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WESTERN CAPE**



**Evaluating South Africa's accession to the World Trade  
Organisation Government Procurement Agreement (WTO GPA).**

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A research paper submitted in partial fulfillment of the requirements of the LLM degree

MASTER OF LAWS IN MERCANTILE LAW

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Date 30 May 2023.

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## **DECLARATION**

I, Vuyo Velebhayi, declare that the research paper titled ‘Evaluating South Africa’s prospective accession to the World Trade Organisation Government Procurement Agreement (WTO GPA)’ is my original work and that all other works used or quoted have been indicated and acknowledged as complete references. This work has not been submitted to any University, College, or other institution of learning for any academic or other awards.

Vuyo Velebhayi

This research paper has been submitted for examination with my approval as Supervisor.



## ACKNOWLEDGEMENTS

I thank my supervisor Professor Patricia Lenaghan for her insightful comments that ensured I gave my best in completing this research. In addition, the following persons assisted my research in one way or the other: Messrs Xavier Poswa and Weekend Mfakele.



## **KEY WORDS**

Accession

Broad based black economic empowerment

Constitution of the Republic of South Africa

Domestic products

GATT

GATS

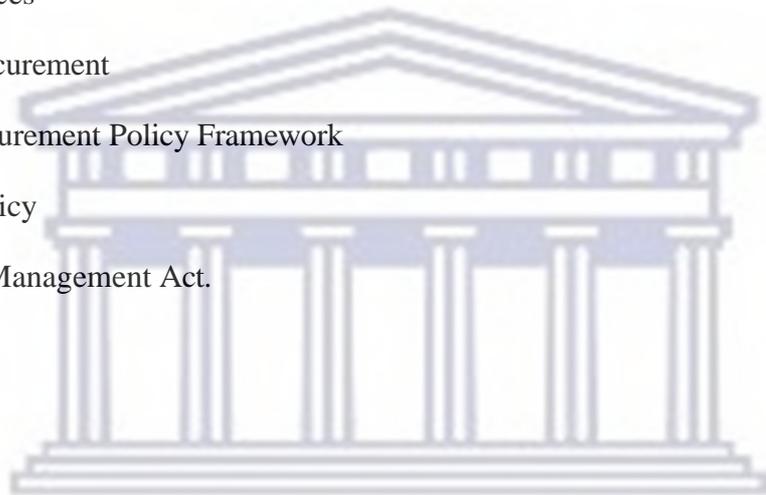
Goods and services

Government procurement

Preferential Procurement Policy Framework

Procurement policy

Public Finance Management Act.



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## **ACRONYMS AND ABBREVIATIONS**

AA	Affirmative Action.
BBBEE	Broad Black Based Empowerment Equity.
BAC	Bid Adjudication Committee.
BEC	Bid Evaluation Committee.
BSC	Bid Specification Committee.
DSU	Dispute Settlement Understanding.
EE	Employment Equity.
GATT	General Agreement on Trade and Tariff.
GATS	General Agreement on Trade and Services.
GPA	Government Procurement Agreement.
NT	National Treasury.
PPPFA	Preferential Procurement Policy Framework Act.
SOE	State Owned Entity.
SME	Small and Medium Enterprises.
UNICITRAL	United Nations Commission on International Trade Law.
WTO	World Trade Organisation

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## **CHAPTER 1**

### **BACKGROUND TO THE STUDY**

#### **1.1 Introduction**

South Africa's participation in international agreements is governed by s231 of the Constitution of the Republic of South Africa, 1996.<sup>1</sup> This section states that the negotiation and signing of all international agreements is the responsibility of the national executive. An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3) of s231 of the Constitution.<sup>2</sup> Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.<sup>3</sup>

The World Trade Organisation (WTO) is the only global international organisation dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments.<sup>4</sup> The goal is to ensure that trade flows as smoothly, predictably, and freely as possible. All major decisions are made by the WTO's member governments: either by ministers (who usually meet at least every two years)<sup>5</sup> or by their ambassadors

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<sup>1</sup> Constitution of the Republic of South Africa 1996, s231 available at [www.gov.za/documents](http://www.gov.za/documents) (accessed on 17 August 2021).

<sup>2</sup> An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

<sup>3</sup> Constitution of the Republic of South Africa 1996, s231 available at [www.gov.za/documents/](http://www.gov.za/documents/) (accessed on 17 August 2021).

<sup>4</sup> World Trade Organisation available at <https://www.wto.org/english/> (accessed on 17 August 2021).

<sup>5</sup> World Trade Organisation available at [https://www.wto.org/english/thewto\\_e.htm](https://www.wto.org/english/thewto_e.htm) (accessed 17 November 2021).

or delegates (who meet regularly in Geneva).<sup>6</sup> Several simple, fundamental principles form the foundation of the multilateral trading system. At an international stage these agreements are also enforceable by Vienna Convention on law of treaties of 1969 inter alia Article XV and Article XVIII.<sup>7</sup> The former specifically focuses on consent to be bound by a treaty expressed by accession and the latter on obligation not to defeat the object and purpose of a treaty prior to its entry into force.

The basic structure of the WTO agreements includes areas such as goods, services, intellectual property, disputes, and trade policy reviews. For the most part, all WTO members subscribe to all WTO agreements. Only after the Uruguay Round that four agreements remained which were originally negotiated in the Tokyo Round, with a narrower group of signatories and are known as plurilateral agreements. All other Tokyo Round agreements became multilateral obligations meaning that obligations for all WTO members. The four were: trade in civil aircraft; government procurement; dairy products and bovine meat.<sup>8</sup>

For this research paper the Government Procurement Agreement (GPA) will be closely studied. WTO principles of Non-discrimination principle, Most Favoured Nation and National Treatment obligations in the General Agreement on Tariff and Trade (GATT) did not deal extensively with matters related to government procurement hence a need for a specific government procurement agreement remained necessary. It is further argued by different authors that other related agreements like General Agreement on Trade and Services (GATS) exempted government procurement in as far as it relates to a wide access to international market.<sup>9</sup> The first version of WTO GPA was signed in Marrakech in April 1994 and entered into force in January 1996. It included the procurement of services, which are usually a major part of government such as construction services, utilities, and transportation. According to

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<sup>6</sup> World Trade Organisation available at [https://www.wto.org/english/thewto\\_e/thewto\\_e.htm](https://www.wto.org/english/thewto_e/thewto_e.htm) (accessed 17 November 2021).

<sup>7</sup> Vienna Convention on the Law of Treaties 1969 available at <https://legal.un.org/ilc/texts/instruments/english/conventions> (accessed 17 August 2021).

<sup>8</sup> Understanding WTO available at <https://www.wto.org/english/thewtoe/whatise/tife/agrm1e.htm> (accessed on 06 November 2021).

<sup>9</sup> Article XIII.1 of General Agreement on Tariffs and Services 1995 available at [www.wto.org](http://www.wto.org) (accessed 20 August 2021).

estimates, this achieved a ten-fold expansion of coverage by, among other things, extending coverage to services including construction services procurement.<sup>10</sup>

The objective of the GPA is to open government procurement markets among its parties. As a result of several rounds of negotiations, the GPA parties have opened procurement activities estimated to be worth more than USD 1.7 trillion annually to international competition, that is, to suppliers from the GPA parties offering goods, services or construction services). Since the start of the Doha round of WTO negotiations the adoption of GPA on 30 March 2012 was praised as the biggest victory for trade liberalisation with the WTO. The GPA is a plurilateral agreement within the framework of the WTO, meaning that not all WTO members are parties to the Agreement. At present, the Agreement has 21 parties comprising of 48 WTO members.<sup>11</sup> Thirty-five WTO members participate in the Committee on Government Procurement as observers.<sup>12</sup> All WTO members are eligible to accede to the GPA. At present, 12 WTO members are in the process of acceding.<sup>13</sup> The WTO GPA has market access schedules which contain several annexes defining the party's commitments with respect to: the procuring entities whose procurement processes will be open to foreign bidders; the goods, services and construction services open to foreign competition; the threshold values above which procurement activities will be open to foreign competition exceptions to the coverage.

The GPA is designed to open, in a reciprocal manner and to the extent agreed between WTO members, government procurement markets to foreign competition, and make government procurement more transparent. It provides legal guarantees of non-discrimination for the products, services, and suppliers of GPA parties in covered procurement activities. Government procurement typically accounts for

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<sup>10</sup> World Trade Organisation Government Procurement available at <https://www.wto.org/english/tratope/gproce/gppgae.htm> (accessed 17 August 2021).

<sup>11</sup> The Agreement on Government Procurement (GPA 2012) consists of 21 parties (covering 48 WTO members, counting the European Union and its 27 member states as one party).

<sup>12</sup> World Trade Organisation Agreement on Government Procurement available at [https://www.wto.org/english/tratope/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratope/gproc_e/gp_gpa_e.htm) (accessed on 20 August 2021).

<sup>13</sup> Albania; Brazil; China; Georgia; Jordan; Kazakhstan; Kyrgyz Republic; North Macedonia; Oman; Russian Federation; Tajikistan and United Kingdom.

about 15% of developed and developing countries' economies. Four other WTO members have undertaken commitments, in their WTO accession protocols, to initiate accession to the GPA.<sup>14</sup>

The accession process starts with the submission of an application for accession and has two main aspects: negotiations between the acceding member and parties of the GPA on the former's coverage offer, and verification that the acceding member's procurement legislation is consistent with the GPA's requirements regarding transparency, procedural fairness for suppliers and domestic review.<sup>15</sup>

As a result of several rounds of negotiations, the GPA parties have opened procurement activities estimated to be worth more than US\$ 1.7 trillion annually to international competition, that is, to suppliers from the GPA parties offering goods, services or construction services).<sup>16</sup> GPA also embodies principles of national treatment, most favoured nation obligations, transparency and related rules.<sup>17</sup> The GPA has the provisions for Special and Differential (S&D) treatment for developing countries to negotiate offsets at the time of accession or soon thereafter. These however are to be transitory measures whose duration has again to be negotiated. An important emphasis is the recognition of the value of the GPA and the resulting transparency not just in achieving value for public money through competitive processes but by explicitly recognising the objective of fighting corruption.<sup>18</sup>

Organisation for Economic Cooperation and Development (OECD) defines procurement expenditure as the expenditure by the government and state-owned enterprises of goods, services and works.<sup>19</sup> This expenditure is further defined as the sum of intermediate consumption (goods and services purchased

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<sup>14</sup> They are Afghanistan, Mongolia, Saudi Arabia, and Seychelles.

<sup>15</sup> World Trade Organisation available at [www.wto.org](http://www.wto.org) (accessed on 23 November 2021).

<sup>16</sup> WTO Agreement on Government Procurement available at [www.wto.org](http://www.wto.org) (accessed on 23 November 2021).

<sup>17</sup> Anderson RD, Muller AC (2017): 'The revised WTO Agreement on Government Procurement (GPA): Key design features and significance for global trade and development WTO Staff Working Paper, No. ERSD-2017-04, World Trade Organisation (WTO), Geneva available at <http://dx.doi.org/10.30875/188535e1-en> (accessed 16 September 2020).

<sup>18</sup> World Trade Organization. Development: Trade and Development Committee, available at <https://www.wto.org/english/tratop> (accessed on 18 August 2021).

<sup>19</sup> Global review of sustainable public procurement 2017 available at <https://wedocs.unep.org> (accessed on 17 August 2021).

for their own use, such as accounting or information technology services), gross fixed capital formation (acquisition of capital excluding sales of fixed assets, such as building new roads) and social transfers in kind via market producers (purchases by of goods and services produced by market producers and supplied to households).<sup>20</sup>

In 2012, a revised version of the GPA was further adopted and is based on the principles of non-discrimination, transparency and procedural fairness.<sup>21</sup> It contains the following main elements: guarantees of national treatment and non-discrimination for the suppliers of parties to the Agreement with respect to procurement of covered goods, services and construction services as set out in each party's coverage schedules provisions on special and differential treatment for developing and least-developed countries detailed procedural requirements on the procurement process.<sup>22</sup> This is to ensure that covered procurement is carried out in a transparent and competitive manner that does not discriminate against the goods, services or suppliers of other parties, avoids conflicts of interest and prevents corrupt practices.

On 13 October 2017 South African government, labour and business held a national consultative forum at Midrand in preparation for December 2017 Buenos Aires Ministerial Conference (WTO) 11th Ministerial Conference.<sup>23</sup> Minister of Trade and Industry Dr Davies stated that South Africa's priorities are aligned to those of the African Group and the Africa, Caribbean and Pacific (ACP) Group. The key priority is the conclusion of the outstanding work of the Doha Development Agenda (DDA) including in agriculture, to address the trade distorting domestic support subsidies being provided by mainly developed countries.<sup>24</sup>

Minister Davis further emphasised that South Africa is assessing each of the GPA proposed issues, to determine whether they can indeed be delivered and whether they meet SA's most urgent

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<sup>20</sup> Global review of sustainable public procurement 2017 available at <https://wedocs.unep.org/> accessed on 17 August 2021).

<sup>21</sup> WTO Agreement on Government Procurement available at [www.wto.org](http://www.wto.org) (accessed on 23 November 2021).

<sup>22</sup> WTO Agreement on Government Procurement available at [www.wto.org](http://www.wto.org) accessed on 23 November 2021).

<sup>23</sup> South African Government website available at <https://www.gov.za/speeches/south-africa-participates-at11th-world-trade-organisation-ministerial-conference-10-t0-13> (accessed on 23 November 2021).

<sup>24</sup> South African Government website available at <https://www.gov.za/speeches/south-africa-participates-at11th-world-trade-organisation-ministerial-conference-10-t0-13> (accessed on 23 November 2021).

developmental needs,<sup>25</sup>The National Consultative Forum also provided an opportunity for Government and Labour to sign a Pledge of not conceding to become a party to the WTO Agreement on Government Procurement.<sup>26</sup>The same pledge was later signed by Business after obtaining the necessary approval.

An analysis of the implications of the GPA for South Africa indicates that there are costs as well as benefits to becoming a GPA member. GPA membership would result in contestability of government procurement markets and the resulting increased competition would ensure better value for money in government procurement.<sup>27</sup> The emphasis on transparency and the explicit mention of reduction of corruption as an important objective of the GPA will result in better governance and a reduction of perceived corruption in South African government. Liberalisation of markets will lead to increased trade and liberalisation of government procurement is also likely to have a multiplier effect in increased trade. An enabling environment by the countries is to have the necessary infrastructure to handle the increase in trade. Despite liberalisation of trade under GATT and WTO, government procurement largely continues to have high levels of home-bias.<sup>28</sup> This is primarily so because a multiplicity of objectives drives government procurement. Considerations of government procurement as a policy instrument very often override cost-effectiveness as the primary consideration in determining it.<sup>29</sup> For example, government procurement is commonly used as a policy tool for developing target sections of

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<sup>25</sup> South African Government website available at <https://www.gov.za/speeches/south-africa-participates-at11th-world-trade-organisation-ministerial-conference-10-t0-13> (accessed on 23 November 2021).

<sup>26</sup> South African Government website available at <https://www.gov.za/speeches/south-africa-participates-at11th-world-trade-organisation-ministerial-conference-10-t0-13> (accessed on 23 November 2021).

<sup>27</sup>Kollamparambil,U The amended Government Procurement :Opportunities and Challenges .Law, Democracy and Development On-line version ISSN 2077-4907 Print version ISSN 10281053 Law democr.Dev. vol.18 Cape Town 2014 available at <http://dx.doi.org/10.4314/idd.v18i1.10> ( accessed on 17 August 2021).

<sup>28</sup> Kollamparambil,U The amended Government Procurement :Opportunities and Challenges. Law, Democracy and Development On-line version ISSN 2077-4907 Print version ISSN 1028-1053 Law democr. Dev. vol.18 Cape Town 2014 available at <http://dx.doi.org/10.4314/idd.v18i1.10> (accessed on 17 August 2021).

<sup>29</sup>Kollamparambil,U The amended Government Procurement :Opportunities and Challenges. Law, Democracy and Development On-line version ISSN 2077-4907 Print version ISSN 1028-1053 Law democr. Dev. vol.18 Cape Town 2014 available at <http://dx.doi.org/10.4314/idd.v18i1.10> (accessed on 17 August 2021).

populations entities owned by historically disadvantaged individuals (HDI's), industry and regions.<sup>30</sup> Liberalisation, however, is not a guarantee for competitive practices. To get the benefit of liberalisation, it is important that policies and law enforcement equipped to identify and deal with uncompetitive practices are strengthened.<sup>31</sup>The Competition Commission of South Africa is recommended for good work in matters related to price fixing. The GPA provides for financial limits below which the members are not compelled to invite international price competition.<sup>32</sup> This provision has a potential to restrict competition against Small, Medium and Micro-Enterprises (SMMEs) and protect the Broad-Based Black Economic Empowerment (BBBEE) beneficiaries. The purpose of this research paper is to assess the benefits of South Africa in acceding to the WTO GPA.

## 1.2 **Research problem**

Evaluating South Africa's readiness for accession to WTO GPA considering WTO GPA's articles. Article IV.4 of GPA (Conduct) reinforces the need for transparency in procurement so that it avoids conflicts of interest (Article IV.4b)<sup>33</sup> and prevents corrupt practices (Article IV.4c).<sup>34</sup> In order to achieve this, Articles VI and VII provide the procedural rules to ensure transparency for procurement through tender laws, with respect to technical specifications, advertising and information dissemination

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<sup>30</sup> Kollampambal, U. (2014). The Amended Government Procurement Agreement: Challenges and opportunities for South Africa. *Law, Democracy and Development*, 18, 202-223 available at <https://dx.doi.org/10.4314/idd.v18i1.10> (accessed on 12 October 2021).

<sup>31</sup> Kollampambal, U. The amended Government Procurement : Opportunities and Challenges. *Law, Democracy and Development* On-line version ISSN 2077-4907 Print version ISSN 1028-1053 *Law democr. Dev. vol.18* Cape Town 2014 available at <http://dx.doi.org/10.4314/idd.v18i1.10> (accessed on 17 August 2021).

<sup>32</sup> Kollampambal, U. (2014). The Amended Government Procurement Agreement: Challenges and opportunities for South Africa. *Law, Democracy and Development*, 18, 202-223 available at <https://dx.doi.org/10.4314/idd.v18i1.10> (accessed 12 October 2021).

<sup>33</sup> Kollampambal, U. (2014). The Amended Government Procurement Agreement: Challenges and opportunities for South Africa. *Law, Democracy and Development*, 18, 202-223 available at <https://dx.doi.org/10.4314/idd.v18i1.10> (accessed 12 October 2021).

<sup>34</sup> Kollampambal, U. (2014). The Amended Government Procurement Agreement: Challenges and Opportunities for South Africa. *Law, Democracy and Development*, 18, 202-223 available at <https://dx.doi.org/10.4314/idd.v18i1.10> (accessed 12 October 2021).

regarding forthcoming tenders, tender scrutiny and valuation criteria, time limits, negotiations with suppliers.<sup>35</sup> Directed/limited tendering is allowed only in exceptional circumstances while the multi-use list of approved suppliers approach is acceptable as long as information on how to get on the list is made publicly available.<sup>36</sup> GPA provides clauses which if utilised effectively can protect the domestic industry during transitional period in order to become competitive internationally.<sup>37</sup> South Africa's option is first to assume observer status at the GPA, which entails no commitments, and provides an opportunity to understand and master the workings of the agreement as well as to establish the costs of compliance with the GPA.<sup>38</sup>

### **1.2.1 The problem statements**

From the above background it is clear that two main questions arise, First, how ready is South Africa to accede to the WTO GPA? In answering this question emphasis must be on procurement legal pre-scripts with a focus on similarities between WTO GPA and Treasury Regulation Notes on prevention of procurement corrupt activities. The second relates to whether South Africa's procurement legal pre-scripts are in line with most of the WTO GPA?

### **1.2.2 Research question**

Flowing from the problem this research paper will investigate what are the benefits of South Africa's prospective accession to the WTO GPA are? Coupled with an analysis of how is South African government's delayed accession to WTO GPA affecting the principle of transparency, anti-corruption

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<sup>35</sup>World Trade Organization Revised Agreement on Government Procurement available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_revised\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_revised_gpa_e.htm) (accessed on 26 August 2021).

<sup>36</sup> Kollampambil, U. (2014). The Amended Government Procurement Agreement: Challenges and opportunities for South Africa. *Law, Democracy and Development*, 18, 202-223 available at <https://dx.doi.org/10.4314/ldd.v18i1.10> (accessed 24 February 2022).

<sup>37</sup>Arrowsmith S, Anderson RD *The WTO Regime on Government Procurement: Challenge and Reform*, Cambridge 2011 available at <https://www.nottingham.ac.uk/pprg/documentsarchive/> (accessed on 24 February 2022).

<sup>38</sup>Kollampambil, U *The amended Government Procurement: Opportunities and Challenges .Law, Democracy and Development Law democr. Dev. vol.18* Cape Town 2014 available at <http://dx.doi.org/10.4314/ldd.v18i1.10> (accessed on 17 August 2021).

measures, accountability, and competitiveness?

### **1.2.3 Investigations to research question**

In answering the above research questions, this research paper will investigate whether South African procurement regulations and policies are in line with most of the World Trade Organisation Government Procurement Agreement (WTO GPA) guidelines. It will investigate South Africa's readiness to accede to the WTO GPA with emphasis on procurement legal pre-scripts similarities. Finally, the research paper will look at the benefits of prospective accession to the WTO GPA.

### **1.2.4 Significance of the study**

This research paper tries to gauge the readiness of South African government to be part of other states which are signatories to WTO GPA to achieve all elements listed in the schedule for accession including but not limited to curb corruption; to be held accountable; to reduce corrupt activities; to promote competitiveness; to increase international market access. To assess the achievements of s217 of the Constitution and whether it is not used by the government as an escape goat to delay the accession to the WTO GPA.

### **1.3 Limitation of the study**

This research paper is restricted to determining whether it will be advantageous for South Africa to be a signatory of WTO GPA despite its unfulfilled domestic commitments related to poverty elevation, its economic policies such as BBBEE, PPPFA, EE and AA. It aims to assess the readiness of South Africa's government procurement system in relation to WTO GPA laws.

### **1.4 Methodology of research**

The research paper relies on peer reviewed articles, dissertations, WTO working papers and reports. It will contrast common legal pre-scripts between WTO GPA and South African procurement legal framework and reconsider if it is in the best interest to consider persuasion for accession. The focus will be on matters of common interest in which South African government can emulate to fight the corrupt activities within its procurement. Other elements of the WTO GPA such as market access, bid opening procedures and bid evaluation processes will be contrasted against South African Supply Chain Management Policy and indicate in what areas can South Africa tighten its laws and regulations. Secondary

sources which will be consulted to substantiate arguments will include books, articles and journal articles, dissertations, and newspaper articles.

### **1.5 Chapter outline**

The study is divided into five chapters. The first chapter introduces the research paper, and it contains the research problem, the significance of the study, limitations of the study and the research method used throughout the dissertation.

Chapter two highlights the readiness of South Africa to accede to the WTO GPA with emphasis on procurement legal prescripts with a focus on similarities with WTO GPA such Treasury Regulation, benefits of WTO GPA membership such as good governance, fighting corruption and supplier collusion. Notes on prevention of procurement corrupt activities.

Chapter three compares South African procurement regulations and policies with the WTO GPA guidelines.

Chapter four tabulates benefits of prospective accession to the WTO GPA. How corruption preventative measures of the WTO GPA can be of benefit to South Africa.

Chapter five is the conclusion to this research paper, findings and recommendations.



## **CHAPTER 2**

### **SOUTH AFRICA'S READINESS TO ACCEDE TO THE WORLD TRADE ORGANISATION GOVERNMENT PROCUREMENT AGREEMENT (WTO GPA) WITH EMPHASIS ON PROCUREMENT LEGAL PRE-SCRIPTS SIMILARITIES TO THE WTO GPA**

#### **2.1 Introduction**

This chapter will start by introducing government procurement laws and how procurement regulations are enacted. South Africa's procurement regime is premised on Section 217 of the Constitution which 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.<sup>39</sup> There are other legal prescripts which are the basis for the implementation and monitoring of good Supply Chain Management tool such as (i) Section 33 of the Constitution sets out the requirements for constitutionally valid administrative action and therefore the grounds on which administrative action may be reviewed by the courts. (ii) Section 195 of the Constitution further lays down the constitutional values for the country's public administration. The Constitution places an emphasis to correct the inequality of South African society and for the use of government procurement as a policy tool to achieve that objective. In this chapter South Africa's readiness to accede to the World Trade Organisation Government Procurement Agreement with emphasis on procurement legal prescripts is investigated. The South Africa's Acts of parliament related to procurement will be visited as well as World Trade Organisation Government Procurement similar prescripts. Flexibility of the Government Procurement Agreement in developing economies affords easily accession any WTO member. This chapter also looks at the benefit to Government Procurement Agreement membership in combating corruption as the membership deters supplier collusion and is a vehicle to procurement market for disadvantaged group. In cooperation with other instruments GPA has proven to be successful in fight against corruption. The next section gives highlights to some of South Africa's procurement enacted Acts, followed by WTO GPA similar prescripts. The benefits of WTO membership such as good governance, GPA's role in combating corruption and the deterrence of supplier collusion by GPA will be discussed. Thereafter this section will explore GPA as a vehicle to procurement markets for disadvantaged group, GPA being in synergy with other instruments in fighting corruption and finally the conclusion of chapter two.

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<sup>39</sup> Constitution of the Republic of South Africa, 1996.

## **2.2 South Africa's Acts of Parliament related to procurement**

Procurement activities are regulated in several acts of parliament as outlined in this section. To promote the achievement of equality legislative and other measures designed to advance persons, or categories of persons who were disadvantaged by unfair discrimination may be taken.<sup>40</sup> The provision in s217(2) of the Constitution led to the formation of a framework for preferential procurement known as Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA). PPPFA leads to a points system for procurement which guides points allocation criteria in accordance with the historically disadvantaged individuals (HDIs) of society. In addition to the (HDI) points criteria allocation there are other activities which are taken into account in the realisation of Reconstruction and Development Programme such as the promotion of South African owned enterprises; the promotion of export orientated production to create jobs and the promotion of SMMEs. Other activities which are considered a criterion to allocate points include the creation of new jobs or the intensification of labour absorption, the promotion of enterprises located in a specific province for work to be done or services to be rendered in that province, the promotion of enterprises located in a specific region for work to be done or services to be rendered in that region. It is important to mention other factors such as the promotion of enterprises located in a specific municipal area for work to be done or services to be rendered in that municipal area, the promotion of enterprises located in rural areas, the empowerment of the work force by standardising the level of skill and knowledge of workers. Lastly the development of human resources, including by assisting in tertiary and other advanced training programmes, in line with key indicators such as percentage of wage bill spent on education and training and improvement of management skills; and the upliftment of communities through, but not limited to, housing, transport, schools, infrastructure donations, and charity organisations.<sup>41</sup>

Allocation criteria in terms of PPPFA is not without challenges. The evaluation of a tender contract must be objective, and a contract should be awarded to the tenderer who achieves the highest score. However a contract may be awarded to a tenderer that did not score the highest total number of points if additional objective criteria to those contained in section 2(1)(d) of the PPPFA justify the award to another tenderer. These criteria, which are additional to the preferential procurement criteria must be clearly defined in the request for bid (RFB). Contracts may be awarded without considering the

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<sup>40</sup>Section 217(2) of the Constitution.

<sup>41</sup>Kollampambal, U Scielo *South Africa Law Democracy and Development* 'The amended Government Procurement Opportunities and Challenges' 203 Vol 18(2014).

preferential procurement policy framework if it is in the national security interest, the bidders are international suppliers, or it is in the public interest. Should an organ of state wish to exempt itself from any or all the provisions of the PPPFA, consent must be obtained from the Minister of Finance. In South African procurement law politicians or government officials are only required to declare their conflict of interest when submitting tenders. These conflicted persons are then not allowed to take part in Bid Evaluation Committee (BEC) and Bid Adjudication Committee (BAC). National Treasury has measures in place regarding the way Supply Chain Management (SCM) practitioners should behave, for example bid evaluation adjudication teams should regulate supply chain management of the institution in an honest, fair, impartial, transparent, cost-effective, and accountable manner in accordance with the accounting officers/authority's directives /delegated powers.<sup>42</sup>

South Africa's accounting officers are mandated to manage but, at the same time, are held accountable for the resources they use.<sup>43</sup> There are clear lines of accountability and broad frameworks of best practices that managers can adopt or, where necessary adapt.<sup>44</sup> An important legislation of note is The Prevention and Combating of Corrupt Activities Act (PCCA) which is the primary law governing Anti-Bribery and Corruption prevention and enforcement in South Africa. It applies to organisations based in the country and those based outside but doing business in the country.<sup>45</sup> Having discussed National provisions related to public procurement, it is important to also appreciate the role of local government in managing public procurement. The next subsection deals with local government sphere and will highlight some important municipal legislation.

#### 2.2.1 In the Local government sphere:

The Municipal Finance Management Act 56 of 2003 is the principal piece of legislation regulating supply chain management in municipalities 'A supply chain management policy may allow the accounting officer to procure goods or services for the municipality or municipal entity under a contract secured by another organ of state, but only if-

a) the contract has been secured by that other organ of state by means of a competitive bidding process applicable to that organ of state.

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<sup>42</sup> Practice Note Number SCM 4 of 2003 Code of Conduct for Supply Chain Practitioners. National Treasury.

<sup>43</sup> Public Finance Management Act 1 of 1999.

<sup>44</sup> Public Finance Management Act 1 of 1999.

<sup>45</sup> Prevention and Combating of Corrupt Activities Act 12 of 2004 (Corruption Act).

- b) the municipality or entity has no reason to believe that such contract was not validly procured.
- c) there are demonstrable discounts or benefits for the municipality or entity to do so; and
- d) that other organ of state and the service provider have consented to such procurement in writing.

Sub regulation (1) (c) and (d) do not apply if-

- a) a municipal entity procures goods or services through a contract secured by its parent municipality; or
- b) a municipality procures goods or services through a contract secured by a municipal entity of which it is the parent municipality'.<sup>46</sup> This regulation is aim at expediting service delivery whilst monitoring the value for money. It is still good in that the procuring municipality is able to determine whether the procurement process was followed to the latter by another municipality which is already utilizing the service of the contracted service provider.

Furthermore to the Regulation 32 the accounting officer of a municipality must, within 10 days of the end of each quarter, submit a report on the implementation of the supply chain management policy to the mayor and the reports must be made public.<sup>47</sup> In line with other developing countries South Africa has to advance economic transformation and enhance the economic participation of black people in the South African economy.<sup>48</sup> A municipal councilor is prohibited from being a member of a bid committee or attend any other committee evaluating or approving quotations or bids nor may a Municipal Councilor attend any such meeting as an observer.<sup>49</sup>

To give effect to the provisions of section 217 of the Constitution South Africa's National Treasury has established an office of the Chief Procurement Officer which is mandated to develop Supply Chain Management (SCM) policies, set uniform norms and standards for policy application.<sup>50</sup> These policies must also be aligned to the Public Finance Management Act (PFMA) and Municipal Finance Management Act (MFMA). The Office provides SCM support for policy implementation at all spheres of

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<sup>46</sup> Regulation 32 of Municipal Finance Management Act (MFMA) 56 of 2003.

<sup>47</sup> Section 21A of the Municipal Systems Act 32 of 2000.

<sup>48</sup> Broad-based Black Economic Empowerment Act 53 of 2003 (BBBEEA).

<sup>49</sup> Section 117 of the MFMA 1 of 1999.

<sup>50</sup> 2015 Public Sector Supply chain management review available at <http://www.treasury.gov.za/publications/other/scmf> (accessed on 17 April 2022).

government, collaborates with law enforcement agencies and works to avoid confusion of legislative mandates.

It must be noted that the Procurement Regulations in PPPFA pre-qualification criteria has been found to be invalid by the Supreme Court of Appeal where the parliament was given 12 months to rectify the invalidity and the appeal to Constitutional Court was also dismissed.<sup>51</sup> Under the Procurement Regulations, if an organ of state elects to apply the pre-qualification criteria, any tender that does not meet the criteria is an “unacceptable tender”. These qualifying criteria advance certain designated groups and provide that only certain tenderers may respond, including tenderers having a stipulated minimum Broad-Based Black Economic Empowerment (B-BBEE) status level; exempted micro enterprises (EMEs) or qualifying small enterprises (QSEs), and tenderers subcontracting a minimum of 30% to EMEs and QSEs which are at least 51% black owned. If feasible to subcontract for a contract above R30 million, then the organ of state must apply subcontracting to advance the designated groups.<sup>52</sup> The following section deals with WTO GPA similarities with SA public procurement regulations.

### **2.3 World Trade Organisation Government Procurement Agreement similar prescripts**

At the World Trade Organisation level the plurilateral Government Procurement Agreement (GPA) is a global effort to liberalise government procurement since it has been exempted from the rules of National Treatment (NT), Non-discrimination and Most Favoured Nation (MFN) under both the General Agreement on Taxes and Tariffs (GATT) and the General Agreement on Trade in Services (GATS).<sup>53</sup> It must be noted that South Africa is neither a party to the GPA nor does it have an observer status.<sup>54</sup> The GPA incorporates detailed requirements regarding aspects of the procurement process such as: (i) notices; (ii) conditions for participation; (iii) qualification of suppliers; (iv) technical specifications and tender documentation; (v) time periods for tendering and delivery; (vi) the use of negotiation and limited

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<sup>51</sup> Minister of Finance v Afribusines NPC Case CCT 279/20 available at

<https://www.concourt.org.za/index.php/judgement> (accessed on 25 October 2022).

<sup>52</sup> Minister of Finance v Afribusines NPC Constitutional Court 2022 available at <https://www.concourt.org.za/index.php/judgement/455-minister-of-finance-v-afribusines-ncp-cct279-20> (accessed on 25 October 2022).

<sup>53</sup> Kollamparambil, U Scielo South Africa Law Democracy and Development 'The amended Government Procurement Opportunities and Challenges' 203 Vol 18(2014).

<sup>54</sup> Kollamparambil, U Scielo South Africa Law and Democracy 'The amended Government Procurement Opportunities and Challenges' 204 Vol 18(2014).

tendering (vii) electronic auctions; and (viii) treatment of tenders, and awarding of contracts.<sup>55</sup> Procurement entities are obligated to publish procurement notices in a reasonable time and in accessible manner to all interested parties to know and bid.<sup>56</sup> One understands that these provisions are intended to ensure that the parties' procurement is performed in a transparent and competitive manner that avoids discrimination against the suppliers of other parties to ensure that market access commitments are not nullified. The procurement can be conducted through methods of open tendering, selective tendering and/or limited tendering.<sup>57</sup>

In the GPA there is flexibility for sub-central (provincial government in the case of South Africa) and other entities, which are, in some respects, required to comply with less stringent requirements than central government entities. Most importantly one of the GPA's requirements that participating governments and their relevant procuring entities are required to conduct their procurement in ways that avoid conflicts of interest and prevent corrupt practices. It reinforces the GPA's place among other international instruments in shaping an international standard of best practices in government procurement. The important feature of the GPA's provisions in this regard is that, at least to the extent that they have been integrated in the operative parts of the Agreement, they are fully enforceable under WTO dispute settlement rules.<sup>58</sup>

The GPA provides in its general scope of application that 'Application of Agreement'<sup>59</sup> implies that:

'This Agreement applies to any measure regarding covered procurement, whether or not it is conducted exclusively or partially by electronic means. Covered procurement means procurement (a) of goods, services, or any combination thereof:

- (i) as specified in each Party's annexes to Appendix I; and
- (ii) not procured with a view to commercial sale or resale, or for use in the production or supply of goods

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<sup>55</sup> Anderson RD; Müller AC *The Revised WTO Agreement on Government Procurement Agreement (GPA) : Key Design Features and Significance for Global Trade and Development* 'WTO Working Paper ERSD' 12 (2017).

<sup>56</sup> Mosoti V *The WTO Agreement on Government Procurement 'A necessary evil in the legal strategy for development in the poor world?'* Vol25.2 594 (2014)

<sup>57</sup> Article IV:4 of the GPA.

<sup>58</sup> Anderson RD; Müller AC *The Revised WTO Agreement on Government Procurement Agreement (GPA): Key Design Features and Significance for Global Trade and Development* 'WTO Working Paper ERSD' 12 (2017).

<sup>59</sup> Article II :1-2 of the GPA.

or services for commercial sale or resale;

(b) by any contractual means, including purchase; lease; and rental or hire purchase, with or without an option to buy.

(c) for which the value, as estimated in accordance with paragraphs 6 through 8, equals or exceeds the relevant threshold specified in a Party's annexes to Appendix I, at the time of publication of a notice in accordance with Article VII.

(d) by a procuring entity; and

(e) that is not otherwise excluded from coverage in paragraph 3 or a Party's annexes to Appendix'.

This shows that each party joins the GPA knowing its envisaged benefits as well as its responsibility of observing the set rules.

The inherent flexibility of the GPA as a market access tool is linked to features of its wording with respect to the application of both the National Treatment (NT) and Most Favoured Nations (MFN) principles. The GPA's main non-discrimination<sup>60</sup> provision contains both aspects and provides as follows:

(a) domestic goods, services, and suppliers; and

(b) goods, services and suppliers of any other Party.<sup>61</sup>

Having discussed the WTO GPA similarities with South African public procurement regulations, the next chapter explores benefits of WTO GPA membership.

#### **2.4 Benefits of World Trade Organisation Government Procurement Agreement membership such as good governance, fighting corruption and supplier collusion**

Considering the challenges of South African government related to issues of good governance, corruption, and supplier collusion in tenders, it is imperative to look at what the WTO GPA offers. This section shares some light in those offers. The governance challenges bear on the performance of public procurement markets are: (i) ensuring integrity in the procurement process and (ii) promoting

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<sup>60</sup>With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to like products of national origin.

<sup>61</sup> Article IV: of GPA.

effective competition among suppliers.<sup>62</sup> Accordingly these challenges are viewed as separate and distinct problems as the corruption is treated first and foremost as a principal-agent problem in which the official is allegedly enriches himself/herself at the expense of the government or the public; while promoting competition involves preventing collusive practices among potential suppliers and removing barriers that unnecessarily impede participation in relevant markets. The two problems, nonetheless, often overlap, for example where public officials are paid to turn a blind eye to collusive tendering schemes or to release information that facilitates collusion.<sup>63</sup>

Collusion often leads to undesirable final outcomes with wide-reaching consequences on the intended beneficiaries such as roads being of poor quality, food procurement may not offer optimal nutrition or even not being delivered in certified quantities, or school buildings may be deficient in terms of safety standards, among other things. Furthermore, collusion in procurement markets reduce opportunities and incentives for private sector companies to participate and compete in procurement markets. Start-ups may not be able to enter markets in which incumbents have put in place collusive schemes, and public confidence in governments is diminished.<sup>64</sup> The GPA is an important tool in addressing the challenge of collusion. As a sign of good governance GPA requires signatories to create a transparent and openly competitive public procurement system with clear procedures and award criteria.<sup>65</sup> In addition to collusion challenge the next section deals with potential advantage of joining GPA in combating corruption.

## **2.5 Government Procurement Agreement's role in combating corruption**

Being part of the GPA can change perspectives and shift the dynamics of procurement systems. There

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<sup>62</sup> WTO Promoting Competition and Deterring Corruption in Public, Procurement Markets: Synergies with Trade Liberalization available at [https://www.researchgate.net/publication/301683897\\_Promoting\\_Competition\\_and\\_Deterring\\_Corruption\\_in\\_Public\\_Procurement\\_Markets\\_Synergies\\_with\\_Trade\\_Liberalization](https://www.researchgate.net/publication/301683897_Promoting_Competition_and_Deterring_Corruption_in_Public_Procurement_Markets_Synergies_with_Trade_Liberalization) (accessed on 17 April 2022).

<sup>63</sup> Anderson RD; Müller AC *The Revised WTO Agreement on Government Procurement Agreement (GPA) : Key Design Features and Significance for Global Trade and Development* 'WTO Working Paper ERSD' 12 (2017).

<sup>64</sup> Anderson RD; Müller AC *The Revised WTO Agreement on Government Procurement Agreement (GPA) : Key Design Features and Significance for Global Trade and Development* 'WTO Working Paper ERSD' 25 (2017).

<sup>65</sup> Mosoti V *The WTO Agreement on Government Procurement 'A necessary evil in the legal strategy for development in the poor world?'* Vol25.2 594 (2014)

are three important areas where GPA role is evident<sup>66</sup>

(i) all participating countries are required to establish independent complaint review mechanisms to which both foreign and domestic suppliers may apply for correction of procedural errors, the GPA puts in place a powerful mechanism for ensuring compliance with applicable rules and established ways of doing business. The effect of this institutional change is reinforced by the fact that foreign suppliers coming from other GPA parties are likely to have stronger incentives than domestic players to report collusion and/or corruption, as they are less subject to ongoing scrutiny and social or other pressures.

(ii) The GPA establishes additional external oversight by making national procurement systems subject to scrutiny in the WTO Committee on Government Procurement and through the WTO's binding dispute settlement system. This additional scrutiny is undertaken in an institutionalised fashion by GPA parties and the WTO's dispute settlement function at the international level, thus helping to break vicious cycles; and

(iii) The GPA participation signals to both domestic suppliers and the outside world that an acceding country is intent on conforming to international best practices as embodied in the GPA thus potentially challenging entrenched expectations in relevant societies regarding corruption.<sup>67</sup>

The current GPA incorporates a new substantive provision regarding the conduct of procurement. A procuring entity shall conduct covered procurement in a transparent and impartial manner that avoids conflicts of interest; and prevents corrupt practices.<sup>68</sup> As further stated in the GPA that the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources and the performance of the Parties' economies in addition to the functioning of the multilateral trading system.<sup>69</sup> GPA is also seen as an instrument of international economic law.<sup>70</sup>



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<sup>66</sup> Anderson RD; Müller AC *The Revised WTO Agreement on Government Procurement Agreement (GPA) : Key Design Features and Significance for Global Trade and Development* 'WTO Working Paper ERSD' 12 (2017).

<sup>67</sup> Anderson RD; Müller AC *The Revised WTO Agreement on Government Procurement Agreement (GPA): Key Design Features and Significance for Global Trade and Development* 'WTO Working Paper ERSD' 12 (2017).

<sup>68</sup> Article V: of the GPA.

<sup>69</sup> Article V: 4 of GPA.

<sup>70</sup> Arrowsmith S; Anderson RD *The WTO Regime on Government Procurement* 'Challenges and Reform' (2011).

## **2.6 Government Procurement Agreement deters supplier collusion**

There is evidence that supplier collusion such as bid rigging, price fixing and collusive tendering, imposes heavy costs in most or even all countries' procurement systems.<sup>71</sup> Governmental measures that limit the possibilities for beneficial trade and competition are often a key factor in facilitating inter-supplier collusion. Such measures include: (i) Buy locally measures that exclude foreign-based or affiliated suppliers in many circumstances; (ii) more general restrictions on market participation, such as burdensome licensing requirements; and (iii) the use by procuring entities of some measures that unnecessarily exclude alternative suppliers. It is argued that collusion grows in markets that are closed to external competition. It is the enforcement of competition law which can be of the assistance in combating the threat of inter-supplier collusion. It is undeniable fact that trade liberalization can also play a vital role in preventing supplier collusion.

The GPA addresses the challenge of combating collusion through different channels such as acting as a vehicle for the progressive opening of parties' markets to international competition through market access commitments. Therefore, suppliers from other GPA parties cannot be arbitrarily excluded from procurement markets. The GPA's transparency provisions ensure that the information necessary to participate in procurements and to prepare responsive tenders is not shared only with the preferred bidders.<sup>72</sup>

GPA also promotes open approaches to procurement design and prevents the tailored technical specifications to favour particular brands or suppliers. The domestic review procedures required by the GPA enhance supplier confidence that contracts will ultimately be awarded on the basis of product quality and competitive pricing, rather than patronage. The WTO Dispute Settlement Understanding (DSU) represents an essential complement to ensure that participating governments honour their commitments and do not arbitrarily exclude potential competitors from the other GPA parties.<sup>73</sup> In the next section GPA as an accessory to procurement markets for disadvantaged groups will be examined.

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<sup>71</sup> Anderson RD; Müller AC *The Revised WTO Agreement on Government Procurement Agreement (GPA): Key Design Features and Significance for Global Trade and Development* 'WTO Working Paper ERSD' 12 (2017).

<sup>72</sup> Anderson RD; Müller AC *The Revised WTO Agreement on Government Procurement Agreement (GPA): Key Design Features and Significance for Global Trade and Development* 'WTO Working Paper ERSD' 12 (2017).

<sup>73</sup> Arrowsmith S; Anderson RD *The WTO Regime on Government Procurement 'Challenges and Reform'* (2011)

## **2.7 Government Procurement Agreement as a vehicle to procurement markets for disadvantaged group**

The GPA's procedural and transparency rules can be an important tool for ensuring access to markets by previously excluded groups. The GPA's transparency and procedural requirements are designed to open markets. The corrupt and collusive practices that can be counteracted through the GPA and related good governance measures unfairly impact on underrepresented groups, preventing them from winning contracts. The GPA's designed requirement for domestic review of procurement decisions provides disadvantaged groups with important fora to voice concerns and address remaining unfair practices that put them at a disadvantage. The GPA's novel approach to special and differential treatment and the flexibilities provided in determining market access commitments also support its use as tool to catalyse progressive market participation through targeted transitional measures. Furthermore there is a direct correlation between government procurement and development.<sup>74</sup> The GPA extends the market access benefits provided by virtue of its national treatment clause only to the agreement's Parties.<sup>75</sup> This assist in limiting a free for all by encouraging other WTO members to join GPA.

## **2.8 Government Procurement Agreement in synergy with other instruments in fighting corruption**

This section will show the existence of interrelations between GPA and other legal instruments. What is significant about GPA is its synergy with other international instruments such as the United Nations Convention Against Corruption and regional trade agreements.<sup>76</sup> United Nations Convention Against Corruption introduces a comprehensive set of standards, measures, and rules that all countries can apply in order to strengthen their legal and regulatory regimes to fight corruption. It calls for preventive measures and the criminalisation of the most prevalent forms of corruption in both public and private sectors.<sup>77</sup>

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<sup>74</sup> Mosoti V *The WTO Agreement on Government Procurement 'A necessary evil in the legal strategy for development in the poor world?'* page 599 Vol 25.2 599(2014) available at <https://scholarship.law.upenn.edu/cgi/> (accessed on 25 October 2022).

<sup>75</sup> Anderson RD; Müller AC *The Revised WTO Agreement on Government Procurement Agreement (GPA) : Key Design Features and Significance for Global Trade and Development* 'WTO Working Paper ERSD' page 21 (2017).

<sup>76</sup> Anderson RD; Müller AC *The Revised WTO Agreement on Government Procurement Agreement (GPA): Key Design Features and Significance for Global Trade and Development* 'WTO Working Paper ERSD' page 23 (2017).

<sup>77</sup> Anderson RD; Müller AC *The Revised WTO Agreement on Government Procurement Agreement (GPA) Key Design*

Article 9 states each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.<sup>78</sup> Accordingly GPA should be seen as one of the key practical tools through which participating governments give effect to the goals set and commitments made with respect to public procurement in the Convention. The Convention further refers to an effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to Article 9:1 are not followed. The GPA also embraces this requirement and incorporates specific standards to ensure the effectiveness of such systems.

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement is also an important practical tool to which countries look to for guidance in public procurement policy and, especially, the development of relevant legislation.<sup>79</sup> Unlike the GPA, the Model Law does not directly facilitate trade and does not have treaty status. Still, it plays an important complementary role, in that many countries use the Model Law as a basis for implementing national legislation that is intended to be GPA-compatible. A new World Bank procurement framework which was approved by the Bank's Executive Board in July 2015 refers to GPA accession as a path by which the World Bank's client countries can put into place legislation. In turn the World Bank may view the legislation to be acceptable for its own purposes at least in some respects, and subject to appropriate safeguards.<sup>80</sup> This is expected to improve coherence and yield important new synergies with the GPA.

## **2.9 Conclusion**

This chapter has shown that South Africa's procurement laws contain loopholes such as lacking consequence management and enforcement. The fact that one only needs to declare conflict of interest if he/she is related to the bidder or knows the bidder is not enough to deter corruption. This can be attributed to the fact that the implicated individuals are colleagues of other bid evaluation committee

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*Features and Significance for Global Trade and Development 'WTO Working Paper ERSD' page23 (2017).*

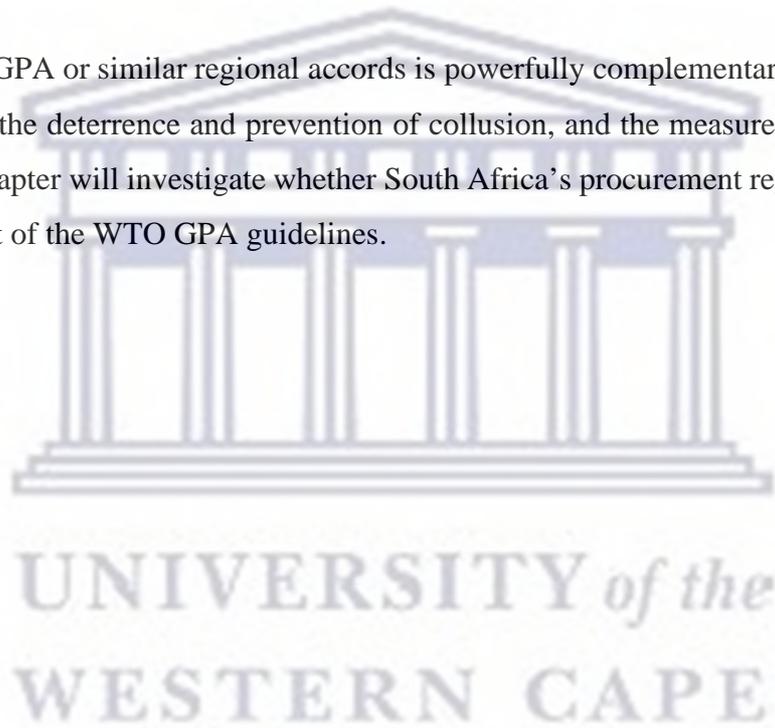
<sup>78</sup> Arrowsmith S; Anderson RD *The WTO Regime on Government Procurement 'Challenges and Reform' page 59 (2011).*

<sup>79</sup> Anderson RD; Müller AC *The Revised WTO Agreement on Government Procurement Agreement (GPA) Key Design Features and Significance for Global Trade and Development 'WTO Working Paper ERSD' page21 (2017).*

<sup>80</sup> Anderson RD; Müller AC *The Revised WTO Agreement on Government Procurement Agreement (GPA) Key Design Features and Significance for Global Trade and Development 'WTO Working Paper ERSD page 21 (2017).*

members and are exerting undue pressure. Based on the discussion on procurement law enforcement membership to the WTO GPA may assist in policing corruption related offences and quickly identify those implicated in tender irregularities. With GPA the conflict of interest is just not allowed and sanction for a wrong doer is enforceable through the WTO dispute settlement undertaking. The GPA can be used to the benefit of acceding member if membership thereof is wisely negotiated. The benefits in accession can bring about savings to the economy through reduced corruption and better value for money in government procurement. WTO Members that become Parties to the GPA can benefit from important potential synergies between their commitments under the various WTO Agreements. In other words, the market access commitments made under the GPA are likely to bear importantly on the benefits emanating from participation in the GATT and the GATS. Market access provided under the GATT and the GATS is regarded important on suppliers' ability to compete in government procurement markets if and to the extent that the goods or services supplied to the government are sourced internationally.

Participation in the GPA or similar regional accords is powerfully complementary to both competition law enforcement in the deterrence and prevention of collusion, and the measures needed to fight corruption. The next chapter will investigate whether South Africa's procurement regulations and policies are in line with most of the WTO GPA guidelines.



## **CHAPTER 3**

### **COMPARISON OF SOUTH AFRICAN PROCUREMENT REGULATIONS AND POLICIES WITH THE WORLD TRADE ORGANISATION GOVERNMENT PROCUREMENT AGREEMENT (WTOGPA) GUIDELINES**

#### **3.1 Introduction**

In addressing this paper's research question of potential benefits when South Africa accede to the World Trade Organisation Government Procurement Agreement (WTO GPA) this chapter looks on South Africa's procurement regulations and policies. In South Africa, the National Treasury oversees the South African public sector Supply Chain Management system. Five fundamental principles of public procurement which applies to all organs of state in the national, provincial, or local spheres of government will be discussed in this chapter. These principles are fairness, equitability, transparency, competitiveness, and cost-effectiveness. The Constitution of the Republic of South Africa makes these principles relevant. In this chapter a focus will be given to the principles of fairness and transparency to the bidding process

An organ of state is defined as any department of state or administration in the national, provincial or local spheres of government, or any other functionary or institution that exercises a power or performs a function in terms of the Constitution, a provincial constitution or any legislation.<sup>81</sup> Not all institutions that are subject to the procurement provisions of the Constitution are bound by the Public Finance Management Act (PFMA) and the Preferential Procurement Policy Framework Act (PPPFA) as the PFMA only applies to those national and provincial public entities that are not only established in terms of legislation, but that are also fully or substantially funded by way of a levy imposed in terms of national legislation and accountable to Parliament. Similarly, the PPPFA only applies to those institutions falling within the ambit of section 239 of the Constitution.

The PFMA regulates procurement by national and provincial public entities through Regulations 16 and 16A of the Treasury Regulations of 2005 issued in terms of the PFMA<sup>82</sup>. Even though certain

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<sup>81</sup> s239 of the Constitution, Act 108 of 1996.

<sup>82</sup> Regulation 16 of the Treasury Regulations deals with public-private partnerships (PPPs) and applies to all national and provincial departments as well as the national and provincial public entities listed in Schedule 3 to the PFMA. Regulation 16A deals with general supply chain management and only applies to the national public entities listed in Part A of

public entities are not bound by these regulations they are still bound by Section 217 of the Constitution.

The discussion of fundamental principles of the Constitution as mentioned above and Treasury regulations in this chapter is linked to the principle of fair and equitable treatment in the WTO GPA.<sup>83</sup> The study aims to investigate the prospects of South Africa's accession to the WTO GPA having enacted similar procurement regulations. To show some of the WTO GPA similar procurement processes the next section examines South Africa's bidding/tendering process. In this chapter the author will discuss the possibility of conflict of interest in bidding, the evaluation criteria, the notion of sub-contracting as well as available platform for aggrieved parties to challenge the outcome. Link of the South African bidding process to the WTO GPA will be investigated. Finally, the chapter will conclude by establishing the link between WTO GPA and various South African procurement bidding processes.

### **3.2 South Africa's bidding process**

The bidding process/tendering process is partly governed by the principle of competitiveness in section 217 of the Constitution of the Republic of South Africa. The procuring authority advertises the bids and holds a competitive bidding procedure which includes the closing of the bid register, the opening of the functionality and price envelopes as well as the reading of the bidders. Where it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from a competitive bidding process are recorded and approved by the relevant committee of the accounting authority.<sup>84</sup>

Within the local government context, a procuring department may deviate from the supply chain management policy under the following aspects: (i) if there is an emergency, (ii) if the goods or services are produced or available from a single provider only, (iii) if the acquisition is of special works of art or historical objects where specifications are difficult to compile, (iv) if the acquisition is of animals for zoos, and (v) in any other case where it is impractical or impossible to follow the official procurement processes. The threshold value of contracts is also used to determine the appropriate

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Schedule 3 of the PFMA and provincial public entities listed in Part C of Schedule 3 of the PFMA, thereby excluding national and provincial public business enterprises from these regulations.

<sup>83</sup>GPA Article XVII Para 2 states that, with respect to imports involving government procurement each contracting party shall afford to the trade of the other contracting parties fair and equitable treatment.

<sup>84</sup> National Treasury Regulations

type of procurement procedure. The threshold values are periodically revised when the procurement policy is revised.

Notably procurement of goods and services, either by way of request for quotations (RFQ) or through a bidding process, must be within the threshold values as determined by the National Treasury.<sup>85</sup> In the event of a tender process a procuring authority must establish a bid specification committee(BSC) to compile specification; a bid evaluation committee (BEC) to evaluate bids; a bid adjudication committee (BAC) to adjudicate and awards bids; provide for the selection of bid adjudication committee members; bidding procedures; and the approval of bid evaluation and/or adjudication committee recommendations.<sup>86</sup> A compliance to the treasury regulations notes is the responsibility of accounting officers or accounting authority. The bidding process has to be understood within the context of government supply chain management policy especially the completion of a mandatory conflict of interest form. The next section elaborates the key elements of supply chain management policy in relation to conflict of interest.

### **3.3 Supply Chain Management policy on conflict of interest**

The supply chain management officials or other bidding process role players must (a) disclose any conflict of interest that may arise; (b) treat all suppliers and potential suppliers equitably; (c) not use their position for private gain or to improperly benefit another person; (d) ensure that they do not compromise the credibility or integrity of the supply chain management system through the acceptance of gifts or hospitality or any other act; (e) be scrupulous in their use of public property; and (f) assist accounting officers or accounting authorities in combating corruption and fraud in the supply chain management system.<sup>87</sup>

Furthermore, 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 (a) disclose that interest; and (b) withdraw from participating in any manner whatsoever in the process relating to that contract.<sup>88</sup> An official in the supply chain management unit who becomes aware of a breach of or failure to comply with any

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<sup>85</sup> 16A6.1 National Treasury Regulations,2017.

<sup>86</sup> 16A6.2 National Treasury Regulations,2017.

<sup>87</sup> 16A8.3 National Treasury Regulations,2017.

<sup>88</sup> 16A8.4 National Treasury regulations,2017.

aspect of the supply chain management system must immediately report the breach or failure to the accounting officer or accounting authority, in writing.

Municipalities are prohibited from making any award to a person who is in the service of the state or, if that person is not a natural person, of which any director, manager, principal shareholder, or stakeholder is a person in the service of the state; or who is an adviser or consultant contracted with the municipality or municipal entity. Furthermore, a bidder is required to complete and submit a declaration of interest form in which it is required to declare any relationship it may have with any employee of the state. The Prevention and Combating of Corrupt Activities Act 12 of 2004 states that any person who, directly or indirectly, accepts, agrees to or offers to accept any gratification from any other person, whether for the benefit of him or herself or for the benefit of another person, as an inducement to award a tender, is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders. A need for transparency is a requirement in the WTA GPA as stipulated in this research paper problem.<sup>89</sup> This section has highlighted some of South Africa's government procurement policies which are in line with WTO GPA. The criteria of both functionality and price of awarding a successful bidder are considered in the next section.

### **3.4 Evaluating criteria both functionality and price**

The principle of transparency in bid evaluation is strictly or ought to be followed in South Africa. All bid documentation must include the evaluation and adjudication criteria, including the criteria prescribed in terms of the PPPFA. An invitation to bid must indicate whether that tender will be evaluated on functionality and, in such scenario, must also indicate the evaluation criteria for measuring functionality, the weight of each criterion, the applicable values and the minimum qualifying score for functionality. Functionality, price, and preference should be weighted and assessed in the manner prescribed by the PPPFA and the 2017 Preferential Procurement Regulations.

In terms of the 2017 Preferential Procurement Regulations, for a tender to be regarded as being acceptable and to be considered further it must meet any pre-qualification criteria and the minimum qualifying score for functionality as indicated in the tender invitation. Only tenders that meet the pre-qualification criteria and the minimum functionality threshold shall progress to evaluation in terms of price and preference.<sup>90</sup> At that stage, the tenders shall be assessed on the basis considering the contract's value either, price shall count for 80 points and preference shall count for 20 points or price shall count for 90 points and preference shall count for 10 points. Bid points are applied on the basis that the bidder with the lowest price will achieve 80 or 90 points for price, depending on the

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<sup>89</sup> See section 3.8.3 below

<sup>90</sup> Preferential Procurement Policy Framework Act (5/2000): Preferential Procurement Regulations, 2017. Available at [www.gov.za/nationaltreasury](http://www.gov.za/nationaltreasury) (accessed on 18 April 2023).

contract value, with the price scores of the remaining bidders being determined relative to that of the lowest-priced bid by employing the formula prescribed by the 2017 Preferential Procurement Regulations.<sup>91</sup> The preference points, which are added to the points allocated in respect of price, are determined by having regard to each bidder's status in terms of the codes issued under the B-BBEE Act. Unless objective criteria justify otherwise, the tender must be awarded to the bidder scoring the highest number of points. If two or more tenderers score an equal number of points the contract must be awarded to the tenderer with the highest B-BBEE score.

Bidders are required to provide relevant proof of their B-BBEE Status Level then the 80/20 preference points systems are applied in accordance with the formula and applicable points provided for in the respective status level contributor tables in the Regulations.<sup>92</sup> Bidders are requested to complete the various preference claim forms to claim preference points. Only a bidder who has completed and signed the declaration part of the preference claim form will be considered for B-BBEE status. There are exceptions in relation to bidders who are sub-contracting the awards as discussed in the next section.

### **3.5 Sub-contracting, pre- and post-award**

A bidder will not be awarded points for B-BBEE status level of contributor if the bid documents indicate that the bidder intends subcontracting more than 25% of the value of the contract to any other person not qualifying for at least the points that the bidder qualifies for, unless the intended subcontractor is an exempted medium enterprise (EME) that has capability to execute the subcontract.<sup>93</sup> A person awarded a contract may not subcontract more than 25% of the value of the contract to any other enterprise that does not have an equal or higher B-BBEE status level of contributor than the person concerned, unless the contract is subcontracted to an EME that has the capability and ability to execute the subcontract.<sup>94</sup> Any agreement entered into and between firms is not allowed if it is between parties in a horizontal relationship and if the bidders were involved in:<sup>95</sup> directly or indirectly fixing a purchase or selling price or any other trading condition; dividing markets by allocating

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<sup>91</sup> Implementation Guide: Preferential Procurement Regulation Framework 2017. Available [http://ocpo.treasury.gov.za/Resource\\_Centre/Legislation/Regulations](http://ocpo.treasury.gov.za/Resource_Centre/Legislation/Regulations) (accessed on 18 April 2023).

<sup>92</sup> The Preferential Procurement Regulations 2017 gazetted on 20 January 2017 (No. 40553) and took with effect from 1 April 2017.

<sup>93</sup> Regulation 5 of the PPPFA 2017.

<sup>94</sup> Regulation 12 (3) of the PPPFA 2017.

<sup>95</sup> Section 4(1) of the Competition Act No. 89 of 1998, as amended.

customers, suppliers, territories or specific types of goods or services; or collusive bidding. This prohibition continues to say that if a bidder in the judgment of the purchaser, has engaged in any of the restrictive practices referred to above, the purchaser may, without prejudice to any other remedy provided for, invalidate the bid for such item offered. It further allows the purchaser to terminate the contract in whole or in part and refer the matter to the Competition Commission for investigation and possible imposition of administrative penalties as contemplated in the Competition Act No.89 of 1998 (the Competition Act).<sup>96</sup>

Section 4(1)(b)(iii) of the Competition Act deals with collusive tendering or bid rigging. Collusive tendering takes place when competing firms agree the terms of each other's bids, prior to submitting their respective bids for a tender. The purpose of such conduct intends to secure the outcome of the tender at adjusted inflated prices. A common example of collusive tendering is cover pricing wherein one bidder will cover another bidder by submitting a fake bid intended to ensure the lower priced bidder's success, while the lower priced bid remains inflated. The modus operandi of bid rigging differs from case to case because of differences in tender structure and industry specifications. Public tenders and private tenders may also differ in their objectives such as promotion of small businesses or BBBEE.<sup>97</sup>

To highlight the strength of South Africa's judiciary system it is worth mentioning the appeal matter which was before the Competition Appeal Court where the court had to decide on the Competition Tribunal ruling concerning the interpretation of section 4(1) (b)(i) and (iii) of the Competition Act. This case arose from the appellants having submitted identical quotations for fumigation services at Hertzogville Magistrates Office to the Department of Public Works. The appellants had both quoted an amount of R 2640.00 (excluding VAT in the case of the Mosebetsi)<sup>98</sup> to render the requested services. The appellants raised contentions that at the relevant period, they were constituent firms within a single economic entity, as envisaged in section 4 (5); that, in any event, properly characterised, their conduct did not coincide with the character of the prohibition in section 4 (1) (b) (i) and (iii) of the Act; and that

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<sup>96</sup> Section 4(1) of the Competition Act No.89 of 1998.

<sup>97</sup> Carrim Y, Ndlovu N Handbook of Case law. The Competition Tribunal's guide to select cases decided from 1999 to 2019 page 198 available at [https://www.comtrib.co.za/Content/Documents/Info%20Library/Tribunal%20Case%20Law/handbook-version1\\_25march2020.pdf](https://www.comtrib.co.za/Content/Documents/Info%20Library/Tribunal%20Case%20Law/handbook-version1_25march2020.pdf) (accessed on 13 November 2022).

<sup>98</sup> A'frica Pest Prevention CC and Another v Competition Commission of South Africa (168/CAC/Oct18) [2019] ZACAC 2 (2 July 2019)

they were not in a horizontal relationship. The Competition Tribunal found that the threshold in section 4 (5) (b) of the Act, requiring the concerned firms to be “similar in structure” to a parent and a wholly owned subsidiary (whilst the subordinate need not be wholly owned), was not met. This was because the common membership that existed between Mosebetsi and A’Africa was capable of only exerting partial or joint control over one of the two firms. Competition Appeal Court overturned the Competition Tribunal ruling and the appeal was upheld.<sup>99</sup>

The permissible use of subcontracting for entry is where the technical specifications require the successful bidder to subcontract a minimum percentage, for example, 30%, of the value of the contract to an Small and Medium Enterprises (SMEs) or businesses owned by HDIs. Subcontracting allows the supplier greater flexibility and diversity of organisational options, which can help cut costs and increase inclusion in the procurement process. For example, specifications for the 30% weight can include the winning bidder’s demonstration for the promotion of a new entrant, providing business support to the new entrant or existing SMEs, through the subsidisation of capital, facilities, tools, equipment, and training.<sup>100</sup> However, collusive tendering can arise where the selected bidder repeatedly subcontracts part of the contract to other firms that were not selected in the relevant tender. For the above reasons, when evaluating what scope to give for possible subcontracting of work, or when deciding to require the supplier to subcontract, the procuring public sector institution must evaluate if the market circumstances allow for the goal of participation by SMEs and HDIs in the public contracts to be achieved without a significant reduction of competition in the tendering process. It is useful to have the notice of the call for tender indicate that bidders must state in their bids whether they intend to use subcontractors, the name of such possible subcontractors, and include requirements for bidders to demonstrate subcontracting with SMEs and HDIs. In certain cases, consideration can be given to the possibility of having the terms of the tender prohibit subcontracting parts of the contract to the same firms that participated in the tender, except with the express authorisation of the procuring entity. Having discussed the condition for subcontracting pre- and post-award the next section deals with the dispute resolution process. In the local government sphere a person whose rights are affected by a decision taken by a political structure, political office bearer, councilor or staff member of a municipality in terms of the

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<sup>99</sup> A’Africa Pest Prevention CC and Another v Competition Commission of South Africa (168/CAC/Oct18) [2019] ZACAC 2 (2 July 2019)

<sup>100</sup> Competition Commission of South Africa A guide on promoting competition in public procurement available at <https://www.compcom.co.za/wp-content/uploads/2022/03/A-Guide-on-Promoting-Competition-in-Public-Procurement-15March2022.pdf> accessed on 04 November 2022.

power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer or staff member, may appeal against such decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.<sup>101</sup> However it is worth mentioning the case between *Municipality of Cape Town v Reader* 2009 1 SA 555(SCA) at 20 it was argued that an unsuccessful bidder has no right to appeal under Section 62 of the Municipal Systems Act.<sup>102</sup>

### **3.6 Challenging the bid outcome**

WTO GPA permits a bid challenge system to a bidder which feels aggrieved by the bid outcome.<sup>103</sup> WTO GPA also promotes that an acceding country must have a domestic review mechanism. In South Africa the Promotion of Administrative Justice Act 3 of 2000 (PAJA) gives effect to the right to administrative action that is lawful, reasonable and procedural fair as well as to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996. Furthermore PAJA lists various grounds of review which include amongst others, lack of authority, bias, non-compliance with a mandatory and material procedure or condition. The list further includes procedural unfairness; material influence by an error of law; ulterior purpose or motive. Others include consideration of failure to take relevant considerations into account; unauthorised or unwarranted influence; arbitrariness or capriciousness; unlawfulness; irrationality; failure to take a decision; and unreasonableness.<sup>104</sup> As stated in section 3.5 above in municipalities s62 of Municipal Systems Act 32 of 2000 is often used to lodge internal appeals although there are questions around legality of the usage as the awarding of tender remains an administrative function of the municipal official not a political appointee. South Africa has shown a compliance to the WTO GPA requirement of a domestic review mechanism. This compliance seems to respond with the topic of the study which aims to investigate prospects of South Africa's accession to the WTO GPA. Apart from the review mechanism of PAJA there are appeals and remedies in terms of South African law as discussed in the next section.

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<sup>101</sup> Section 62(1) of the Municipal Systems Act 32 of 2000.

<sup>102</sup> *Municipality of Cape Town v Reader* 2009 1 SA 555(SCA) par 20 available at <http://www.saflii.org/za/cases/ZASCA/2008/130> (accessed on 27 May 2023)

<sup>103</sup> WTO GPA Article XX.

<sup>104</sup> Promotion of Administrative Justice Act 3 of 2000.

### 3.7 Appeals and remedies

The review proceedings take long from six months up to one year to finalise or even over longer periods depending on the complexity of a matter. If the aggrieved party wishes to suspend the award it has to lodge a parallel application in the form a Court Interdict pending the outcome of the review proceedings. It is important to stick to the review timeframe to avoid a need for condonation applications. Failure to adhere to the timeframe may lead to the dismissal of review applications. It is advisable that the aggrieved party must act with the utmost expediency when seeking to challenge procurement awards. The Courts of South Africa after hearing a matter they are then obliged by relevant legal prescript to give any order that is just and equitable. One of the investigation objectives of this research paper is to examine whether South Africa's procurement policy is in line with the prescripts of WTO GPA such as existence of domestic review mechanism. In a reported case the losing bidder challenged the procuring entity on the grounds of review that the proposing of deviations was not a permissible basis for treating bidder's bids as non-responsive, and that the materiality of the deviations was not a matter for assessment by the bid evaluation committees (BECs) and bid adjudication committees (BACs), which should have fully evaluated bidder's bids; and that that it was impermissible for functionality to have been excluded as a matter for evaluation.<sup>105</sup> In the case of SMEC South Africa (Pty) Ltd (SMEC) v the City of Cape Town and Others,<sup>106</sup> the applicant sought the setting aside of two tender awards by the first respondent, the City of Cape Town (City) concerning Tender No 36C/2020/21. The second application concerns Tender No 26C/2020/21. Tender No 36C/2020/21 was for the provision of transport engineering, planning and management services in four geographic regions. Tender No 26C/2020/21 was for the provision of services in respect of the management of the City's railway sidings. Most of the procurement legal prescripts such as Construction Industry Development Board (CIDB) contracts and deviations, City of Cape Town SCM regulations and policy were ventilated as a show of the effectiveness of South Africa's review mechanism although the review application was dismissed. WTO addresses most of the world's procurement prevalent shortcomings such as corruption, conflict of interest, transparency and the next section discusses the WTO responses to these pertinent issues.

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<sup>105</sup> SMEC South Africa (Pty) Ltd v The City of Cape Town and Others; SMEC South Africa (Pty) Ltd v The City of Cape Town and Others (8277/2021;14097/2021) [2022] ZAWCHC 131 (23 June 2022). Available at <https://www.saflii.org/za/cases/ZAWCHC/2022/131.html> (Accessed on 18 April 2023)

<sup>106</sup> SMEC South Africa (Pty) Ltd v City of Cape Town and Others; SMEC South Africa (Pty) Ltd v City of Cape Town and Others (8277/2021;14097/2021) [2022] ZAWCHC 131 (23 June 2022) Available <https://www.saflii.org/za/cases/ZAWCHC/2022/131.html> (Accessed on 18 April 2023)

### **3.8 The World Trade Organisation responses:**

Having discussed the appeals and remedies in section 3.7 above it is important to appreciate the role of the WTO response in relation to the special four principal aspects such as anti-corruption, response on conflict of interest, transparency, and prevention of collusion. These aspects will be discussed in this section to illustrate the dedication of WTO to uphold the rule of law. These four aspects remain the most pillars in the healthy functionality of public procurement and can be worth emulated.

#### **3.8.1 On anti-corruption**

The WTO GPA highlights two serious governance challenges on the performance of public procurement markets being: (i) ensuring integrity in the procurement process and (ii) promoting effective competition among suppliers.<sup>107</sup> It has been reported that the two problems often overlap, for example where public officials are paid to turn a blind eye to collusive tendering schemes or to release information that facilitates collusion. Regarding corruption issues, participation in the GPA can change perspectives and shift the dynamics of procurement systems in important respects such as:

First, by requiring all participating countries to establish independent domestic review systems, the GPA puts in place a powerful mechanism for ensuring compliance with applicable rules and shaking up established ways of doing business. The effect of this institutional change is reinforced by the fact that foreign suppliers coming from other GPA parties are likely to have stronger incentives and fewer inhibitions than domestic players to report collusion and/or corruption, as they are less subject to ongoing scrutiny and social or other pressures.

Second, the GPA establishes additional external oversight by making national procurement systems subject to scrutiny in the WTO Committee on Government Procurement and through the WTO's binding dispute settlement system. This additional scrutiny is undertaken in an institutionalised way by GPA parties and the WTO's dispute settlement function at the international level, thus helping to break vicious cycles; and

Third, GPA participation signals to both domestic suppliers and the outside world that an acceding country's intent is on conforming to international best practices as embodied in the GPA. Considering

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<sup>107</sup>Sue Arrowsmith and Robert D. Anderson, *The WTO Regime on Government Procurement: Challenge and Reform* (2011) page15.

the above three points, it is the view of the writer that participating in the WTO GPA South Africa can benefit through being watched by other WTO GPA states.

### **3.8.2 On conflict of interest**

Procuring entity shall conduct covered procurement in a transparent and impartial manner that avoids conflicts of interest; and prevents corrupt practices.<sup>108</sup> Insight into the intended purpose of this provision is provided by related language in the preamble to the revised Agreement that recognises its shared purpose with other international instruments and initiatives in deterring corrupt practices.<sup>109</sup> The wording further states that the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources and the performance of the parties economies in addition to the functioning of the multilateral trading system. Article V:4(b) and (c) creates an obligation for GPA Parties to conduct their procurements in ways that avoid conflicts of interest and corrupt practices.

### **3.8.3 On transparency**

Transparency rules similar to those of the GPA are included in many procurement systems with the specific aim of addressing corruption.<sup>110</sup> Furthermore, the fact that such rules are included in the GPA can have an impact on preventing corruption in Parties to the Agreement and the fact that GPA accession can help states implement such rules against domestic vested interests and lock them into their systems means that in practice the GPA can assist states in addressing the problem of corruption. Reducing corruption can itself enhance the GPA's unarguable objective of liberalisation of markets. Initially addressing conflicts of interest and corruption was not actually an objective of the GPA, but merely one consequence of it. The provision suggests that the GPA aims to address corruption independent from any impact on market access, to ensure more efficient and effective management of resources and to improve the general functioning of Parties' economies.

### **3.8.4 On prevention of collusion**

The GPA plays an equally important role in helping to deter and prevent the related and equally serious problem of inter-supplier collusion. Much evidence shows that such collusion, also known as bid rigging, price fixing and collusive tendering, imposes heavy costs in most or even all countries'

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<sup>108</sup> OECD (2016) Preventing corruption in public procurement available at <https://www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf> (accessed on 07 November 2022).

<sup>109</sup> Article IV of GPA.

<sup>110</sup> Arrowsmith, S *Public Procurement Regulation* (2011) pp20-1.

procurement systems. While all markets are potentially susceptible to collusive practices, there is evidence that public procurement markets may be uniquely prone to such practices. The large number of cartel cases related to procurement markets that have been prosecuted in recent years shows that suppliers view public bodies as attractive targets for collusive schemes. The most effective deterrent for collusion and corruption is to develop clear best practices, rules and regulations on detecting collusion and corruption in procurement processes, coupled with strong enforcement.<sup>111</sup>

Government departmental measures that limit the possibilities for beneficial trade and competition are often a key factor in facilitating inter-supplier collusion. Such measures include the unnecessarily exclusion of alternative suppliers. Such measures are an important example of state measures and practices that directly limit competition and facilitate private anti-competitive conduct. It is therefore shown that collusion flourishes in markets that are closed to external competition.

It becomes obvious that the enactment and vigorous enforcement of competition law has a vital role to play in combating the threat of inter-supplier collusion. Trade liberalisation can play an important complementary role. The pro-competitive impact of the trade liberalisation in government procurement markets does not arise from explicit rules to combat bid rigging. The GPA addresses the challenge of combating collusion through different channels as follows:

- Agreement provides a vehicle for the progressive opening of parties' markets to international competition through market access. Suppliers from other GPA parties cannot be arbitrarily excluded from procurement markets. This makes collusion more difficult by increasing both the number and the diversity of potential competitors for individual procurement and thereby addressing key underlying conditions that are known to facilitate collusion.
- the GPA's transparency provisions ensure that the information necessary to participate procurement and to prepare responsive tenders is not shared only with the usual suspects. This helps to broaden the set of potential suppliers.
- the Agreement promotes open approaches to procurement design and discourages or makes more difficult practices such as tailor-made technical specifications to favour brands or suppliers.
- the domestic review procedures required by the GPA enhance supplier confidence that

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<sup>111</sup> OECD. Policy Roundtables. Collusion and Corruption in Public Procurement 2010 pp 31 of 509. Available at <https://www.oecd.org/competition/cartels/46235884.pdf> accessed on 18 April 2023.

contracts will ultimately be awarded based on product quality and competitive pricing, rather than patronage thereby encouraging participation from a broader range of potential suppliers; and

- the WTO Dispute Settlement Understanding (DSU) represents an essential complement to ensure that participating governments honour their commitments and do not arbitrarily exclude potential competitors from the other GPA parties.

The WTO responses mentioned in this section clearly demonstrates the GPA members' commitments and their willingness to abide by the prescripts of WTO even more than their individual domestic laws. The next section considers WTOGPA principles compatible to South Africa's redress objectives.

### **3.9 World Trade Organisation Government Procurement principles equivalent to South Africa's previous disadvantaged persons**

This section examines South Africa's procurement provisions which have similarities with WTO GPA articles. The GPA provides for financial limits below which the members are not compelled to invite international price competition.<sup>112</sup> This provision has a potential to restrict competition against Small, Medium and Micro-Enterprises (SMMEs) and protect the Broad-Based Black Economic Empowerment (BBBEE) beneficiaries. The GPA's procedural and transparency rules can be an important tool for ensuring access to markets by previously excluded groups. Unreformed procurement systems favour incumbent firms through well-established communication channels. The GPA's transparency and procedural requirements are designed to open markets in that they help create transparent and fair procurement systems, and thereby can ensure that businesses entering the market are not kept in the dark about information relating to procurement opportunities thus they get a fair chance to compete.<sup>113</sup> The author of this research paper concurs with the sentiment that South Africa is an example of countries that have employed a systematic procurement policy to support small enterprises and disenfranchised black business community. Therefore, signatory status in the WTO GPA should not prevent South Africa from supporting its domestic industry as it can use the fairly flexible provisions under Article V

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<sup>112</sup>Kollamparambil,U. *The Amended Government Procurement Agreement: Challenges and opportunities* (2014)18, pp.202-223. (accessed 12 October 2021).

<sup>113</sup> Anderson RD;Müller AC *The Revised WTO Agreement on Government Procurement Agreement (GPA): Key Design Features and Significance for Global Trade and Development* 'WTO Working Paper ERSD' pp 14 (2017).

of the WTO GPA to argue for preference of domestic suppliers.<sup>114</sup> The writer of this research paper further agrees with some authors who are of the view that accession of China may lead other major developing WTO members to consider joining the GPA. Such Members might also see potential commercial opportunities in their participation in the Agreement and might not want to be foreclosed from markets to which China has access (via the GPA).<sup>115</sup>

### **3.10 Conclusion**

The main purpose of this chapter is about the comparison of the South African procurement regulations and policies with the World Trade Organisation Government Procurement Agreement (WTO GPA). This chapter leads to the conclusion that the Government Procurement Agreement is an international legal instrument for promoting competition, transparency, integrity, and enhanced value for money in national procurement regimes. It does so by emphasising the objectives of national reforms aimed at promoting competition, efficiency, and transparency in the procurement process. In looking very closely between South Africa's procurement regime and WTO GPA one can view that corrupt and collusive practices that can be counteracted through the GPA and related good governance measures unfairly and unjustifiably impact on underrepresented groups thus preventing them from winning contracts. It is safe to say such groups are less likely to have the economic means and channels to pay bribes, or to successfully negotiate a market share for themselves in a collusive scheme among incumbent competitors. The GPA's in-built requirement for domestic review of procurement decisions provides disadvantaged groups with important platform to voice concerns and address remaining unfair practices that put them at a disadvantage. Again, the topic in this study relates to the benefit which South Africa can get on accession to the WTO GPA, thus tapping from the wide international market access. It is of interest to mention that on 04 November 2022 South African government has issued Preferential Procurement Regulations 2022 as a precursor for revised PPPFA in compliance with Constitutional Court judgment. This is a step towards the right direction in tandem with the principles on equal treatment and non-discrimination envisaged by the WTO. The writer further argues that South Africa is now more than ready to become an observer to the WTO GPA whilst preparing for the full accession.

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<sup>114</sup> Masoti V *The WTO Agreement on Government Procurement: A necessary evil in the legal strategy for development in the poor world* page 602.

<sup>115</sup> Anderson RD; Arrowsmith S *The WTO regime on Government Procurement: Challenges and Reform* page 69.

## **CHAPTER 4**

### **BENEFITS OF PROSPECTIVE ACCESSION TO THE WORLD TRADE ORGANISATION GOVERNMENT PROCUREMENT AGREEMENT**

#### **4.1 Introduction**

This chapter discusses the potential benefits of accession to the World Trade Organisation Government Procurement Agreement (WTO GPA) and the corresponding possible direct gains to South Africa in fighting corruption. The plurilateral Government Procurement Agreement (GPA) is an attempt to liberalise government procurement necessitated by the fact that it has been exempted from the rules of National Treatment, Non-discrimination, and Most Favoured Nation (MFN) under both the GATT and the General Agreement on Trade in Services (GATS).<sup>116</sup> The WTO GPA compliments government procurement laws and does not serve as a replacement to any country's enacted laws. The basic nature of the WTO GPA is that it is an internationally recognised tool that promotes access to other GPA Parties' procurement markets and improved value for money in each participating member's procurements. The significance of government procurement is more prevalent in economic, social and trade dimensions.

Considering infrastructure development, which is arguable each government's long-term investment objective, a large proportion of Gross Domestic Product (GDP) is on government procurement. Government procurement supports essential functions of government, it is vital for development and social policy purposes such as provision of transportation, airports, highways, ports; public health including hospitals, medicines, water, and sewer systems, schools, and universities as well as national security. It is further important for good governance as well as a good component of international trade. This chapter will further discuss accession to WTO GPA as well as the benefits of open and transparent procurement system. It will be argued in this chapter that apart from other award qualification criteria, South African legislation allows for an exclusion or debarment of certain suppliers from public

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<sup>116</sup> Kollamparambil, U. (2014). *The Amended Government Procurement Agreement: Challenges and opportunities for South Africa. Law, Democracy and Development*, 18, 202-223 available at <https://dx.doi.org/10.4314/idd.v18i1.10> (accessed 12 October 2021).

contracts awards.<sup>117</sup> The entry of new potential suppliers will promote more healthy competition resulting in lower prices and better-quality goods and services for the public, access to technology, health care provision including creating opportunities for domestic firms to access prime or sub-contracts. These benefits can potentially assist with long term local industry development and increased access to foreign markets. If done through the GPA or a similar instrument there will be technology transfer to the domestic labour market. It is an undeniable fact that prior to signing for GPA, countries first sign up with WTO and through participating in other WTO agreement they apply for observer status in the GPA. The next section explains the linkage between WTO accession process and GPA membership.

#### **4.2 Linkage between World Trade Organisation accession process and Government Procurement Agreement membership**

The acceding WTO members make some commitments at the time of their accession to the Organisation to eventually join the GPA.<sup>118</sup> Important complementarities exist between GPA accession and disciplines under other elements of the WTO Agreements. While not a substitute for domestic reforms, accession to the GPA can reinforce reforms that enhance transparency and competition internally.<sup>119</sup> GPA accession can encourage inward foreign-direct investment, by signalling a country's commitment to good governance and the fair treatment of all players.<sup>120</sup> Many countries in the region and worldwide are reforming their government procurement system. International instruments and institutions can provide guidance, while leaving room for legislative and political flexibility to adapt to specific country systems.

South Africa's option is first to assume observer status at the GPA, which entails no commitments, and provides an opportunity to understand and master the workings of the agreement as well as to establish

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<sup>117</sup> South Africa's National Treasury Regulation 16A9.2(a)(iii) Gazette No. 26513 available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/26513gen1261b.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/26513gen1261b.pdf) (accessed on 07 November 2022).

<sup>118</sup> World Trade Organisation Agreement on Government Procurement Parties, observers and accessions available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm) (accessed on 07 November 2022).

<sup>119</sup> Pelletier P *WTO accession and GPA accession: links and recent experience* seminar on WTO accessions rules Geneva, Switzerland, from 4 to 15 February 2019 available at [https://www.wto.org/english/thewto\\_e/acc\\_e/pelletier](https://www.wto.org/english/thewto_e/acc_e/pelletier) (accessed on 21 December 2021).

<sup>120</sup> Pelletier P *WTO accession and GPA accession: links and recent experience* WTO seminar on WTO accessions rules Geneva, Switzerland, from 4 to 15 February 2019 available [https://www.wto.org/english/thewto\\_e/acc\\_e/pelletier](https://www.wto.org/english/thewto_e/acc_e/pelletier) (accessed on 21 December 2021).

the costs of compliance with the GPA. Considering the unfulfilled developmental commitments of South Africa the GPA membership process states that in negotiations on accession the Parties shall give special consideration to the development, financial and trade needs and circumstances of developing countries and least developed countries unless specifically identified otherwise.<sup>121</sup> The Parties shall accord special and differential treatment to (a) least developed and (b) any other developing country where and to the extent that this special and differential treatment meets its development needs.<sup>122</sup>

This study further examines the effects on national welfare and market access of two public procurement practices such as discrimination against foreign suppliers of goods and services and non-transparency of the procedures used to allocate government contracts to firms. Transparency rules like those of the GPA are included in many procurement systems and corruption measures with the specific aim of addressing corruption.<sup>123</sup> Such rules are included in the GPA with the positive impact of preventing corruption in parties to the agreement. Therefore, GPA accession can help states implement the rules against domestic vested interests and lock them into their systems. That means in practice the GPA can assist states in addressing the problem of corruption. Reducing corruption can itself enhance the GPA's unarguable objective of liberalisation of markets. The provision in WTO GPA recognises not only that conflicts of interest and corruption may impact upon access to markets but also suggest that the GPA aims to address corruption quite apart from any impact on market access to ensure more efficient and effective management of resources and to improve the general functioning of Parties' economies.<sup>124</sup>

This study seeks to analyse the gap in the literature about the need to introduce specific timeframe related to the expected end to South Africa's economic redress targets.<sup>125</sup> The WTO GPA contains

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<sup>121</sup> Article V:1 of WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 14 October 2021).

<sup>122</sup> Article V WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 14 October 2021).

<sup>123</sup> South African National Treasury Code of Conduct for Supply Chain Management practitioners (Practice Note 4 of 2003)

<sup>124</sup> Arrowsmith S, Anderson RD *The WTO Regime on Government Procurement: Challenge and Reform 2011* available at <https://www.nottingham.ac.uk/pprg/documentsarchive/> (accessed on 21 November 2021).

<sup>125</sup> such as Broad-Based Black Economic Empowerment (BBBEE) programme related to the enterprise development and direct ownership, Affirmative Action (AA) as it relates to employment and management and Preferential Procurement Policy Framework Act (PPPFA) Act 5 of 2001 as it relates to government's industrialisation policy such as government

several detailed procedural obligations which procuring entities must fulfil to ensure the effective application of its basic principles.<sup>126</sup>The provisions codify recognised good practices in government procurement aimed at ensuring efficiency and value for money. They also serve the purpose of guaranteeing that access to covered procurement is open and that an equal opportunity is given to both domestic as well as foreign suppliers and suppliers in competing for government contracts. In the context of WTO GPA there are some benefits from open and transparent procurement system as discussed in the next section.

### **4.3 The benefits of open and transparent procurement system**

South Africa's bidding process was discussed in the previous chapters<sup>127</sup>and this chapter is outlining the WTO open and transparent procurement process in a bid to establish similarities. In terms of WTO GPA prior to the actual tendering process, tendering parties are required to publish an invitation to participate in the form of a tender notice in a publicly accessible publication indicated in Appendix II to the Agreement.<sup>128</sup> Entities at central government level in Annexure 1 are required to use a notice of proposed procurement.<sup>129</sup> Whereas other entities in Annexes 2 and 3 may,<sup>130</sup> under certain conditions, use a notice of planned procurement or a notice regarding a qualification system to fulfil the requirements of the tender notice.<sup>131</sup>

The Agreement further allows the use of open, selective, and limited tendering procedures provided they are consistent with the provisions laid out in Articles VII to XVI. Under open procedures all

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adopted designation of sectors and products for local production and content to be supported through public procurement.

<sup>126</sup> Articles VII to XVI WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>127</sup> Chapter 3 section 3.2page27

<sup>128</sup> WTO Government Procurement: The Plurilateral Agreement Overview of the Agreement on Government Procurement tendering procedure available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gpa\\_overview\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gpa_overview_e.htm) (accessed on 08 November 2022).

<sup>129</sup> Annex 1, the central government entities whose procurement is covered by the Agreement.

<sup>130</sup> Annex 2, the sub-central government entities whose procurement is covered by the Agreement; Annex 3, all other entities whose procurement is covered by the Agreement

<sup>131</sup> Article IX :3,7,9 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

interested suppliers may submit a tender.<sup>132</sup> Whereas under selective tendering procedures, only those suppliers invited to do so by the entity may submit a tender.<sup>133</sup> To ensure optimum effective international competition, purchasing entities are required to invite tenders from the maximum number of foreign suppliers.<sup>134</sup> Article VIII lists protections to ensure that the procedures and conditions for qualification of suppliers do not discriminate against suppliers of other WTO GPA Parties. The protections also state that any conditions for participation in tendering procedures by suppliers shall be limited to those that are essential to ensure the firm's capability to fulfil the contract and shall not have a discriminatory effect.<sup>135</sup>

Once a year the entities using the selective tendering method are required to publish, in a publication indicated in Appendix III to the Agreement, their lists of qualified suppliers, and to specify the period of validity of those lists and the conditions that need to be met for inclusion of interested suppliers in the lists.<sup>136</sup> Under limited tendering procedures the tendering entity contacts the potential suppliers individually.<sup>137</sup> The Agreement restricts that the method can only be used in the following situations : (i) in the absence of tenderers in response to an open tender or (ii) selective tender or (iii) in cases of

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<sup>132</sup> Article VII:3 (a) WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>133</sup> Articles VII:3(b) and X WTOGP available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>134</sup> WTO Government Procurement: The Plurilateral Agreement Overview of the Agreement on Government Procurement tendering procedure available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gpa\\_overview\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gpa_overview_e.htm) (accessed on 08 November 2022).

<sup>135</sup> WTO Government Procurement: The Plurilateral Agreement Overview of the Agreement on Government Procurement tendering procedure available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gpa\\_overview\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gpa_overview_e.htm) (accessed on 08 November 2022).

<sup>136</sup> Article IX:9 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>137</sup> Article VII:3(c) WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

collusion, when the product or service can be supplied only by a particular supplier, or (vi) for reasons of extreme urgency brought about by events unforeseeable by the entity.<sup>138</sup>

Procuring entities may negotiate with tenderers, provided this is indicated in the initial tender notice or it appears from the tender evaluation that no one tender is the most advantageous and subject to safeguards to ensure that such negotiations do not discriminate between tenderers.<sup>139</sup>

The Agreement prescribes certain minimum deadlines that must be allowed for the preparation, submission, and receipt of tenders to enable responsive tendering.<sup>140</sup> The provisions are designed to allow all suppliers, domestic and foreign, to prepare and submit tenders before the closing of the tendering procedures. In general, the minimum period is 25 days for the receipt of applications to be invited to tender in the case of selective tendering, and 40 days for the receipt of tenders, counting from the date of publication of an invitation to tender.<sup>141</sup> The minimum time-limits for receipt of tenders may be reduced to 24 or even 10 days in certain well-defined circumstances such as a state of urgency which requires only 10 days.<sup>142</sup>

In the tender documentation the bid issuing entity is required to give all necessary information related to the procurement in question to enable potential suppliers to submit responsive tenders, including information required to be published in tender notices and other important information, for example economic and technical requirements, financial guarantees and the criteria for awarding the contract

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<sup>138</sup> Article XV WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>139</sup> Article XIV WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>140</sup> Article XI:2 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>141</sup> WTO Government Procurement: The Plurilateral Agreement Overview of the Agreement on Government Procurement tendering procedure available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gpa\\_overview\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gpa_overview_e.htm) (accessed on 08 November 2022).

<sup>142</sup> WTO Government Procurement: The Plurilateral Agreement Overview of the Agreement on Government Procurement tendering procedure available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gpa\\_overview\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gpa_overview_e.htm) (accessed on 08 November 2022).

and procedural information such as the closing date and time for receipt of tenders.<sup>143</sup>The Agreement contains obligations on technical specifications in order to ensure that entities do not discriminate against and among foreign goods and suppliers through the technical characteristics of products and services that they specify.<sup>144</sup>Technical specifications shall be in terms of performance rather than design, and be based on international standards, where they exist, or otherwise on national technical regulations, recognised national standards, or building codes.

The objective of the procedural rules for submission, receipt and opening of tenders is to ensure fairness, equity and transparency in the procurement process.<sup>145</sup> All tenders solicited under open and selective procedures by entities shall be received and opened under procedures and conditions guaranteeing the regularity of the openings. Only tenders that conform to the essential requirements of the tender notice or documentation and are from a supplier which complies with the conditions for participation can be considered for award.<sup>146</sup>Entities have the obligation to award contracts to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender is either the lowest tender or the tender which is determined to be the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation. An entity that has received a tender abnormally lower than other tenders may enquire with the tenderer to ensure that it can comply with the conditions of participation and be capable of fulfilling the terms of the contract.<sup>147</sup>Surely the process is to ascertain that the appointed supplier will be able to discharge its obligations in accordance with the provisions of the contract. To improve the flow of information the WTO GPA calls for regular consultations in the tender committee regarding developments in information technology and, if

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<sup>143</sup>Article XII WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>144</sup> Article VI WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>145</sup> Article XIII:1-3 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>146</sup>Article XIII:1-3 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>147</sup> Article XIII:4 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

necessary, negotiation of modifications to the Agreement itself.<sup>148</sup> Information must be provided, after the award of the contract, on the award decision in the form of a notice, giving information on such matters as the nature and quantity of the products and services in the contract award, the name and address of the winning tenderer, and the value of the winning award or the highest and the lowest offer considered in the award of the contract.<sup>149</sup>

Moreover, in response to a request from a supplier from a Party to the Agreement, the procuring entity must provide prompt and pertinent information on its procurement practices; an explanation of the reasons why a supplier's application to qualify was rejected, why its existing qualification to tender was brought to an end, and on the characteristics and relevant advantages of the tender selected.<sup>150</sup> Notwithstanding the disclosure requirement the tendering entities are entitled to withhold certain information on grounds of confidentiality.<sup>151</sup> The Agreement provides for the protection of confidential information.<sup>152</sup> The government of an unsuccessful tenderer may seek such additional information on the contract award as is necessary to ensure that the procurement undertaken in a fair and impartial manner.<sup>153</sup> The next section examines special provisions that are designed to assist the developing countries to cope with stringent procedures of open and transparent tender system.

#### **4.4 Special provisions for developing countries**

For a developing country like South Africa the Agreement recognises the development, financial and trade needs of developing countries, in particular least-developed countries, and allows special and

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<sup>148</sup> Article XXIV:8 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>149</sup> Article XVIII:1 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>150</sup> Article XVIII: 2 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>151</sup> Article XVIII:4 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>152</sup> Article XIX :4 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>153</sup> Article XIX :2 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm)( accessed on 20 September 2022).

differential treatment in order to meet their specific developmental objectives.<sup>154</sup> Developmental objectives of developing countries should be taken into account in the negotiation of coverage of procurement by entities in developed and developing countries.<sup>155</sup> The developing countries also get technical assistance<sup>156</sup>; establishment of information centres giving information on procurement practices and procedures<sup>157</sup>. There is also special treatment for least-developed countries.<sup>158</sup> As an exception to the general prohibition of offsets, developing countries may negotiate, at the time of their accession, conditions for the use of offsets provided these are used only for the qualification to participate in the procurement process and not as criteria for awarding contracts.<sup>159</sup> Any aggrieved Party has a right to approach a competent body to seek a legal recourse. The following section will deal with the process of a dispute resolution which is like South Africa's review processes.

#### **4.5 Dispute resolution mechanism**

The GPA stipulates that each Party shall establish or designate at least one impartial judicial or administrative authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of a covered procurement.<sup>160</sup> The establishment must be done in a timely, effective, transparent and non-discriminatory manner that is not prejudicial to the supplier's

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<sup>154</sup> Article V:1 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>155</sup> Article V:3,5-7 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>156</sup> Article V:8-11 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>157</sup> Article V:11 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>158</sup> Article V:12 and 13 WTO GPA available [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>159</sup> Article XVI WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>160</sup> Kollamparambil, U. (2014). *The Amended Government Procurement Agreement: Challenges and opportunities for South Africa. Law, Democracy and Development*, 18,202-223 available at <https://dx.doi.org/10.4314/idd.v18i1.10> (accessed 12 October 2021).

participation in ongoing or future procurement.<sup>161</sup> Moreover, each Party must adopt and maintain procedures for corrective action or compensation for the loss or damages suffered. In addition to domestic review procedures, Article XX affords each Party recourse to the provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes with respect to any matter affecting the operation of the GPA.<sup>162</sup>

The possibility to turn to the WTO Dispute Settlement Body (DSB) is a serious reason for foreign partners to seek compromises in trade disagreements. Since the creation of the DSB, more than half of cases out of 610 initiated proceedings have been resolved at the stage of initial consultations.<sup>163</sup> Disputes between Parties under the Agreement are subject to the procedures of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).<sup>164</sup> There are special provisions disallowing cross-retaliation as a result of disputes arising under the other WTO Agreements as well as suspension of concessions or other obligations under any other WTO Agreement because of any dispute arising under the GPA.<sup>165</sup> The DSB has the authority to approve consultations among parties to a dispute regarding remedies when withdrawal of a violating measure is not possible.<sup>166</sup>

As stated in the previous chapter<sup>167</sup> the GPA sets out mandatory requirements for the establishment of a domestic bid challenge system, giving suppliers believing that a procurement has been handled

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<sup>161</sup> Kollamparambil, U. (2014). *The Amended Government Procurement Agreement: Challenges and opportunities for South Africa. Law, Democracy and Development*, 18, 202-223 available at <https://dx.doi.org/10.4314/idd.v18i1.10> (accessed 12 October 2021).

<sup>162</sup> Kollamparambil, U. (2014). *The Amended Government Procurement Agreement: Challenges and opportunities for South Africa. Law, Democracy and Development*, 18, 202-223 available at <https://dx.doi.org/10.4314/idd.v18i1.10> (accessed 12 October 2021).

<sup>163</sup> Ministry of Foreign Affairs of the Republic of Belarus Benefits of WTO Membership available at [https://mfa.gov.by/en/export/wto/cons\\_wto/](https://mfa.gov.by/en/export/wto/cons_wto/) (accessed on 14 September 2022).

<sup>164</sup> Article XXII:1 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>165</sup> Article XXII:7 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>166</sup> Article XXII:3 WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>167</sup> See section 3.6

inconsistently with the requirements of the GPA a right of recourse to an independent domestic tribunal.<sup>168</sup> Parties may confer the authority to hear challenges by suppliers on national courts or on an impartial and independent review body. If a bid challenge is heard by a review body which does not have the status of a court of law, either its decisions must be subject to judicial review or it must follow the procedures/criteria laid down in detail in the Agreement.<sup>169</sup> The body must have the authority to order the correction of a breach of the Agreement or compensation for the loss or damages suffered by a supplier, but this may be limited to costs for tender preparation or protest. Pending the outcome of the challenge, it must be able to order rapid interim measures, including the suspension of the procurement process, to correct breaches of the Agreement and to preserve commercial opportunities.<sup>170</sup> Being a member of GPA has some few highlights as elaborated in the next section.

#### **4.6 The membership**

Membership provides a principle of most favoured nation treatment, which means equal access for all companies of all WTO Members to the markets of all Members of the Organisation. National treatment (NT) prohibits national producers from gaining advantages over importers; reduction of trade barriers, primarily tariffs and quantitative restrictions, which provides for increased trade between Members; predictability and transparency of international trade.<sup>171</sup> WTO Members have bound their tariffs and cannot, except for good reason, introduce other import restrictions, such as bans or quotas; increased competitiveness by eliminating unfair practices between trading partners aimed at stimulating trade primarily export subsidies and dumping opportunity to defend trade interests at the WTO Dispute Settlement Body, since all members will have international commitments towards acceding country for non-application of trade restrictions.<sup>172</sup> For acceding country WTO membership will

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<sup>168</sup> Article XX WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>169</sup> Article XX:6(a)-(g) WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>170</sup> Article XX:7(a)-(c) WTO GPA available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>171</sup> Ministry of Foreign Affairs of the Republic of Belarus Benefits of WTO Membership available at [https://mfa.gov.by/en/export/wto/cons\\_wto/](https://mfa.gov.by/en/export/wto/cons_wto/) (accessed on 14 September 2022).

<sup>172</sup> Ministry of Foreign Affairs of the Republic of Belarus Benefits of WTO Membership available at [https://mfa.gov.by/en/export/wto/cons\\_wto/](https://mfa.gov.by/en/export/wto/cons_wto/) (accessed on 14 September 2022).

provide additional benefits such as participation in the development of new rules and principles of international trade, participation in the WTO activity will allow the acceding country to promote its national interests and to timely adapt to the evolving global trade rules. The dispute settlement system provides a mechanism through which WTO Members can ensure that their rights under the WTO Agreement can be enforced.<sup>173</sup> The DSU aims to provide a fast, efficient, dependable, and rule-oriented system to resolve disputes about the application of the provisions of the WTO Agreement.

#### **4.7 Potential benefits of GPA accession for developing/emerging countries**

This section lists potential benefits such as trade gains from assured access to other Parties' procurement markets.<sup>174</sup> Possibilities for achieving enhanced value for money in acceding countries' own procurement systems, through strengthened competition. Potentially increased incentives for inbound foreign direct investment. Opportunity to influence the terms of other Parties' accessions. Opportunity to influence the future evolution of the Agreement. Included are synergies with other international instruments, and national legislation as well as increasing membership of the Agreement worldwide. It is further argued that membership is an important benchmark for national procurement reforms.

Even being an observer bears some benefits such as participation in the discussion in Committees related to work programs, gaining access to relevant information regarding accession negotiations, becoming acquainted with the operation and administration of the Agreement. These include assessing its interest in the GPA as well as the relevance of the Agreement to its economy. Directly receiving information regarding upcoming meetings, meeting documents, and post-meeting summaries and report. Observer status can be requested by a simple letter to the chairperson of the GPA Committee.<sup>175</sup> The interests of the least developed and developing countries are safe guarded as elaborated in the previous chapter.<sup>176</sup>

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<sup>173</sup>Introduction to the WTO dispute settlement system available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c1s3p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s3p1_e.htm) (accessed on 08 November 2022).

<sup>174</sup>Ministry of Foreign Affairs of the Republic of Belarus Benefits of WTO Membership available at [https://mfa.gov.by/en/export/wto/cons\\_wto/](https://mfa.gov.by/en/export/wto/cons_wto/) (accessed on 14 September 2022).

<sup>175</sup> Article XXI:4 WTO GPA available [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed on 20 September 2022).

<sup>176</sup>See section 4.4.

#### **4.8 Conclusion**

This chapter has highlighted the reality that a bigger portion of government procurement is in infrastructure development. On examination it was further established that GPA indeed does not replace domestic laws but enhances necessary developments on transparency and competition. This chapter further discussed a welcome exemption of special and differential treatment for developing countries who wish to join the GPA. Members of WTO GPA are benefiting from healthy credit ratings as their procurement processes are transparent and monitored by all members. However, another reality discussed is the fact that membership means that a country cannot just amend its tariffs against another member without showing a good cause.

It is the submission of the study that what is envisaged by South Africa's constitution as discussed in previous chapters is similarly to most of the WTO GPA principles. Like most policies in South Africa supply chain management policy implementation and policing is a challenge. South Africans frequently hear of irregularly awarded contracts and rigging of tenders despite clear supply chain management policy requirement of supplier vetting. If South Africa's supply chain management policy is good for domestic supplier then same can be said for foreign suppliers. What this chapter showed is that the development objectives of PPPFA and BBBEE policies can be the reason for the delay in South Africa's accession to the WTO GPA. It is evidenced on the accession processes that the pace of accession to the GPA depends on the WTO Member in question, which then implies that an acceding member can keep on shifting the goal posts.



## **CHAPTER 5**

### **CONCLUSION AND RECOMMENDATION**

#### **5.1 Introduction**

The focus of this research paper is evaluating South Africa's prospective accession to the World Trade Organisation Government Procurement Agreement (WTO GPA). The research problem involves analysing South Africa's readiness for accession considering WTO GPA's articles. Introductory chapter of this research paper brings in s231 of the Constitution of the Republic of South Africa which governs the negotiation and signing of all international agreements.<sup>177</sup> The first chapter goes on to introduce WTO as the only global international organisation that deals with the rules of trade between nations. The GPA is further introduced as the specific agreement that deals with most favoured nations, national treatment and non-discrimination obligations as far as they were not adequately dealt with in the General Agreement on Trade and Tariffs (GATT).

Towards the end of chapter one it is stated that South Africa's public procurement regime is premised from section 217 of the Constitution of the Republic of South Africa. National Treasury within the department of Finance is constitutionally mandated to enact public procurement regulations and policies to govern procurement of goods and services in the national departments, provincial departments, municipalities, municipal entities, state owned entities, state owned companies. These National Treasury regulations and policies are also yardsticks for good procurement practice in other entities offering public services such as public universities. South Africa's public procurement regulations and policies were examined in comparison to the with WTO GPA guidelines. GPA membership is shown to be beneficial in that member countries are guided to establish independent complaint review mechanisms to deal specifically with tender appeals and allegations of supplier collusion.<sup>178</sup>

The aspect of transparency is also addressed in the GPA membership through progressive opening of parties to international competition and procurement information is shared openly across the market participants.<sup>179</sup>

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<sup>177</sup> See section 1.1

<sup>178</sup> See sections 2.5-2.6

<sup>179</sup> See section 2.6

## **5.2 Research findings**

South Africa's procurement regulations and policies are by far in line with WTO GPA prescripts.<sup>180</sup> There is however a general lack of consequences for procurement law offenders. South Africa's National Treasury is empowered to bar any entity from getting a state tender because of poor workmanship and any other proven procurement related offence. However, South Africa's law enforcement agencies seem to lack the necessary skill to detect, investigate and secure convictions for procurement offences related to natural persons. It is submitted that a declaration of conflict-of-interest requirement when an official is related to the bidder or knows the bidder is not enough to deter corruption as the replacement is more likely to be a colleague. On analysis it is found that the government protection against international competitors through local content requirement is adversely impacting on technology transfer and innovation. Furthermore, the engineering skills for capital infrastructure programs could be sourced from international competitors if South Africa's tendering market is widened to include international market. South Africa is a hegemony in the African continent yet is not a member of WTO GPA and that has a potential of being used by construction mafia groups who are allegedly known to extort money in awarded bidders and demand contraction tenders.

## **5.3 Research recommendation**

As South Africa is opening its market to international community in power producing sector and road network infrastructure a need to negotiate GPA is inevitable. A timeline in respect of redress objectives need to be specific so that South Africa is not seen through the international market eyes as over protecting local businesses owned by previously disadvantaged individuals.

To succeed in competition law enforcement in the deterrence and prevention of collusion, and the measures needed to fight corruption, South Africa has to expedite accession to the WTO GPA. By acceding to the WTO GPA South African law enforcement agencies can benefit in fighting sophisticated tender and construction mafia crimes by benefiting from the first world crime fighting experts.

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<sup>180</sup> See section 3.

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