accounting. OECD (2020) indicates that while impartiality throughout the entire procurement process is important, the processes of bid evaluation and award tend to be the most vulnerable stages. This implies that conflict of interest may occur at a policy development level which will unknowingly or silently start to influence the procurement planning phase, designing of the procurement strategy, development of terms of reference or specifications, determination of the evaluation criteria, and preference points. This has a massive impact on negatively influencing the competent judgement of the officials appointed to serve in the bid committees. This could be equivalent to the emerging of a new dichotomy (public-private interest dichotomy) within the public administration that requires to be properly managed.

The last dynamic of conflict of interest is the financial implications linked to addressing or failure to address conflict of interests. According to OECD (2005), there are costs attached to such avoidance, and costs in preventing, assessing and managing such risks. There are also costs involved in any actual harm that does in fact result from a particular conflict situation. This implies that government departments must invest in mechanisms that will assist in curbing against conflict of interest. One of the critical aspects that government can invest on which is often underestimated is investing on change management interventions.

The Genesis of Conflict of Interest: A Theoretical Perspective

According to Gençkaya (2009), the existence of conflict of interest in the public service is as old as public administration itself. According to Davis and Snead (1982), one of the first authors who wrote about conflict of interest is Joseph Margolis in 1979. Margolis (1979) made key ground-breaking analysis about conflict of interest. Firstly, he regards conflict of interest as an avoidable exploiting of conflicting roles. Secondly, he regards conflict of interest as a situation tending to undermine the independent professional judgement. Lastly, he argues that the term conflict of interest is used rather freely to describe a broad range of morally questionable situations that occur in the course of business activity. Davis and Snead (1982) applied conflict of interest using a Lawyers Analysis of conflict of interest as a basis to explore the concept and apply it in other professional business ethics environments. According to Hazard (1977), the Lawyers Analysis of conflict of interest is to be found in the American Bar's Association Code of Professional Responsibility as well as in numerous articles, books, court opinions and opinions of various Bar Ethics Committees. There are two critical proponents of the American Bar's Association Code of Professional Responsibility. Firstly, the Bar understands the Lawyer's role to be exercising professional judgement within the bounds of the law, solely for the benefit of his or her client free of compromising influences and loyalties. Secondly, the Bar understands the Lawyer to commit his or her legal training, knowledge and sagacity fully to his client within the bounds of the law and what the clients wants. Seger (2008) posits that in many societies in the past it had been assumed that elected or non-elected public officials would take advantage of public office to promote their own personal interests whilst in modern societies they should be expected to act exclusively in the interests of the state. In this regard Davis and Snead (1982) regards interests as a shorthand of any influence, loyalty or other concern capable of compromising a lawyer's ability to act for the benefit of his or her client within the ambit of the law. The discussion above shows that the concept conflict of interest has its origin in the legal fraternity wherein lawyers and judges are required by law to act in a fair and impartial manner without favour or prejudice. Seger (2008) further indicates that over the years, democratic societies and their governments became accountable to their public, and as a result citizens start demanding public officials to discharge their duties in the public interest with fairness and impartiality. Llalla (2016) indicates that in a country with solid democracy, citizens must recognize and have proper transparency regarding the fact that where their contributions go through paid taxes, or how public funds are used, while businesses are also interested to this process, considered not only as indirect beneficiaries of public funds, but as well as beneficiaries in conducting the process of redistribution. According to Mafunisa (2003), in emerging democracies, such as South Africa, the 1996 Constitution unearthed a plethora of rights which include amongst others; the freedom of expression and media independence as enshrined in the Bill of Rights which makes it easier for the media to expose unethical conduct of officials charged with public office

(Mathebula, 2015). It is on this basis that from the dawn of democracy in South Africa, public procurement has been going through rigorous reforms aimed at making procurement a phenomenon fit for purpose and curb against any form of anomalies which includes unethical conduct of procurement officials and all those that are involved in the value chain of public procurement system (Zitha & Mathebula, 2015). In this era, conflict of interest remains a very necessary and critical discourse in both the public and the private environment. It can be argued that by its origin, the concept conflict of interest has a negative connotation which if not managed can impact negatively on the realisation of the constitutional principles. Furthermore, the concept itself questions the ethical nerve of those that are involved in dispensing public resources through public procurement system. This assertion stems from the fact that conflict of interest is directly linked to exercising the professional judgment of those trusted with public duties and the notion of fairness and impartiality in the execution of procurement function.

Types of Conflict of Interest

According to the World Bank (202), conflict of interest is often categorized as two types which are; actual conflict of interest and potential and or perceived conflict of interest. These are where a person's independence, objectivity or impartiality are compromised, could be compromised, or may be seen by some as being compromised. These types are therefore interrogated below.

Actual Conflict of Interest

According to Davis and Snead (1982), actual conflict of interest is some kind of interest which there is certainty that adversely affect the professional judgement of a person in discharging his or her official responsibility. Gençkaya (2009) indicates that actual conflict of interest is classified under pecuniary conflict of interest which may arise as a result of a staff member, or a member of his or her family, owning property, holding shares or a position in a company bidding for government work, accepting gifts or hospitality, or receiving an income from a second job. Under this kind of conflict of interest, money does not have to change hands, however, the benefit could be an increase in the value of a property because of a favourable rezoning decision, or the selection of a particular tenderer for a contract. According to Chelin (2022), actual conflict of interest occurs when a direct conflict exists between the public official's private or personal interest and the individual's public duty and those of the public body. For instance, a company belonging to a senior public official is competing for a tender to provide services to the department which the individual oversees.

Perceived Conflict of Interest

According to Grundy, Dunn and Bero (2020), conflict of interest can be difficult to recognize and assess and not all conflicts of interest have the same magnitude of risk with regards to the probability and extent to which the it could unduly influence decision-making and compromise results. It is therefore essential to ensure that the primary interests (e.g., mission, goals, obligations, values) of the committee and its members and the secondary interests, obligations or relationships that could constitute a conflict of interest are clearly defined and understood. This will enable managers and committee chairs to make a determination about the relevance of a disclosed interest and the existence and seriousness of a conflict of interest

Mechanisms Put in Place to Curb Against Conflict of Interest

At the centre of the mechanisms that have been put in place to curb against this epidemic (conflict of interest) within the public procurement system is the legislative framework regulating public procurement. Such pieces of legislation were promulgated with the aim of promoting ethical conduct in the public service. The challenge has always been the negligence to the provisions of these policies as discussed below.

The Constitution of the Republic of South Africa, 1996

The plethora of legislative frameworks put together to curb against conflict of interest draw its lines from the Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution). Section 195(1) of the Constitution provides a set of democratic values and principles governing public administration which includes amongst others the promotion and maintenance of high standard of professional ethics. Zooming closer to the execution of the procurement function, section 217 of the Constitution provides a basis upon which public procurement must be implemented and it provides that “*when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective*”. According to Malan and Fourie (2020), the above are the five foundational principles that form the basis for the entire legislative framework regulating government procurement in South Africa and are echoed in other legislation pertaining to procurement. Public officials embroiled in conflict of interest therefore not only undermine service delivery mandate of organs of State but also undermines the Constitution.

Public Service Regulations, 2016

Regulation 13 of the Public Service Regulation of 2016 stipulates the ethical parameters that regulates the conduct of public servants. Amongst others, Regulation (13)(b) prevents any public servant from engaging in any transaction or action that is in conflict with or infringes on the execution of his or her official duties. The above take cognisance of the fact that conflict of interest within the public procurement system does not only affect procurement officials but also other officials outside the procurement office but are part of the value chain in the procurement of goods and services in their respective departments. Moreover, by virtue of being appointed as a public servant, one has an obligation to adhere to the provisions of section 195 of the Constitution as well as the Regulation 13 of the Public Service Regulations of 2016.

Public Finance Management Act (Act No.1 of 1999)

To give effect to section 217 of the Constitution, Sections 38 (1)(a)(iii) and 51 (1) (a) (iii) of the Public Finance Management Act (Act No.1 of 1999), prescribes that accounting officers / authorities must ensure that the institution has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. This is consistent with the aim of the Act, which is to promote sound financial management in the public service and other organs of State. Sound financial management with no doubt would extend to how procurement officials execute their financial duties while also guarding against conflict of interest.

Treasury Regulations

Regulations 16A3.2 of the Treasury Regulations of 2005, charges Accounting Officer/Authority with an obligation to establish a Supply Chain Management system which must be fair, equitable, transparent, competitive and cost effective. Moreover, Regulations 8(3)(a) and (b) of the Treasury Regulations of 2003 stipulates parameters within which procurement officials and any role player within the public procurement value chain has to comply with. This includes amongst other compliance with highest ethical standards, adhere to National Treasury Code of Conduct for Supply Chain Management practitioners and other role players involved in the procurement of goods and services, recognise and disclose any conflict of interest that may arise, treat all suppliers and potential suppliers equitably. Regulation 8(4) (a and b) stipulates that if a Supply Chain Management official or other role player, or any close family member, partner or associate of such official or other role player, has any private or business interest in any contract to be awarded, that official or other role player must disclose that interest; and withdraw from participating in any manner whatsoever in the process relating to that contract and this same notion is applicable to all bid committees.

National Treasury Instruction Notes

From time to time National Treasury issues Instruction Notes aimed at giving effect to the legislation. Paragraph 2 of the National Treasury Practice Note Number SCM 4 of 2003 provides the code of conduct for Supply Chain Management practitioners that must be adhered to at all material times. Its scope is not only limited to SCM practitioners but also to all officials and other role players involved in the value chain of the public procurement system. Furthermore, the Practice Note require SCM practitioners and any other role player in the value chain to comply with the Code of Conduct for the Public Service as contemplated in Chapter 2 of the Public Service Regulations of 2001 with specific reference to paragraph C4.12 and C5.3 to C5.4. Paragraph 2 of the above Practice Note directly addresses conflict of interest. Sub-paragraph 2.1 of the above Practice Note provides that “*SCM practitioners, to the extent required by their position should declare any business, commercial and financial interests or activities under taken for financial gain that may raise a possible conflict of interest*”. Sub-paragraph 2.2. of the same Practice Note provides that “*SCM practitioners should not place themselves under any financial or other obligation to outside individual or organisation that might seek to influence then in the performance of their duties*”. Lastly, sub-paragraph 2.3 of the same Practice Note provides that “*SCM practitioners should not take improper advantage of their previous office after leaving their official position*”. Furthermore, National Treasury issued a code of conduct for Bid Adjudication Committees (BAC) which address amongst others issues of conflict of interests for BAC members. moreover, National Treasury SCM Instruction 3 of 2016/17 on preventing and combating the abuse in the Supply Chain Management system. Paragraph 3.1 of the above-mentioned Instruction Note obligates the Accounting Officer/Authority to establish a system that deals with the management of complaints and or allegations of abuse in the Supply Chain Management system. Moreover, paragraph 3.5 of the National Treasury SCM Instruction 3 of 2021/22 indicates that it is imperative for the Accounting Officer/Authority to establish mechanisms to identify risks and internal control weakness in their SCM system to development mitigating strategies and control. The concept of conflict of interest is not only a situation confronting procurement officials and all officials within the public service, but it also a situation that confronts the bidders. In this regard, National Treasury issues a Standard Bidding Document (SBD) form marked SBD4 wherein bidders are required to declare their interest failure which may results in the invalidation of the bid. The above discussion shows the extent to which conflict of interest is prioritised and also the extent of measure that have been put in place to address the matter.

Public Audit Amendment Act, (Act No. 5 of 2018)

The Auditor-General of South Africa is the supreme audit institution which through this amendment Act it has been empowered to action against Accounting Officers/authorities who are failing to implement the recommended remedial action. On yearly basis it conducts audits for all spheres of government including the state-owned enterprises. One of the common denominator in the audit report is non-compliance with SCM prescripts which amongst others include aspect of conflict of interest. Section 5(a)(2) provides that “*If the accounting officer or accounting authority has failed to implement the recommendations contained in the audit report referred to in subsection (1), the Auditor-General must take appropriate remedial action to address the failure to implement the recommendations*”.

Conclusion

Conflict of interest in the South African public service continues to dominate debates across various realms of society. At the core is the failure of officials to conduct themselves within the prescripts and confines of the law. What exacerbate the situation is the failure to close the legislative gaps which merely requires officials particularly those involved in public procurement to declare their business interests. This paper sought to critically interrogate the notion of conflict of interest in the South African public service and more specifically to procurement officials. This paper successfully argued that the scourge of conflict of interest which in itself is an ethical dilemma is prevalent in procurement processes

due to the financial benefits that are likely to accrue to officials. The South African government has however started engaging in legislative processes and other mechanisms to curb conflict of interest. Some of those initiatives include the professionalisation of the public service while municipal officials are barred from holding political positions in political powers. This is so as conflicts mostly arise in instances of political interference and the tendency of politicians to favour those that are politically connected in the public procurement system.

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