

How SA's new state of disaster could affect construction contracting

By [Natalie Reyneke](#)

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South Africa declared a state of disaster in response to the longest and most intense power cuts in the history of the country. The previous state of disaster during the Covid-19 pandemic had significant knock-on effects for the construction sector, with specific legislation necessitating far-reaching changes.

The first set of regulations to the electricity state of disaster were gazetted on 27 February 2023. Here are some of the areas that may be impacted.

Less red tape?

It stands to reason that procuring more electricity generation at speed would be a priority in an energy crisis. Consequently, independent power producers (IPPs) may benefit from reduced red tape in the process of getting approvals to bring production projects online. Procuring related goods and services may also be simplified to speed things up.

The regulations enable specific directions to be issued during the state of disaster, such as:

- Removing barriers to developing and building new generation capacity;
- Streamlining and speeding up applications and decision-making on energy expansion projects. Examples may include environmental authorisations, condonations and exemptions associated with energy infrastructure and generation;
- Energy infrastructure upgrades and repairs may not have to comply with aspects of the National Environmental Management Act;
- Expediting the appointment of original equipment manufacturers (OEMs) to fast-track Eskom's delivery of the Generation Recovery Plan.



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Despite the directions that can be issued under the state of disaster, legislation that governs procurement by public institutions will remain in place. These are the Public Finance Management Act (PFMA), Municipal Financial Management Act (MFMA) and Preferential Procurement Policy Framework Act.

However, the PFMA and MFMA do contain emergency provisions which apply during the state of disaster. To curb abuse of the system and corruption experienced during Covid-19 state of disaster, any goods or services procured under these emergency provisions must be published and reported to Parliament within a month, including reasons for deviating from the normal procurement procedures. Accounting officers are required to take steps to ensure that anti-corruption measures are implemented during emergency procurement.

Specific regulations governing PFMA and MFMA emergency procurement procedures have not yet been published, but there are strict confines in both acts, so it will be interesting to see how they can be amended during the state of disaster.

Load shedding as a claim for time and/or damages

The energy crisis has impacted numerous clients and contractors in various ways. Affected contractors are seeking advice

on whether load shedding, or the unavailability of electricity, is an employer or a contractor risk. The answer depends on the form of contract between the parties. Since load shedding first became a reality, I have seen several contracts that specify lack of electricity as a contractor risk. In that case, the contractor needs to allow for additional time taken to complete the work, and/or costs for generators.

In contracts that were not as prophetic, the now well-known force majeure clause in standard form contracts would be the most obvious place to seek answers. The *Fidic Red Book* refers to force majeure as an exceptional event. The question is whether load shedding would be an exceptional event, given the history of load shedding in the country.

New contracts being concluded now would need to anticipate load shedding in the immediate term and provide for this in the contract. It is no longer an exceptional event. The electricity shortage is unlikely to be solved quickly.



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Changes in law

The Covid-19 state of disaster represented a change in law in some contract forms. This had far-reaching consequences for employers under the standard form Fidic construction contract - the contractor was entitled to an extension of time and the payment of costs as a result of the change in law. Based on what has been gazetted to date, this change in law does not have significant time and cost impact on contracts already signed and in place. Contracts entered into during the state of disaster must carefully consider regulations that only apply while the state of disaster is in effect.

Quicker dispute resolution processes

Over the past few years, dispute avoidance clauses have been included in the most common standard form contracts (Fidic 2017 and NEC4). The purpose of these clauses is to identify early interventions to avoid or limit the extent of disputes.

The state of disaster regulations published do not specifically address the avoidance of disputes.

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