

**ENQUIRY INTO WHAT FRUSTRATES THE EFFICACY OF PREFERENTIAL PUBLIC
PROCUREMENT AS A POLICY TOOL FOR BLACK ECONOMIC EMPOWERMENT**

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DECLARATION

I, Soraya Beukes, hereby declare that this dissertation is original and has never been presented to any other University or institution. I also declare that secondary information used has been duly acknowledged in this dissertation.

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I would like to dedicate this thesis to my mother Rugaya Josephs, 'I love you mummy'.

ABSTRACT

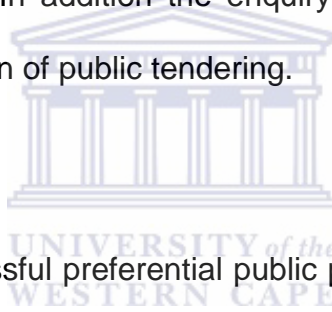
Black Economic Empowerment (BEE) has been a topic of discussion since the dawn of democracy in April 1994. Due to the entrenched inequalities of the past, economic empowerment is very important for the economic growth of the majority of South Africa's citizens. However, significant economic enrichment of black people has not been made, despite, economic success, legislation, state policies and programme interventions. This economic growth is to be realised through the use of preferential procurement as a policy tool for BEE.



Whilst sufficient legislation has been enacted to regulate preferential procurement, to favour black people, much still seems to be lacking in the enforcement of the laws in public procurement. Central to the challenges of preferential procurement is the disharmony between the Framework legislation governing preferential procurement and BEE. This discord has seen two visions being followed for preferential procurement; the Procurement Act refers to the beneficiaries of BEE as historically disadvantaged individuals (HDI; s) and the goals for BEE are measured through specific goals which promotes narrow empowerment; the BBBEE Act on the other hand defines black people as the recipients of BEE and through the BEE Codes broad-based empowerment is promoted through seven core elements. This congruency has not served the promotion of preferential procurement, it has created a hindrance that frustrates economic growth for those it is intended. The other quandary that undermines the success of preferential

procurement is willful practices engaged by both tenderers and public officials; skills deficiency in the adjudication of tenders and self-interest. The success of BEE through preferential procurement is dependent on a coherently legislated procurement environment fortified by perceptive public officials.

The objective of this thesis is to analyse the impact of these challenges on the success of preferential procurement. The study will highlight the main practices that defeat the use of preferential procurement. This will include an analysis of the various legislation and the amendments thereto. In addition the enquiry will examine the proficiency of public officials in the adjudication of public tendering.



Recommendations for a successful preferential public procurement environment will be made. The proposed thesis will utilise, *inter alia*, relevant legislation, case law, theses, journals, books and policy documents.

KEYWORDS

1. Bidder
2. Broad based black economic empowerment
3. Collusion
4. Competitive bidding
5. Corruption
6. Disharmony
7. Policy tool
8. Preferential public procurement
9. Scorecard
10. Transformation




ABBREVIATIONS

All SA	All South African Law Reports
ANC	African National Congress
BAC	Bid adjudication committee
BBBEE Act	Broad Based Black Economic Empowerment Act 53 of 2003
BEC	Bid evaluation committee and a bid adjudication committee
BEE	Black Economic Empowerment
BEE Codes	Broad Based Black Economic Empowerment Codes of Good Practice
BSC	Bid specification committee
CEO	Chief Executive Officer
CIPRO	Companies and Intellectual Property Commission
COMESA	Common Market for Southern and Eastern Africa
COSATU	Congress of South African Trade Unions
DTI	Department of Trade and Industry
DCS	Department of Correctional Services
DPSA	Department of Public Service and Administration
DPW	Department of Public Works
GCC	General Conditions of Contract
GCIS	Government Communication and Information System
GDP	Gross Domestic Product
HDI	Historically Disadvantaged Individuals
IDASA	Institute for Democracy in South Africa
MEC	Member of the Executive Council
ILO	International Labour Organisation
JOL	Judgements Online
NPA	National Prosecuting Authority

PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
PFMA	Public Finance Management Act 1 of 1999 (as amended by 29 of 1999)
PMG	Parliamentary Monitoring Group
PSC	The Public Service Commission
RDP	Reconstruction and Development Program
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SANAS	South African National Accreditation System
SAPA	South African Press Association
SAPR	Suid Afrikaanse Publiekreg/South African Public Law
SAPS	South African Police Services
SCM	Supply Chain Managements
SMME	Small, Medium and Micro Enterprises
SIU	Special Investigations Unit
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organisation



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CHAPTER 1

INTRODUCTION

1.1 Background to the study

During the apartheid-era, public procurement was used both to economically advance and protect large white-owned enterprises and to discriminate against black-owned businesses.¹ According to Gounden the public procurement policies of the past were racially defined by restricting the participation in public tendering to white people.² This was done by making public tender procedures very complicated to suit and favour large white-owned enterprises, to the exclusion and the detriment of small emerging black-owned businesses.³ The white minority were thus the primary participants and beneficiaries of public sector procurement.⁴ This contributed to the current situation in South Africa where black people make up the political majority but an economic minority.⁵

¹Bolton P 'Government Procurement as a Policy Tool in South Africa' (2006) 6 Journal of Public Procurement, abstract.

²Gounden S *The Impact of the Affirmative Procurement Policy on Affirmable Business Enterprises in the South African Construction Industry* (unpublished PhD thesis, University of Natal, 2000) para 3.11.

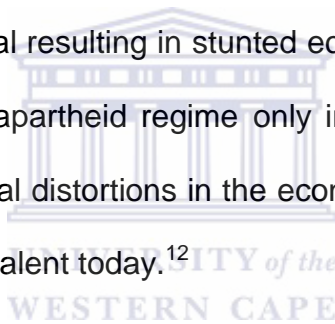
³Williams S 'The Use of Exclusions for Corruption in Developing Country Procurement: The Case of South Africa' (2007) *Journal of African Law* 2.

⁴Gounden S (2000) para 3.11.

⁵In *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) para 45 the court held that 'the postscript to the interim Constitution refers to our "past of a deeply divided society". Differentiation made on the basis of race was a central feature of those divisions and this was a source of grave assaults on the dignity of black people in particular. It was however not human dignity alone that suffered. White areas in general were affluent and black ones were in the main impoverished. Many privileges were dispensed by the government on the basis of race, with white people being the primary beneficiaries. The legacy of this is all too obvious in many spheres, including the disparities that exist in the provision of services and the infrastructure for them in residential areas.'

The pre-democratic era was characterised by a legacy of dispossession of assets, particularly land, which led to the disempowerment of black people.⁶ This system, which excluded black people⁷ from economic power started with dispossession of land as far back as the 1800s and continued throughout the twentieth century.⁸ During this period the apartheid government engaged in capital-intensive development for which semi-skilled black labourers was used,⁹ causing black people to work as cheap labour.

This produced a country with a landless black majority, restricted in accessing skills development due to vastly inferior education.¹⁰ The consequence was the exclusion of black people from capital accrual resulting in stunted economic growth for black people. This abuse of power saw the apartheid regime only investing in the white minority.¹¹ This manifested in vast structural distortions in the economy: the result led to a crisis in the apartheid economy still prevalent today.¹²



1.2 The importance of black economic empowerment (BEE)

⁶Department of Trade and Industry *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) (hereafter DTI Policy Strategy) para 1.9.

⁷Refer to black, coloured and indian people.

⁸DTI Policy Strategy (2003) para 2.2.2.

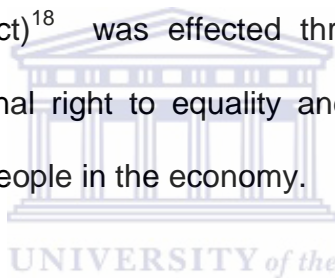
⁹Crankshaw O *Race, Class and the Changing Division of Labour Under Apartheid* (1997) 50. Also see BEE Commission Report 'A National Integrated Black Economic Empowerment Strategy' (2001) 35. (hereafter BEE Commission Report).

¹⁰DTI Policy Strategy (2003) para 2.2.4.

¹¹Barnard R *Apartheid and Beyond: South African Writers and the Politics of Place* (2007) 5 states that apartheid represented territorialisation of power.

¹²BEE Commission Report (2001) 3.

The importance of BEE can be read into the preamble to the Constitution¹³ which provides that the people of South Africa collectively commit to the transformation of the South African society. The promotion of those who are economically disadvantaged was further addressed by including a procurement clause to this effect in the Constitution.¹⁴ This inclusion of preferential procurement to promote economic transformation highlights the importance placed on economic empowerment for those historically excluded from economic participation.¹⁵ Ultimately the constitutional prescript¹⁶ to economic empowerment was legislated in the Preferential Procurement Policy Framework Act (Procurement Act).¹⁷ To complement this Broad-Based Black Economic Empowerment Act (BBBEE Act)¹⁸ was effected three years later to promote the achievement of the constitutional right to equality and to increase broad-based and effective participation of black people in the economy.



The response of the government to the pre-apartheid position was to articulate a policy that would develop an economy that could provide for the needs of all its economically

¹³The Constitution of the Republic of South Africa Act 108 of 1996 (hereafter the Constitution). We, the people of South Africa..., Recognise the injustices of our past... Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights....

¹⁴Section 217 (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented. See para 1.3 for discussion on the procurement clause.

¹⁵Bolton P (2006) 203.

¹⁶Section 217(3).

¹⁷Act 5 of 2000.

¹⁸Act 53 of 2003,

active people and enterprises, in a sustainable manner by 2014.¹⁹ This vision of economic equality was developed through the Reconstruction and Development Programme (RDP) of 1994 and can be traced back to the Freedom Charter.²⁰

The Department of Trade and Industry (DTI), tasked with the promotion of BEE was concerned that increased inequality and uneven development presented a real danger for both industrialised and developing economies.²¹ That is why it encouraged economic growth for the political majority through preferential procurement which was identified as the source to the sustainable growth and development.²² Essentially public sector procurement was seen as essential in the quest to remedy the prejudicial practices of the past²³ so as to counter the apprehension that absence of shared economic growth would lead to lower levels of growth thereby restricting demand which is detrimental to any economy.²⁴ Broad-based growth is consequently the key to the success of the South African economy. But primarily the promotion of BEE must be associated with good governance that aspires to the principles of transparency and fairness as required in terms of the Constitution.

¹⁹DTI Policy Strategy (2003) para 1.1.

²⁰RDP as published in *Government Gazette* No. 16085 of 23 November 1994. DTI Policy Strategy (2003) para 1.3

²¹DTI Policy Strategy (2003) para 2.2.5 states that: 'The marginalisation of black people, eventually resulted in a deteriorated growth rate placing the apartheid economy in a crisis- GDP growth fell to zero between 1970 and 1979 with high levels of unemployment.'

²²DTI Policy Strategy (2003) para 3.22 refers to HDIs as collective reference to African, Coloured and Indian South African citizens unfairly discriminated against during the apartheid-era.

²³Bolton P 'The Use of Government Procurement as an Instrument of Policy' (2004) 121 *SALJ* 624.

²⁴DTI Policy Strategy (2003) para 3.4.4.2.

Despite this vision and the comprehensive programme to provide a legislative framework for equality and economic transformation,²⁵ credible economic transformation is still evading the majority of the citizens. Ten years after the DTI policy document (2003), promoting BEE was written the full potential growth of South Africa is still undermined by economic disparities and is characterised by racial and gender inequalities insofar as access to wealth, income, skills and employment is concerned.²⁶ South Africa still has the world's most unequal distributions of income due to the fact that the South African economy continues to exclude black people from financial and economic resources.²⁷



1.2.1 The present position of BEE

Post democratic zeal by government in enacting procurement laws to advance economic empowerment has resulted in preferential procurement thwarted by the failure to heed the legislative prescripts on the one hand and nefarious practices on the other. It is believed that BEE in South Africa has not worked because it created millionaires and superstars instead of equipping people with basic skills: this is due to the clumsy way it

²⁵Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, to address deracialisation and engendering; Restitution of Land Rights Act 22 of 1994 which address land dispossession; Employment Equity Act 55 of 1998 to address unfair discrimination in the workplace by requiring enterprises, employing more than fifty-five people to take affirmative action within a defined time period. Competition Act 89 of 1998 in order to provide all South Africans equal opportunity to participate fairly in the national economy.

²⁶DTI Policy Strategy (2003) para 1.5.

²⁷BEE 'Overview' available at <http://www.yokogawa.com/za/cp/overview/za-bee.htm> (accessed on 30 July 2010).

(BEE) had been implemented.²⁸ Friedman intimates that BEE is not a failure because it still needs to be adequately implemented. He believes what we have seen over the last 17 years is a process that enabled politically connected individuals to access a large portion of the BEE pie in the hope that the problem will go away.²⁹ Comments from the mining industry are that South Africa's laws over the past 16 years had opened the market for all but the BEE policy had led to enriching only a few.³⁰ This viewpoint alluded to the fact there was virtually no transformation in the mining industry. Furthermore it seems that the attempts at gradual economic transformation brought about a failed BEE project due to corruption; this has seen the erosion of entrepreneurship.³¹



What is prevalent today is that BEE as commonly practiced 'creates a small class of unproductive but wealthy black crony capitalists and thus strikes a blow against the emergence of genuine entrepreneurship.'³² This is because the vision for BEE has been distorted in that preferential procurement benefits those for whom it is not intended.³³ This situation does not accord with the government's vision that describes an economy that must be susceptible to greater ownership participations, by a greater majority of its

²⁸Booyesen V 'BEE a failure' Fin 24 18 Sep 2008 this is according to Phosa (ANC Treasurer-general) addressing MBA students at the University of the Free State available at <http://www.fin24.com/Business/BEE-a-failure-20080918> (accessed 17 November 2011).

²⁹Mammburu L Roberts J & Bratt M 'BEE cannot be called a failure — Friedman' *Business day* 9 Nov 2011 available at <http://www.businessday.co.za/articles/Content.aspx?id=158256> (accessed 17 November 2011).

³⁰Prinsloo L 'Failure of BEE fuels nationalisation debate' *Mining Weekly* 22 June 2011 available at <http://www.miningweekly.com/article/failure-of-bee-fuels-nationalisation-debate-bam-2011-06-22> (accessed 17 November 2011).

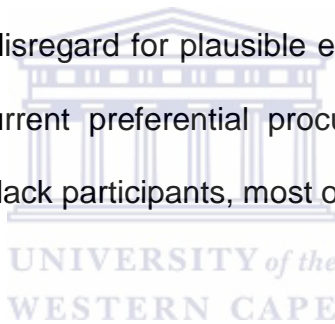
³¹SAPA 'Narrow BEE at the 'heart of corruption, SACP asserts' *Polity.org* 27 April 2011 <http://www.polity.org.za/article/narrow-bee-at-the-heart-of-corruption-sacp-asserts-2011-04-27> (accessed 17 November 2011).

³²Mbeki M *Architects of Poverty: Why African Capitalism Needs Changing* (2009) 69.

³³BEE Commission Report (2001) 4.

people.³⁴ These measures were codified in the BBEE Act and Codes (BEE legislation)³⁵ which provides a comprehensive and focused strategy for BEE.³⁶

Further cause for concern is raised by the recent Auditor-General of South Africa (AGSA) report that deviation by public officials from the prescribed procurement legislation and regulations during the execution of tender procedures, extends to 43 percent of the projects selected for auditing.³⁷ The result of which is that between five and 94 percent procurement processes across provinces ignore the procurement laws. This deviation is aided by self-interest and the lack of oversight in supply chain management processes to monitor compliance to legislation and regulations.³⁸ This behaviour intimates a flagrant disregard for plausible economic growth in South Africa. This is evident in that the current preferential procurement environment notionally favours a narrow ensemble of black participants, most of who are politically connected.



The success of preferential procurement ultimately depends on whether the political will exists to ensure compliance on the one hand and the rooting out of the adverse practices beleaguering public procurement, on the other. Unfortunately, regardless of all

³⁴RDP White Paper (2000) para 3.8.1. Furthermore para 1.2.7 states 'No political democracy can survive and flourish if the majority of its people remain in poverty, without land, without their basic needs being met and without tangible prospects for a better life. Attacking poverty and deprivation will therefore be the first priority of the democratic government.' BEE Commission Report (2001) states that 'the RDP is the country's blueprint for transformation- encapsulates clearly the vision and values of BEE' 1.

³⁵ This thesis will refer to the BBEE Act and BEE Codes as the BEE Legislation.

³⁶DTI Policy Strategy (2003) para 2.2.6.

³⁷AGSA report to Parliament on a performance audit of the infrastructure delivery process at the provincial departments of Education and Health (August 2011) para 2.2.3 (a) (hereafter AGSA report on Education and Health Departments). Paragraph 1.3 details that two hundred and forty seven (247) projects amounting to R6, 635 billion were selected for detail auditing (between 2008 and 2011) available at <http://www.agsa.co.za/Reports%20Documents/performance%20audit%20of%20the%20infrastructure%20delivery%20process.pdf> (accessed on 25 October 2011).

³⁸AGSA report on Education and Health Departments (August 2011) para 3.2.3 (b).

the measures established, meaningful economic participation by the majority of South Africans remains far too limited.³⁹

The BEE legislation promotes the comprehensive inclusion of black people in the mainstream of the economy, whether as owners or employees. This will mean that business patterns should change to include more black people accumulating wealth through, not only ownership but also skills development, in order to engage in business, in the existing and new economic activities.

An underlying problem in the promotion of BEE is that public officials have demonstrated a flagrant disregard for those constitutional imperatives promoting economic prosperity.⁴⁰ This behaviour negates good governance and compromises the fair application of preferential procurement. This undermines the use of preferential procurement because the majority of the population remains outside the mainstream economy. A good basis to start from is that every attempt should be made to deal with the acquiring of goods or services in the spirit of section 217 of the Constitution.⁴¹

It will thus serve the government well to err on the side of caution and not use BEE to enrich a black minority (politically connected people) at the exclusion of the vast

³⁹See Gounden S (2000) for an analysis of the achievements of BEE through preferential procurement in the Construction Industry.

⁴⁰AGSA report on Education and Health Departments (August 2011).

⁴¹Malinga M 'Zero Tolerance against Fraud and Corruption Conference' National Treasury Supply Chain Management 25–26 September 2007 available at <http://www.publicworks.gov.za/PDFs/AntiCorruptionConference/National%20Treasury%20-%20Mr.pdf> (Accessed 12 Jun 2010).

majority.⁴² Such a situation will parallel with the apartheid period because in both instances the minority were empowered and the majority disregarded.

1.3 The procurement clause

The Interim Constitution⁴³ includes a procurement clause which requires the public procurement of goods and services, to be a fair, public and competitive administration by tender boards. Preferential procurement was clearly not addressed at this stage. However in order to remedy the ills of the past and include black people in the mainstream of the economy, the post apartheid government later embarked on a reconstructive and development initiative.⁴⁴ A way of addressing this was to include preferential procurement in the procurement clause of the Constitution.⁴⁵ The procurement clause therefore embodies economic redress in the interest of equity by using preferential public procurement to bring about BEE. This has seen preferential public procurement as a constitutional principle meaning the spirit of section 217(1) should be observed in the adjudication of tenders.⁴⁶ This spirit promotes good governance⁴⁷ in that fairness, equitability, transparency, competitiveness and cost-effectiveness must permeate the process of public tendering.

⁴²De Lange D 'Corruption Bombshell' *Cape Times* 3 March 2011 1.

⁴³Act 200 of 1993 s187.

⁴⁴ANC 'Discussion document on RDP' (no date) provides that 'the RDP was developed to strike at the institutions, structures and social interests of those forces that have grown rich and powerful out of minority rule' available at www.anc.org.za (accessed on 19 February 2011).

⁴⁵Section 217 (1).

⁴⁶Penfold G & Reyburn P 'Public Procurement' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2ed (2004) 25-1.

⁴⁷Gounden S (2000)1.3.

The reason for using public procurement to promote BEE is that due to its procurement budget size,⁴⁸ government markets provide significant opportunities to influence economic growth.⁴⁹ Through preferential procurement, the cause of black people is advanced by them being treated as the preferred bidders⁵⁰ when government procures goods or services. The Constitution, correctly in my view, does not spell out precisely who the preferential bidders should be. The Constitution⁵¹ does not refer specifically to black people but rather to 'persons, or categories of persons, disadvantaged by unfair discrimination'. This omission may however be the source of all the confusion between the Procurement Act and the BBBEE Act.⁵²

Furthermore the procurement clause applies to all organs of state at all three levels of government that is, national, provincial and local, and any other institution identified in national legislation.⁵³ Needless to say any level of government found flouting the spirit of section 217(1) will be undermining good governance and thereby the Constitution.

1.3.1 The obligation to implement preferential procurement framework legislation: Section 217 (3)

⁴⁸Department of Environmental Affairs and Tourism, United Nations, and United Nations Environment Programme (2008) states that the South African government spends between 11 and 15 % of its gross domestic product, on public procurement available at <http://www.environment.gov.za/Services/documents.html#>. (accessed 2 February 2011). Mc Donald O (2008) 6 states that 'government procurement accounts for approximately 4.5 per cent of developing countries gross domestic product (GDP) and that globally, government procurement is big business, with government's annual spending on tradable goods and services estimated at more than US\$2,000 billion' 3.

⁴⁹Arrowsmith S 'Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation' (1995) *Law Quarterly Review* 236.

⁵⁰See chapter two para 2.3 for a discussion on the objectives of preferential procurement.

⁵¹Section 217 (2) (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

⁵²See chapter two for a discussion on the discord between the Acts.

⁵³Section 217(1).

Emanating from the procurement clause⁵⁴ is that that government entities engaged in public procurement must implement a preferential procurement policy. Those policies must observe the Procurement Act⁵⁵ that serves as the framework for preferential procurement. The Constitutional Court also confirmed that if there is a preferential procurement policy to be followed, there is a duty on the government that its discretion, insofar as it relates to procurement, must be exercised in accordance with such policy.⁵⁶ The National Treasury further notes that 'open and effective competition is best served by a framework of procurement laws, policies, practices and procedure that is transparent and accessible to all potential bidders.'⁵⁷



1.4 Title of the study: Frustrations plaguing preferential procurement of goods and services

The objective of this thesis is to flesh out some of the frustrations that hinder the success of preferential procurement. The use of preferential procurement is inhibited by a number of challenges which impedes the success of BEE. An overarching problem is that government lacks enthusiasm in proper oversight and political commitment to the

⁵⁴Section 217(2) [d]oes not prevent the organs of state or institutions referred to in s217(1) from implementing a procurement policy providing for- (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

⁵⁵Constitution s 217 (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

⁵⁶*Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others (2004) 4 SA 490 (CC) (2004) BCLR 687 (CC) para 100.* (hereafter *Bato Star Fishing*).

⁵⁷National Treasury: General Procurement Guidelines (no date) 7 available at [www.treasury.gov.za/legislation/pfma/supplychain/General Procurement Guidelines.pdf](http://www.treasury.gov.za/legislation/pfma/supplychain/General%20Procurement%20Guidelines.pdf) (accessed 4 May 2010).

success of preferential procurement processes. Simply put, government is not seen as actively rooting out those practices that put strain on the public procurement environment. The head of the Special Investigation Unit (SIU), the agency that has proved to uncover the most corruption in public procurement states that '[o]ur policies are pretty good but if there are not consequences for breaching them... a culture of impunity spreads pretty quickly.'⁵⁸

The legislation

The preferential procurement environment is facing several other challenges. The first area for examination is to determine whether the framework legislation, the Procurement Act and BBBEE Act share the necessary cogency to bring about the broad-based empowerment that is intended.⁵⁹ This study will draw attention to the amendments to the Procurement Regulations over the last eight years and its influence on the field of preferential procurement. Finally the Procurement Regulations 2011 has also gained attention through important changes.⁶⁰ These changes need to be highlighted and its impact on the main framework Acts assessed.

⁵⁸SAPA Government corruption: R30bn could be lost-SIU *Media24* 12 October 2011 available at <http://www.news24.com/SouthAfrica/Politics/Govt-corruption-R30bn-could-be-lost-SIU-20111012> (accessed on 25 October 2011). See chapter three para 3.2. for discussion on corruption.

⁵⁹ See chapter two for a discussion on the cogency of the Acts.

⁶⁰Visser A 'Momentum for broad BEE' *Fin 24.com* 9 October 2011 available at <http://www.fin24.com/Economy/Momentum-for-broad-BEE-20111009> (accessed 24 October 2011)

Willful practices

Secondly, billions of rands are reportedly being squandered on the procurement of goods and services for government, without following proper tender procedures and without having to deliver on the tender obligations.⁶¹ The competitive bidding arena is undermined by supply chain officials conflicted with self-interest. This practice sees non-meritorious suppliers landing government contracts and thereafter failing to perform, resulting in more economic investment in new suppliers.⁶² The reality is that the public procurement environment is facing challenges of some serious malpractices which undermine the proper application of the procurement and BEE legislation.

These practices bear not only on the fiscus but also on the economic empowerment of the target groups.⁶³ The SIU reported to parliament that the woes in public procurement have reached excessive levels. The unit is currently investigating 558 procurement contracts to the value of R1.9bn⁶⁴ Further investigations are probing procurement irregularities to the tune of R330 million which is linked to the building and renovation of 33 police stations.⁶⁵ The SIU reported that government could lose as much as 20 percent of its procurement budget (R30 Billion) to immoral behaviour.

⁶¹De Lange D 'Corruption Bombshell' *Cape times* 3 March 2011 1.

⁶²AGSA report on Education and Health Departments (August 2011) para 2.2.3 (c) Education Department: original contract R45, 723,343 additional costs R63, 953,012. Health Department: original costs R313, 420,619 additional costs R536, 947,831.

⁶³AGSA report on Education and Health Departments (August 2011) para 2.2.3 (c)

⁶⁴Ndaba B 'Yet another Gauteng ministry faces a fraud lawsuit' *The Star* 12 October 2011 <http://www.iol.co.za/the-star/yet-another-gauteng-ministry-faces-a-fraud-lawsuit-1.1155279> (accessed 25 October 2011)

⁶⁵SAPA 'Government corruption: R30bn could be lost-SIU' *Media24* 12 October 2011 available at <http://www.news24.com/SouthAfrica/Politics/Govt-corruption-R30bn-could-be-lost-SIU-20111012> (accessed 25 October 2011).

Skills

Thirdly it seems that good governance is undermined by public officials displaying alarming degrees of ineptitude in applying legislation concerning the economic development of black people.⁶⁶ The observance of empowering provisions during competitive bidding suffers because officials in supply chain management are not adequately trained for the job. There needs to be an enquiry into the existence of training important skill to decipher the legislative prescripts in order to execute the objectives of the legislation during tender adjudication.

Recent media reports reveal that skills deficiency is costing provincial government R800 million in law suits by service providers, for contract bungling by state officials in supply chain management.⁶⁷ In addition contracts are not effectively monitored which leads to delays in completion which negate cost-effectiveness. Essentially this situation exists due to lack of technical⁶⁸ and project management skills.⁶⁹ The AGSA found that the ability for proper record keeping was also undermined by procurement officials; this failure compromises accountability as documents cannot be submitted for auditing.⁷⁰

⁶⁶*Intertrade Two (Pty) Ltd v Mec for Road and Public Works* (2008) 1 All SA 142 (CK).

⁶⁷Ndaba B 'Yet another Gauteng ministry faces a fraud lawsuit' The Star 12 October 2011
<http://www.iol.co.za/the-star/yet-another-gauteng-ministry-faces-a-fraud-lawsuit-1.1155279> (accessed 25 October 2011)

⁶⁸AGSA Report on Education and Health (August 2011) para 2.3.3 (a) for 70% of the projects selected for detailed auditing, the projects were completed late or were still being constructed although the contractual completion dates had passed.

⁶⁹AGSA Report on Education and Health Departments (August 2011) paras 3.2.4; 3.2.5.

⁷⁰AGSA Report on Education and Health Departments (August 2011) para 3.2.1.

Conflict of interest

Fourthly the SIU reports that South Africans are losing between R25 and R30 billion every year to conflict of interest and incompetence in public service.⁷¹ This unit is currently investigating 360 cases involving conflict of interest by public officials, amounting to R3.4 billion.⁷² The SIU investigations of staff proved that the Department of Public Works paid at least R35 million to entities where staff held an undeclared interest. This self interest leads to choosing suppliers that lack capacity to deliver on the contract on the one hand and undermines cost-effectiveness on the other.⁷³ Rose-Ackerman argues that the procurement system should limit private gain available to officials because corruption and self interest by public officials can defeat procurement efforts to the contrary.⁷⁴ This seems pretty much the situation in South Africa; the measures in place are failing because there is a tendency of noncompliance to declaration of interest policies.

Precautionary measures are often not enough because conflict of interest sometimes exists at the highest echelons of government who profit from their inside knowledge of

⁷¹De Lange D 'Taxpayers fleeced of R30bn' IOL News 13 October 2011 available at <http://www.iol.co.za/news/politics/taxpayers-fleeced-of-r30bn-1.1156259> (accessed 13 October 2011).

⁷²SAPA 'Government corruption: R30bn could be lost-SIU' *Media24* 12 October 2011 available at <http://www.news24.com/SouthAfrica/Politics/Govt-corruption-R30bn-could-be-lost-SIU-20111012> (accessed 25 October 2011).

⁷³AGSA Report on Education and Health Departments (August 2011) para 2.2.3 (b). Paragraph 1.1.3 (a) five months after beginning construction of the school on 19 January 2006, 89% of the contract value had already been paid to the contractor. The project was suspended as the school was situated on the Mbombela soccer stadium site and had to be demolished to make way for the new stadium. The budget increased from R508 953 to R8, 5 million for the subsequent temporary structures that were built for the school's operation. However, these structures also have to be demolished as they were constructed on a railway site. Madonsela P 'Public Protector a media briefing on the release of the SAPS lease report' 22 February 2011 available. <http://www.pprotect.org/index.asp> (accessed 3 March 2011).

⁷⁴Rose-Ackerman S *Corruption and Government: Causes, Consequences and Reform* (1999) 68.

bids and political connections. Such 'grand-corruption' is not always the focus but rather middle-level procurement decisions controlled by professional civil servants.⁷⁵ 'Grand-corruption' occurs where government transfers large financial benefits to private firms through procurement contracts and the award of concessions. Also bribes transfer monopoly rents to private investors with a share to the corrupt officials.⁷⁶ The recent lease debacle is a case in point where senior officials were censured for by-passing tender procedures in leasing premises for the police. This conduct exists because public officials have the power to assign scarce benefits and enforce onerous costs.⁷⁷ The fortunate aftermath of this matter is that the responsible minister has been removed from her post and has resigned as Member of Parliament: in addition the Department of Public Works has admitted that there is something serious amiss in the control of the department.



Schwarz argues that if procurement distinctions are properly managed, it will fade over time and give way to common economic empowerment to all which can lead to commonly produced enhanced strength in the market.⁷⁸ This common economic empowerment is the concept that South Africans should aspire to and for this reason the government's economic success will be determined by the success of BEE. All indications are that if bad practices are not nipped in the bud, preferential procurement will not reap the desired result.

⁷⁵Rose-Ackerman (1999) 65.

⁷⁶Rose-Ackerman (1999) 27

⁷⁷Rose-Ackerman (1999) 39.

⁷⁸Schwartz J 'On Globalisation and Government Procurement (2003) in Arrowsmith S & Thybus M (eds) *Public Procurement: The Continuing Revolution* (2003) 40.

1.5 Aims and significance of the study

Preliminary investigation has shown that the objective of preferential procurement is not being attained; gaining a significant number of black people into the mainstream of the economy has remained a challenge.⁷⁹ This study will attempt to determine the reasons for this relative failure by enquiring into the objectives of legislation and the implementation of those objectives during public tendering.

First this study intends to examine the legal regime that embraces preferential procurement and broad-based BEE. The transformation of the legislation over the last eight years will be highlighted, in order to express the influence of the amendments. In the discussion there will be a critical analysis of the Procurement Act and Regulations together with the BBBEE Act and BEE Codes. Although there is literature in the field of public procurement the coherence between the two main legislation governing procurement, (Procurement Act and the BBBEE Act) has not enjoyed close scrutiny.

Secondly a further objective is to assess the conduct of officials in supply chain management (SCM) and the manner in which they exercise their responsibilities during the adjudication of tenders. Evidently the awarding of public tenders is notoriously subject to influence and manipulation and the constitutional requirements are more breached than observed.⁸⁰ Thus the thesis will focus on the ability to observe the constitutional imperatives during competitive bidding procedures. This will in particular

⁷⁹Bolton P *The Legal Regulation of Government Procurement in South Africa* (published LLD thesis, University of the Western Cape, 2005) 608.

⁸⁰*Minister of Social Development v Phoenix Cash & Carry* (2007)3 All SA 115 (SCA).

make reference to the way the legislation is applied during public tendering; an analysis of the various stages of competitive bidding will be pursued. It is during competitive bidding where the ability of SCM officials is tested. Another area of conduct that compromises the integrity of preferential procurement is the flouting of the constitutional principles in the procurement clause. Scandalous reports of accounting officers in government disregarding the principles, recently came under scrutiny.⁸¹ In disregarding the principles of SCM, the constitutional principles in the procurement clause are flouted.

Thirdly this thesis will analyse some of the willful practices that beleague the procurement environment. These malpractices⁸² have seen procurement laws being ignored and tender processes being by-passed. The way in which these malpractices are dealt with will be considered and improvements suggested. The significance of this study is to point out that the envisaged goal for reform by the year 2014⁸³ is being deferred by failure to root out or even suppress the practice of tender manipulation.

1.6 Research question

This study seeks to determine the causes for the failure in the objectives of preferential procurement. This will be done by first looking at the coherence between the Procurement Act and the BBEE Act as well as the linkage between the respective

⁸¹Madonsel P 'Public Protector a media briefing on the release of the SAPS lease report' 22 February 2011.

⁸²See chapter three for a discussion on these malpractices.

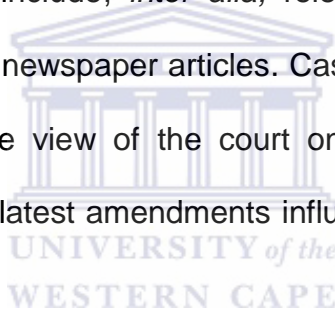
⁸³Zuma J 'State of the nation address' 11 February 2010.

www.statssa.gov.za/about_statssa/work_programmme_2010pdf (accessed 20 April 2010).

regulations. Secondly, preliminary enquiries raise the belief that challenges of practices such as willful behaviour, incompetence and self-interest are negatively affecting the use of preferential procurement as an instrument. This research will dissect the implications of these practices on preferential procurement and attempt to provide some directions on how to inhibit these practices in the process of competitive bidding.

1.7 Research methodology

The information for this literature based thesis will be sourced from primary and secondary sources which will include, *inter alia*, relevant legislation, books, theses, journals, policy documents and newspaper articles. Case law forms a significant part of the enquiry in order to get the view of the court on the challenges met by public procurement. Furthermore, the latest amendments influencing preferential procurement and BEE will be researched.



1.8 Overview of chapters

The first chapter outlines the framework of this thesis. The second chapter explores the preferential procurement legislation in South Africa. This chapter will highlight the influence of the legislative measures on preferential procurement. In doing so the study will be investigating the alignment of the relevant framework Acts in order to highlight whether there is sufficient cogency between these Acts. There have been difficulties experienced as a result of the implementation of affirmative action in the framework

legislation. The enquiry will analyse how these Acts refer to the beneficiaries of BEE and the allocation of preferential points.

Chapter three reviews the most pertinent challenges that are thwarting the success of preferential procurement. Recent reports and case law will be used to illustrate the extent and nature of these challenges. Attention will also be given to the various anti-corruption measures implemented by government.

Chapter four explains the process of competitive bidding, with the intention to illustrate the behaviour of public officials during the execution stage of the preferential procurement environment. The SCM system will be put under close scrutiny to uncover the mischief that officials display when planning, or during, public tender adjudication.



Chapter five will conclude with recommendations which encourage the successful use of preferential procurement in promoting broad-based BEE. In the summation recommendations will be made on how to suppress or perhaps combat the challenges that defeats the efficacy of preferential public procurement.

CHAPTER 2

THE LEGAL REGIME DOMINATING PREFERENTIAL PUBLIC PROCUREMENT

2.1 Introduction

In view of the general acceptance that the procurement laws are not achieving their objectives,¹ this chapter will look at the legislation regulating the field so as to determine the possible reasons for this relative failure. For this reason this chapter will pay close scrutiny to the interaction between the Preferential Public Procurement Framework Act (Procurement Act)² and Procurement Regulations (2001, 2009, 2011)³ and how it relates to the Broad-Based Black Economic Empowerment Act (BBBEE Act)⁴ and BEE Codes⁵. This study will entail an enquiry into the amendments brought about by the new Procurement Regulations 2011 which comes into effect on 7 December 2011. To analyse the procurement legislation this study will commence by explaining the basis for using public procurement to promote economic transformation.

Furthermore the BEE legislation will be examined to illustrate how the BEE Codes seek to promote coherency and the same objectives that are needed for the proliferation of broad-based BEE. This chapter will explore salient points of the BEE legislation to draw attention to the core elements that the BEE Codes advance together with the way

¹See chapter one.

²Act 5 of 2000.

³Regulations in GN R725 GG 22549 of 10 August 2001; Draft Regulations in GN1103 GG 32489 of 2009; Regulations in GN R502 GG 34350 of 8 June 2011.

⁴Act 53 of 2003. Please note when referring to BBBEE Act together with the BEE Codes this study will call it the BEE Legislation.

⁵GN112 GG 29616 of 9 February 2007.

preferential points are allocated. These core elements that need to be considered for a more broad-based approach to BEE include ownership, management, skills development and preferential procurement with other black enterprises. This discussion is essential to pin-point the target group and the manner in which benefits should accrue to them as prescribed by the legislation.⁶

The Public Finance Management Act (PFMA)⁷ will receive a brief discussion in order to present its importance in the public procurement domain. This Act oversees all financial transactions in public administration and this chapter will explain how it is observed during procurement processes.



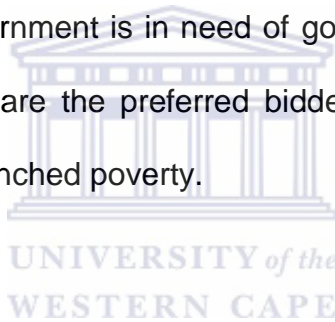
2.2 Preferential public procurement promoting BEE

The focus on BEE post apartheid was energised by the introduction of the use of preferential procurement as instrument of policy in 2000. This was realised through the preferential procurement legislation (Procurement Act and Regulations) together with the BBBEE Act and BEE Codes and was intended to bring about a coherent strategy for the implementation of a more broad-based focus for BEE.

⁶BBBEE Act (2003) s1 refers to 'broad-based black empowerment' as the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies.

⁷Act 1 of 1999.

The use of public procurement to extend economic prosperity to black people in South Africa is in parallel with international best practice.⁸ This is with particular reference to the use of state buying power to achieve its socio-economic objectives such as skills development, employment opportunities and economic empowerment for black people. To give credence to this, preferential procurement is addressed as a policy tool in the Constitution,⁹ whereby black people are given business opportunities to engage in the mainstream of the economy through procurement with government.¹⁰ In the main, preferential procurement is to be used to encourage and assist the emergence of black owned businesses, by providing black people with access to government contracts for goods or services. When government is in need of goods or services, a tender process ensues whereby black people are the preferred bidders.¹¹ In this way the government aims to relieve historically entrenched poverty.



To help achieve this progress of black people, the public procurement system is governed by legislation¹² that prescribes preferential points to this effect. It is self-evident that

⁸Arrowsmith S 'Public Procurement as an instrument of policy and the impact of market liberalisation'1995 *Law Quarterly Review* 243 notes that procurement in Northern Ireland was used to combat religious discrimination under the Fair Employment (Northern Ireland) Acts of 1976 and 1989. Non-compliance led to disqualification from participation in the procurement of Northern Island departments.

⁹Section 217.

¹⁰Watermeyer R 'The Use of Targeted Procurement as an Instrument of Poverty Alleviation and Job Creation in Infrastructure Projects' (2000) *Public Procurement Law Review* 232.

¹¹This is subject to a number of provisions see para 2.4.

¹²Procurement Act s2 (1) An organ of state must determine its preferential procurement policy and implement it within the following framework:

- (a) A preference point system must be followed;
- (b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;
- (ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;

procurement as a policy tool should be regarded as an integral part of the country's economic growth and transformation.¹³ The question is not whether South Africa can afford to use preferential public procurement as a policy tool, but rather whether it can afford not to.

2.3 The objectives of preferential procurement

The idea behind using preferential or targeted procurement is to provide black people with opportunities to participate in public procurement, despite their lack of the necessary resources, capacity or expertise. The environment, in which these aspirations are to be achieved, must have regard for the pressure it places on the public purse.¹⁴

South Africa uses a 'targeted procurement' system similar to what was successfully applied in Malaysia; in both cases the political majority is targeted for preferential procurement.¹⁵ Through targeted procurement small businesses can access markets and thereby create business opportunities for this sector. The success of preferential procurement in South Africa will, however, depend on appropriate planning, clear

BBBEE Act (2003) s9(1) In order to promote the purposes of the Act, the Minister may by notice in the Gazette issue codes of good practice on black economic empowerment that may include-

- (b) qualification criteria for preferential purposes for procurement and other economic activities.
- (c) Indicators to measure broad-based black economic empowerment.

See para 2.3 for a discussion on verification of BEE bidders.

¹³Bolton P *Law of Government Procurement in South Africa* (2007) 259.

¹⁴Bolton P 'The Use of Government Procurement as an Instrument of Policy' (2004)121(3) *South African Law Journal* 625.

¹⁵Mc Crudden C 'Integration of Social Policy into Sustainable Public Procurement: Using public procurement to achieve social outcomes' *A study for the United Nations Department of Economic and Social Affairs* (2004) 261 available at www.edf.org.uk/news/ChrisMcCruddenPaper.pdf (accessed 10 June 2010). Emsley I *The Malaysian Experience of Affirmative Action Lessons for South Africa* (1996).

identification of goals, and the willingness and ability to enforce appropriate sanctions on contractors failing to deliver on the social objectives to which they are contractually committed.¹⁶

Furthermore the success of preferential procurement is largely due to the fact that it targets those 'who ought to benefit' in a regulated manner.¹⁷ Most importantly, targeted groups (black people) should be motivated to take advantage of the preferential public procurement opportunities presented, and there should be measures in place by which the *bona fides* of target groups can readily be established.¹⁸

For this reason verification agencies have been established through the BEE Codes¹⁹. The BBEE Act²⁰ provides that indicators should be put in place to measure broad-based black economic empowerment. These indicators are contained in the BEE Codes²¹ under the generic scorecard. Each of the seven core elements contained in the scorecard is measured in an enterprise in order to obtain a BBEE status level.²² This status level of a bidder is the BBEE status received by a measuring entity based on the bidder's overall performance using the generic scorecard. Once such evaluation is done the enterprise is issued with a BEE status level certificate through a South African National

¹⁶Hawkins J & Wells J 'Modifying Infrastructure Procurement to Enhance Social Development' (2008) 4 *ATDF Journal* 61 available at http://www.atdforum.org/IMG/pdf_Modifying_infrastructure_John_Jill.pdf (accessed 10 June 2010).

¹⁷Watermeyer R (2000) 233.

¹⁸Watermeyer R (2000) 228.

¹⁹ Section 10.

²⁰Section 9(1) (c).

²¹BEE Codes (2007) s8.

²²BEE Codes (2007) s7.

Accreditation System, accredited verification agency or by registered auditors approved by the Independent Regulatory Board of Auditors.²³

2.4 The allocation of preferential points for BEE

What is essential for, and characterises, the preferential procurement policy is the implementation of a preference point system that *must* be followed.²⁴ These preference points are predetermined by the BEE Codes to BEE compliant enterprises in a dual scale system.²⁵ This basically means that price and preferential goals are the important criteria determining the tender award.

Although price is important, other criteria such as equity ownership²⁶ and development goals²⁷ as contemplated by the scorecard also play a determining role in the award. This means that preference points scored must first and foremost include points for equity ownership²⁸ by black citizens, and in addition preference points may also be scored for achieving the other six core elements provided for by the scorecard. However preference

²³Procurement Regulations (2011) reg 10.

²⁴*Grinaker LTA Ltd and Another v Tender Board (Mpumalanga) and Others* (2002) 3 All SA 336 (T) para 38 (hereafter *Grinaker*). Procurement Act s2 (1) (a) A preferential point system must be followed. (emphasis added).

²⁵Procurement Regulations 2011 reg 5 (1) states the 80/20 preference point system applies to contracts with a value equal to or above R30 000 up to R1 million, and regulation 6(1) states the 90/10 preference point system applies to contracts with a value of more than R1million.

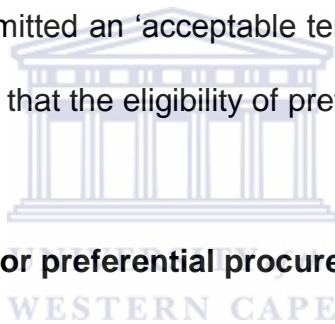
²⁶Penfold G & Reyburn P 'Public Procurement' in *Woolman S et al (eds) Constitutional Law of South Africa 2ed* (2004) (2004) para 25-16 notes that: '[e]quity ownership is equated to the percentage of an enterprise or business owned by individuals or, in respect of a company, the percentage of a company's shares that are owned by individuals who are actively involved in the management of the enterprise or business and exercise control over the enterprise, commensurate with their degree of ownership at the closing date of tender.'

²⁷Reconstruction and Development Program (RDP) as in GG 16085 of 23 November 1994. RDP goals are now contained in the seven core elements of the generic scorecard provided by the BBBEE Codes.

²⁸BEE Codes generic score cards code 000 provide for 20 points for ownership. Code 100 provides for the ownership key principles. Procurement Regulations (2011) reg 5(2); 6 (2) provides a B-BEE status level contributor table that includes those points for ownership.

points may only be scored to the maximum of 10 or 20 points, respectively, depending on the value of the tender.

The reason for the dual-scale system is to redress past economic imbalances, which placed black people in the impoverished position they are in today. As a result they cannot compete effectively economically because they are unable to offer the best prices for government contracts; this is the reason that price cannot be the only determining criterion.²⁹ Incidentally, the tender documents must specify which one of the dual-scale preference point systems will be utilised in the adjudication of tenders.³⁰ Needless to say it is only after a bidder has submitted an 'acceptable tender'³¹ (which should include their BBBEE verification certificates), that the eligibility of preference points arises.



2.5 Legislative provisions for preferential procurement

The decision to award procurement contracts to black people is not taken arbitrarily, on the contrary it is a complex decision dominated by a host of Acts. Because, procuring goods or services for the state involves the spending of state resources the overarching legislation for this is the PFMA and Treasury Regulations. In addition it was necessary to have legislation to specifically promote preferential, to ensure that the economic promotion of black people is done fairly, as to avoid those it did not intend to benefit. For this reason the Procurement Act and Regulations was implemented to provide a

²⁹Penfold G & Reyburn P (2004) 25-16.

³⁰Regulations (2011) reg 3 (b).

³¹Procurement Act s1 (i) "acceptable tender" 'means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.'

framework to state entities to guide their policies for preferential procurement. This Act provides for the allocation of preferential points to HDIs by measuring specific goals. Subsequent to this legislation, the BBBEE Act and BEE Codes were enacted to provide for a more broad-based approach, whereby seven core elements are observed when allocating preferential points which are prescribed. This legislation (BBBEE Act and Codes) was also aimed at bringing about a more coherent strategy for BEE. However this coherency was not to because the two Acts promote two separate visions.

This disharmony has been the situation since the implementation of the BBBEE Act in 2003. Which means, for the past eight years the legislation promoting preferential procurement, has been causing disparity as to the recipients of preferential points and the evaluation of those points.



The importance of the procurement legislation was highlighted in the *CEO of the South African Social Security Agency N.O and Other v Cash Paymaster Services (Pty) Ltd*³² where the Supreme Court of Appeal intimated that once legislation echoing the constitutional demands of section 217(1) is put in place, the procurement process must take place within the constraints of such legislation. It is incumbent on government not to award public tenders indiscriminately to black people without due consideration for the laws and policies that is implemented for this purpose, chiefly, the PFMA,³³ Treasury Regulations 2005,³⁴ the Procurement Act and Regulations 2011 and the BBBEE Act and

³²(2011) 3 All SA 233 (SCA) para 15.

³³Act 1 of 1999, as amended by Act 29 of 1999.

³⁴GN R225 GG 27388 of 15 March 2005; as amended by GN R146 GG 29644 of 20 February 2007.

BEE Codes. How the legislation and its amendments influence preferential procurement needs to be explored to expose how it will affect the procurement environment.

2.5.1 Legislation dominating preferential procurement

Arrowsmith argues that success in public procurement can only be achieved if the legal rules are stabilised by an adequate procurement 'environment'.³⁵ First there must be a well-designed legislative framework. Secondly, proper recruitment and training of procurement personnel is key in ensuring that discretion is exercised wisely³⁶ against the backdrop of the framework legislation, when adjudicating tenders. In both instances the procurement system in South Africa is lacking. First, this is evidenced by the Procurement Act (the framework act for preferential procurement) being misaligned with the BBEE Act (framework act for BEE).³⁷ Secondly, due to this disharmony procurement personnel cannot exercise their decisions on a rational basis since this is influenced by the dual definition given for target groups and the different methods of procuring preferential points. This incoherency has led to much confusion in the public procurement arena due to the tendency by public officials to ignore the BBEE Act and apply the provisions of the Procurement Act in allocating preferential points.³⁸

2.5.2 The Public Finance Management Act of 1999 and Treasury Regulations 2005

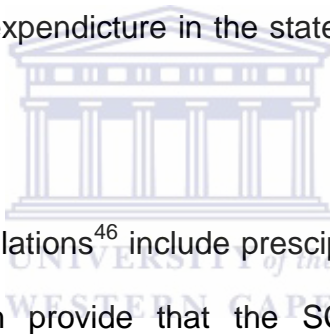
³⁵Arrowsmith S, Linarelli J & Wallace D Jr *Regulating Public Procurement: National and International Perspective* (2000) 18.

³⁶Arrowsmith S, Linarelli J & Wallace D Jr (2000) 19. See chapter four para 4.3 for discussion on skills.

³⁷See para 2.5.3 for discussion on the disharmony.

³⁸AGSA Report on Investigation into the Procurement of Various Contracts at the Gauteng Provincial Department of Roads and Transport (June 2011) (hereafter AGSA report June 2011); AGSA Report to Eastern Cape Provincial Legislature on Investigation at Department of Roads and Transport (July 2010).

Public procurement entails the use of public money and the PFMA also plays a central role in procurement procedures. The PFMA and Treasury Regulations³⁹ regulate financial management in the national and provincial spheres of government while the Municipal Finance Management Act (MFMA)⁴⁰ similarly dictates sound financial management in the affairs of municipalities and other institutions in the local government sphere. Evidently the PFMA,⁴¹ Treasury Regulations⁴² (which also regulate procurement of goods and services and SCM)⁴³ and MFMA⁴⁴ resonates with section 217 (1) because it mirrors the same sentiment that procurement processes must be 'fair, equitable, transparent, competitive and cost-effective'. The inclusion of constitutional principles in the main legislation that governs public expenditure in the state, indicate that organs of state are bound by these principles.⁴⁵



Furthermore the Treasury Regulations⁴⁶ include prescripts for SCM on the the acquisition of goods and services which provide that the SCM systems must consider the Procurement Act and the BBEE Act when contracting for goods and services.⁴⁷ It makes good financial sense that the PFMA applies to all government departments,

³⁹Government Gazette 27388 GN R225 of 15 March 2005; as amended by GN R146 GG 29644 of 20 February 2007.

⁴⁰Act 56 of 2003.

⁴¹Section. 38(1)(a)(iii) provides that the accounting officer for a department, trading entity, or constitutional institution must ensure the use and maintenance of "an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective" and section 51(1)(a)(iii) provides that an accounting authority for a public entity must ensure that that public entity does the same.

⁴²Regulation 16A3.2(a) A supply chain management system referred to in paragraph 16A.3.1 must– be fair, equitable, transparent, competitive and cost effective.

⁴³Regulation 16A6. See chapter four para 4.2.1 for discussion on SCM.

⁴⁴Sections 111–12 provide that each municipality and municipal entity must have and implement a supply chain management policy that is "fair, equitable, transparent, competitive and cost-effective" and complies with a prescribed regulatory framework that is "fair, equitable, transparent, competitive and cost-effective."

⁴⁵*CAE Construction CC v Petroleum Oil & Gas Corporation of SA (Pty) Ltd & Others* (2007) JOL 18912 (C) para 27.

⁴⁶Regulations 16A.

⁴⁷Regulations 16A3.2 (b),(c).

parastatals, utilities and government-owned enterprises as designated by the act.⁴⁸ Needless to say a breach of section 217(1) principles during tender adjudication is a breach of constitutional principles and also a breach of the PFMA (or MFMA).

The PFMA no doubt plays a pivotal role in the functioning of public contracting entities since it lays the ground rules for public financial transactions and obliges public bodies to maintain appropriate procurement systems.⁴⁹ Despite this, recent findings by the Auditor General of South Africa (AGSA) revealed that section 217 (1) is also contravened by officials not keeping proper centralised filing systems in maintaining SCM policies and processes and thereby failed to submit reports for auditing.⁵⁰ This behaviour falls foul of the PFMA and leads to unlawful behaviour. In *Steenkamp v Provincial Tender Board, Eastern Cape*⁵¹ the Constitutional Court averred that ‘in our constitutional dispensation every failure of administrative justice amounts to a breach of a constitutional duty and is unlawful.’

Such unlawful behaviour was also displayed in the recent South African Police (SAPS) lease debacle. The Public Protector was tasked to investigate the non-compliance with tender procedures and thereby constitutional principles for the leasing of the SAPS headquarters in the amount of R500 million.⁵² The findings showed that this improper

⁴⁸Williams S ‘The use of exclusions for corruption in developing country procurement: The case of South Africa’ (2007) 51 *Journal of African Law* 6.

⁴⁹Williams S (2007) 6.

⁵⁰AGSA Report (June 2011) para 1.2.2.

⁵¹(2007)(3) SA 121 (CC) para 137.

⁵²Madonsela T ‘Public Protector, SAPS lease report’ 22 February 2011.

behaviour occurred because the SAPS failed to implement proper controls in terms of SCM, as required by the PFMA and relevant procurement prescripts.⁵³

Moreover, the SAPS failed to comply 'with the relevant provisions of the PFMA, Treasury Regulations and supply chain management rules and policies.'⁵⁴ There was also breach of fiduciary duty by the minister insofar as good governance in terms of the PFMA which led to maladministration and reckless dealing in public funds.⁵⁵

2.5.3 The Procurement Act of 2000 and Regulations of 2011: Disharmony between legislation creating a hindrance

As noted the Procurement Act provides the framework within which organs of state should structure their preferential procurement policies. On the other hand the BBBEE Act provides for the framework for the broad-based application of BEE. These Acts dominates the promotion of preferential procurement and therein lays the importance for its cogency.

The congruency does not exist due to the fact that the Procurement Act⁵⁶ provides for preferential points that must accrue to historically disadvantaged individuals (HDIs) by measuring specific goals and RDP goals.⁵⁷ The BBBEE Act on the other hand accrues

⁵³Madonsela T 'Public Protector: SAPS lease report' 22 February 2011.

⁵⁴Madonsela T 'Public Protector: SAPS lease report' 22 February 2011.

⁵⁵Madonsela T 'Public Protector: SAPS lease report' 22 February 2011.

⁵⁶Section 2(1)(d)(i) the specific goals may include- contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability; DTI Policy Strategy (2003) para 3.22 refers to HDIs as collective reference to African, Coloured and Indian South African citizens unfairly discriminated against during the apartheid-era.

⁵⁷Reconstruction and Development Program as published in GG 16085 dated 23 November 1994 provides for a description on these goals which is codified in the BEE Codes (2007) s8.

these preferential points to black people, by providing through the BEE Codes for a predetermined score card, detailing the points to be considered when calculating preferential points. The reason for this discord is the changed vision about the target groups promoted by the BEE legislation which advocates for more broad-based economic empowerment than the Procurement Act.

This misalignment of the framework legislation has been a topic of discussion since 2003 (when the BBEE Bill was contemplated).⁵⁸ In order to alleviate the discord the Procurement Regulations were redrafted. The Procurement Regulations were to define the target groups for BEE and provide for the accrual of preferential point in tandem with the BEE Codes. After eight years the Procurement Regulations 2011 were finally enacted and will be effective from 7 December 2011. Interestingly the finalised Procurement Regulations 2011 completely omitted any definition for the target group that should benefit from preferential procurement. This resulted in the Procurement Act continuing to cause distortions in this regard, and the Act needs amendment coherent to the BBEE Act that defines the target group as black people. In addition the evaluation of preferential points as prescribed by the Procurement Act was not remedied by the Procurement Regulations 2011 which now prescribe the calculation of preference points as provided for in the BEE Codes. This is because subordinate legislation (Regulations) cannot remedy the framework Act (Procurement Act); it can only be remedied by amending the Act

⁵⁸Parliamentary Monitoring Group 'National Treasury Preferential Procurement Policy Framework Act: Hearings' 8 September 2003 (hereafter PMG Procurement Act hearings) available at <http://www.pmg.org.za/minutes/20030907-preferential-procurement-policy-framework-act-hearings> (accessed 30 April 2011).

It is quite unfortunate that government has dragged its feet for eight years to fix the gap in the legislation and manages to come out with an end product that does not mend the two most important points namely, the identity of those who are to benefit and how the applicants should be viewed. Seemingly the Procurement Act will continue to create discontent and hindrance in the procurement environment. For this reason this study will crystallise the time line preceding the implementation of the Procurement Regulations 2011 to highlight the problems in the legislation that will continue to bedevil the procurement environment.

2.5.3.1 Time line of disharmony

As early as 2003 the parliamentary finance select committee⁵⁹ held a hearing in parliament with regard to the problems that were proving troublesome when implementing the provisions of the Procurement Act. The contention at this hearing was that the Procurement Act's definition of HDIs which refers to the target groups is problematic and that it created loopholes.⁶⁰ An example of the unintended consequence of this definition is that a white, male owned business can transfer his business to his white spouse in order to obtain preferential points and thereby win public tenders without having to embrace any BEE ideologies.⁶¹ Furthermore the concerns were compounded by the following shortcomings in the Procurement Act:

⁵⁹PMG Procurement Act hearings 2003.

⁶⁰PMG Procurement Act hearings 2003.

⁶¹PMG Procurement Act hearings 2003.

- 'It provided no formulated means of applying policy (goals were set by officials without specific targets to be achieved);
- it lacked mechanisms to monitor fronting ('rent-a-black');
- there was no uniformity in how different state organs applied the Act;
- it was not aligned with the Black Economic Empowerment (BEE) Act;
- the RDP goals the Act aimed to achieve could not be measured;
- the calculations required to award points were too many and too laborious.⁶²

The finance committee noted that the different definitions of beneficiaries in the Acts were untenable and urged that the Procurement Act be aligned with the BEE Bill.⁶³ Despite this warning the BBBEE Act was implemented without amendment to the Procurement Act thereby causing the disagreement. In an attempt to remedy this, the Regulations 2001 were to be redrafted in 2004⁶⁴ in anticipation of bringing the Procurement Act more in line with the BBBEE Act (of 2003).

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Notwithstanding this the National Treasury sent out a circular on 13 February 2007 to inform accounting officers of the latest development regarding the alignment of the Procurement Act, with the aims of the BBBEE Act and its related strategy.⁶⁵ This circular related to the fact that the revised Procurement Act must be finalised and that the relevant

⁶²PMG Procurement Act hearings 2003.

⁶³PMG Procurement Act hearings 2003.

⁶⁴Draft Preferential Procurement Regulations, in GN 2174 GG 26863 of 4 October 2004.

⁶⁵National Treasury 'Supply Chain Management: Alignment of Preferential Procurement with the Aims of the BBBEE Act and its Related Strategy' para1, 18 April 2007 (hereafter National Treasury SCM alignment of Preferential Procurement with the BBBEE Act) available at <http://www.treasury.gov.za/divisions/sf/sc/PPPFA/circular%20070419.pdf> (accessed 30 April 2011)

Bill be submitted to parliament for consideration by June 2007.⁶⁶ The revised legislation (Procurement Act) was intended to include:

'broadening the basis of evaluation to beyond only equity ownership and the promotion of the non-quantifiable RDP goals; bidders will also be able to earn preferences for other elements such as the number of black people in management, transfer of skills, equity employment, indirect empowerment by procuring goods and services from black enterprises and socio-economic development initiatives.'⁶⁷

This was clearly an attempt to bring the Procurement Act in concert with the objectives of the BBBEE Act. However in the meantime the National Treasury urged accounting officers and accounting authorities to apply the current Procurement Act⁶⁸ and the Procurement Regulation 2001. This status quo was to remain until such time that the revised Procurement Act was officially enacted and the revised regulations pertaining thereto were formally promulgated by the Minister of Finance.⁶⁹ The revised Procurement Act had not seen the light of day when in 2009 this disjuncture in the legislation came under scrutiny again. This was when the National Treasury made presentations to the parliamentary briefing committee that the Procurement Act was not aligned with the broader goals of the BBBEE Act.⁷⁰

⁶⁶National Treasury SCM Alignment of Preferential Procurement with the BBBEE Act para 3.2. The National Treasury will convene various workshops and training initiatives to support accounting officers and accounting authorities in the implementation of the new preferential procurement policy as soon as the Act and its Regulations are amended para 4.2.

⁶⁷National Treasury SCM Alignment of Preferential Procurement with the BBBEE Act para 3.4.

⁶⁸Act 5 of 2000.

⁶⁹National Treasury SCM alignment of Preferential Procurement with the BBBEE Act para 4.1.

⁷⁰Parliamentary Monitoring Group 'National Treasury Preferential Procurement Draft Regulations Briefing' 9 September 2009 (hereafter PMG 'Draft Regulations briefing 2009') available at <http://www.pmg.org.za/report/20090909-draft-preferential-procurement-regulations> (accessed 3 May 2011).

It was again highlighted that the Procurement Act⁷¹ incorporated a preferential point system that used the promotion of specific and 13 RDP goals to determine preference points during public tendering.⁷² This is in contrast with the BBEE Act that refers to black people as beneficiaries and a score table that predetermines preferential points, in the 2007 BEE Codes.⁷³ Furthermore, with the implementation of the BEE Codes, the Procurement Regulations of 2004 was updated in parallel with these Codes. This was done by a working group consisting of the National Treasury and the BEE unit of DTI, and the draft Procurement Regulations 2009 was the product of this labour, which was aimed at mending the rift in the legislation. The new draft Procurement Regulations 2009 replaced the awarding of preferential points on the basis of HDI status and the promotion of RDP goals, with the BEE rating of a bidder as per the predetermined table⁷⁴ (as provided for in the BEE Codes). Furthermore these draft Preferential Regulations 2009⁷⁵ also defined black people as the generic term identical to the BBEE Act.

The National Treasury recommended that in the short term the amended draft Procurement Regulations 2009 be used.⁷⁶ In contradiction the National Treasury recommended that 'in the short-term the Procurement Act would be retained'.⁷⁷ Cognisance should reflect that the National Treasury recommended that the draft Procurement Regulations of 2009, which were not effective and not law yet, be used.

⁷¹Sections 2(1) (b) (i); (d) (i); (ii)

⁷²PMG Draft Regulations briefing 2009.

⁷³BEE Codes in GN 112 GG 29617 of 9 February 2007. Objectives: s1.2 specifies the application of the Codes and the basis for measurements under the Codes; s1.5 specifies the elements of the BBEE measurable under the Generic Scorecard.

⁷⁴PMG Draft Regulations briefing 2009. Draft Regulations 2009 reg 4(3); 5(3); 6(3).

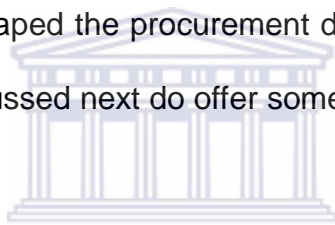
⁷⁵Regulation 1 (f)"Black people" is a generic term, which bears the same meaning assigned to this expression in the Broad-Based Black Economic Empowerment Act, 2003 and its Codes of Good Practice.

⁷⁶PMG Draft Regulations briefing 2009.

⁷⁷PMG Draft Regulations briefing 2009.

Furthermore, there was no further recommendation to update the Procurement Act; instead it was recommended that the Procurement Act be completely repealed in the long term. This contradicted the earlier circular in 2007 referring to the finalisation of the revised Procurement Act. This ultimately meant that the ambiguities in the definition of black people and the measurement of preference points remained in use.

This perpetuated the situation as public officials may choose to apply the Procurement Act or the BBBEE Act, when measuring preferential points. The much awaited final Procurement Regulations 2011 failed to eliminate this choice and the much needed amended Procurement Act escaped the procurement domain. However the Procurement Regulations 2011 which is discussed next do offer some attention grabbing changes.



2.5.3.2 The Procurement Regulations 2011 amendments and its impact on preferential procurement

The Aids Law Project had raised concerns in its submissions to the regulations when it was still in draft form. It submitted that the Procurement Act and Regulations⁷⁸ were in conflict in the criteria that should be considered when not awarding the bid to the highest scorer.⁷⁹ The Procurement Act provides for objective criteria⁸⁰ to determine this, whereas the draft Procurement Regulations 2009 (and Regulations 2001), provided for reasonable and justifiable grounds to be determined when awarding to such a bidder. This was

⁷⁸Draft Procurement Regulations (2009).

⁷⁹Aids Law Project 'Submission on Draft Preferential Procurement Regulations 2009' 6 available at <http://www.tac.org.za/community/files/file/ALP%20submission%20on%20draft%20Preferential%20Procurement%20Regulations,%202009.pdf> (accessed 22 April 2011).

⁸⁰See para 2.6.1 for discussion on objective criteria.

remedied by bringing the Procurement Regulations 2011⁸¹ in line with section 2(1) (f) of the Procurement Act which provides for objective criteria to be observed when awarding to a bidder not scoring highest points.

The court in *Sizabonke Civills cc t/a Pilcon Projects v Zululand District Municipality and Others*⁸² declared regulation 8 of Regulations 2001⁸³ invalid on the basis that it conflicted with the Procurement Act. The contention was that the regulation referred to functionality and price which gives the impression that the points allocated for price may be split between price and functionality. In contrast to this the Procurement Act⁸⁴ provides for the allocation of points for price only. This ground of invalidity was remedied by the Procurement Regulations 2011⁸⁵ providing that points for functionality should be evaluated separately from points for price.

Whether this solves the problem need to be answered in the light of the AGSA report into provincial procurement irregularities.⁸⁶ It was found that the 90 points allocated for price is as practice split into 30 points for functionality and 60 points for price. Notably the AGSA do not lament this as a deviation from the Procurement Act, despite this report being completed after the court in *Sizabonke*⁸⁷ declared the Procurement Regulations 2001,

⁸¹Regulation 7 (1) A contract may be awarded to a tenderer that did not score the highest total number of points, only in accordance with s2 (1) (f) of the Act.

⁸²(10878/2009) ZAKZPHC 21 (2010) para 30 (hereafter *Sizabonke*).

⁸³Regulation 8 (1) an organ of state must, in the tender documents, indicate if, in respect of a particular tender invitation, tenders will be evaluated on functionality and price. Regulation 8(3) the total combined points allowed for functionality and price may, in respect of tenders with an estimated Rand value above R500, 000, not exceed 90 points.

⁸⁴Section 2(1) (b) (i) provide for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price.

⁸⁵Regulation 4.

⁸⁶AGSA report June 2011 para 10.2.1.7 (a).

⁸⁷(10878/2009) ZAKZPHC 21 (2010).

(providing for price and functionality), invalid. Interestingly the investigation revealed that the SCM officials chose to use the Procurement Act to calculate preferential points and the term HDIs were used to calculate equity ownership, in effect ignoring the BBBEE Act and BEE Codes.⁸⁸

The Procurement Regulations 2011 further reflect the following amendments:

- For ease of reference the Procurement Regulations 2011⁸⁹ include a BBBEE status table which measures the BEE status of bidders on seven levels.⁹⁰ This conforms to the BEE Codes which provides for a generic scorecard to this effect. What this means is that BEE is not only measured in terms of ownership, management and control of the business, but extends a more broad-based approach, which include *inter alia* enterprise development, rural development and points for new entrants.⁹¹ On the other hand the Procurement Act still provides for a different formula when measuring preference points which allows for discretion in applying specific goals (this cannot be remedied by the Procurement Regulations 2011). It is also noted by the AGSA report that SCM officials elect to observe the Procurement Act during preferential procurement⁹² and thereby do not promote the broad-based economic empowerment as anticipated by the BBBEE Act and BEE Codes.

⁸⁸AGSA report June 2011 para10.2.1.7 (b).

⁸⁹Regulation 5(2).

⁹⁰These levels are discussed in para 2.7.

⁹¹See para 2.7 for a discussion on the BBBEE Act and BEE Codes.

⁹²AGSA report June 2011 para10.2.1.7 (b).

- The Regulations 2011⁹³ are further extended to apply to all organs of state including, national and provincial departments, municipalities, parliament, provincial legislatures and schedule 3A and 3C public entities (as contemplated by the PFMA). This amendment resolves a major point of contention in the earlier code. An improvement brought about by the regulations is that organs of state must apply a preferential procurement system which is compliant with the Procurement Act and Regulations.⁹⁴ These entities had a choice to deviate from the framework of the Procurement Act and Regulations under the Procurement Regulations 2001.⁹⁵

This creates uniformity as parastatals like ESKOM, TELKOM and TRANSNET must observe the Procurement Act and Regulations when engaging in the procurement of goods and services. This inclusion was necessary bearing in mind the vast budgets⁹⁶ these parastatals spend on procurement.

- The threshold value for bids going out on tender has also increased depending on the point system used.⁹⁷ This gives SMMEs access to bigger contract with government, and if successful this will empower those enterprises to expand their employment base.

⁹³Regulation 2(1).

⁹⁴Regulations (2011) 2((2) An organ of state contemplated in sub-regulation (1) must, unless the Minister of Finance has directed otherwise, only apply a preferential procurement system which is in accordance with the Act and these regulations.

⁹⁵Regulation 2(3) an organ of state may deviate from the framework contemplated in section 2 of the Act in respect of a pre-determined tariff based professional appointments.

⁹⁶Creamer T 'Eskom recovers to R3,6bn profit, but culls R15bn worth of capex in the process' *Polity 2* June 2010 reports that ESKOM has a procurement budget of R9 billion available at <http://www.polity.org.za/article/eskom-recovers-to-r36bn-profit-but-culls-r15bn-worth-of-capex-in-the-process-2010-06-02-1> (accessed 10 October 2011).

⁹⁷The 80/20 preference points system has been increased from R500 000 to R1 000 000. The 90/10 value has been increased to bids of more than R1 million rand.

Notwithstanding these changes, the Procurement Regulations 2011 do not resolve the discord between the BBEE Act and the Procurement Act. To remedy this, the Procurement Act has to be aligned to the way the BEE Codes measure preferential points, and the way the BBEE Act defines the preferential points recipients, which means the Procurement Act should be amended. Failing to amend the Procurement Act will prolong the disharmony; that effect will be elaborated on next.

2.5.3.3 The impact of what was not harmonised

The economic empowerment of black people is undermined by the points system under the Procurement Act which enables white-owned companies to undercut prices and thereby benefit from tender awards without promoting BEE. For example a white-owned company with disabled white people and white women offering the best price will outscore a black-owned company with a higher price. This is as a result of the Procurement Act including white females⁹⁸ and white disabled people as HDIs, meaning they can score preferential points through public tendering, lawfully, without having to subscribe to any policy to broaden BEE. This situation is untenable in sustaining preferential procurement.

The problem with the Procurement Regulations 2011 is that it was cross-referenced to the problems created by the Regulations 2001. That is why it was drafted on the back of the BEE Codes on how to measure preferential points, without due regard to the provisions of the Procurement Act. Instead the Procurement Act should have been amended as such

⁹⁸Notwithstanding that black women were discriminated by law, whilst white women bore disadvantage due to social preferences.

and the Procurement Regulations 2011 should have followed suit. The current Procurement Regulations created a new problem which now renders it incoherent with the Procurement Act. The evidenced by the fact that the Procurement Regulations 2011 provide for a table that predetermines the preferential points for BEE compliant bidders, whereas the Procurement Act measures preferential points through specific and RDP goals.

This compounded the cogency problem in public procurement since the regulations may not be inconsistent with the Procurement Act, as this is against the principle of legality.⁹⁹ The fact is the impugned Procurement Act remains law together with the inconsistent Regulations 2011. This is unlawful and therefore cause for concern. This state of affairs will cause confusion in bid adjudication during which SCM officials¹⁰⁰ must consider the evaluation and adjudication of public procurement in terms of the Procurement Act and BBBEE Act.

This inconsistency aids fronting because black people can front for white companies since the Procurement Act does not employ the strict rules for measuring equity as the BEE Codes do. A case in point is the ground breaking *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another*¹⁰¹ where the director (black) had left the company, but they continued to use him as a statistic to score preferential points and thereby acquired several tender awards. If the BEE Codes are correctly applied this situation may be circumvented as the Codes dictate re-evaluation of

⁹⁹ *Sizabonke* (10878/2009) ZAKZPHC 21 (2010) para 28.

¹⁰⁰ Treasury Regulations 16A3.2 (b); (c).

¹⁰¹ (2011) 1 SA 327 (CC).

the BEE verification certificate every two years, to ensure that the BEE status of a bidder is monitored. This is further supported by DTI establishing a central database containing the information underlying each verification certificate.¹⁰²

2.6 The Procurement Act: Possible disregard of the highest preferential points

Bolton reasons that the most controversial procurement provision is section 2 (1) (f) of the Procurement Act¹⁰³ which provides that: 'the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer'. This provision is unusual since public officials in public procurement are expected to guard against wasteful expenditure and observe value for money¹⁰⁴ whereas this regulation necessarily promotes that a tender may be awarded to a bidder offering a higher price. Moreover the Procurement Act expresses in peremptory terms that the contract *must* be awarded to the bidder scoring the highest points (which means the lowest price). The court also confirmed in *RHI Joint Venture v Minister of Roads and Public Works*¹⁰⁵ that the tender board has the special responsibility of ensuring that tenders awarded constitute the minimum costs to the government. This being said, the major and sole consideration is

¹⁰²BEE Codes s10.9.

¹⁰³Bolton P 'The Use of Government Procurement as an Instrument of Policy' (2004) 121(3) SALJ 627. Also see Regulations (2011) s7 a contract may be awarded to a tenderer that did not score the highest total number of points, only in accordance with section 2(1)(f) of the Act.

¹⁰⁴Treasury Regulations 9.1 also see PFMA s38; 76 (2) (e).

¹⁰⁵(2003) 5 BCLR 544 (CK) para 25 (*hereafter RHI Joint Venture*).

that points are allocated for price and empowerment; the combination of best price and BBEE status are the determining factors.¹⁰⁶

The court in *Grinaker*¹⁰⁷ agreed with this approach and held that, the awarding of a tender to a bidder not tendering the lowest price, will conflict with, not only the Procurement Act but also the Constitution insofar as section 217(1) is concerned. This will result in a contract which is not competitive or cost-effective. The court emphasised the importance of the lowest price, by overturning the tender board's decision (which saw the tender awarded to the bidder with the highest price) and awarded the tender to the bidder offering the lowest price.¹⁰⁸

Nevertheless, although the bidder scoring the highest points *must* be selected, the highest points with the lowest price do not necessarily land a bidder the tender award. This is contemplated by the Procurement Act¹⁰⁹ which provides for objective criteria to be considered in awarding the tender to a bidder not scoring the highest points.¹¹⁰ What this ultimately means, is that there must first be a determination of which bidder scored the highest points based on their BBEE status level certificate. Secondly a determination of whether objective criteria (as in the Procurement Act) exist, in addition to those

¹⁰⁶*Grinaker LTA Ltd and Another v Tender Board (Mpumalanga) and Others* (2002) 3 All SA 336 (T) para 66 (hereafter *Grinaker*).

¹⁰⁷*Grinaker* (2002) 3 All SA 336 (T) para 70.

¹⁰⁸*Grinaker* (2002) 3 All SA 336 (T) para 70.

¹⁰⁹Procurement Act s 2(1)(f) the contract *must* be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer' (emphasis added). Paragraphs (d) and (e) set out specific goals for which preference points can be awarded and require that any goals for which preference points will be awarded be indicated in the conditions of tender.

¹¹⁰See para 6.3.1.

contemplated in the core elements of the BEE Codes, justifying the award of a tender to another bidder.¹¹¹

The legislature envisaged that, over and above the criteria noted in the Procurement Act,¹¹² there must be other objective criteria justifying awarding the bid to another tenderer.¹¹³ It stands to reason that the legislature did not intend that the criteria contemplated in the BEE Codes should be taken into account twice.¹¹⁴ Cognisance should be taken that such other objective criteria only come into consideration when considering a tender other than the one scoring the highest points.¹¹⁵

Despite the fact that a bidder with a higher price (subject to objective criteria) may be awarded the tender, value for money is seen as the primary goal of most procurement systems¹¹⁶ The National Treasury states: 'In its most basic form, value for money is the reason for an institution to enter into a private-public partnership.'¹¹⁷ 'Value for money' is not a vague term but rather a term that is defined in monetary terms and will be subject to audit.¹¹⁸ This conforms to the principle that when organs of state contract for goods or

¹¹¹ *Grinaker* (2002) 3 All SA 336 (T) paras 40-1.

¹¹² *Road Mac Surfacing, Kgotsong Civils Joint Venture and Another v MEC for the Department of Transport and Roads, North West Province and Others* (2005) JDR 1033 (HC) para 22. (hereafter *Road Mac Surfacing*).

¹¹³ *Grinaker* (2002) 3 All SA 336 (T) para 60.

¹¹⁴ *Grinaker* (2002) 3 All SA 336 (T) para 60.

¹¹⁵ *Grinaker* (2002) 3 All SA 336 (T) para 62.

¹¹⁶ Arrowsmith S, Linarelli J & Wallace D Jr (2000) 28, 29.

¹¹⁷ National Treasury: Public Private Partnership Manual, Module 5: PPP Procurement 5 (hereafter National Treasury PPP Manual) available at www.nationaltreasury.gov.za (accessed 10 November 2010).

¹¹⁸ National Treasury PPP Manual 5.

services, the aim must be to get the best possible terms on goods or services which are suitable for the requirements.¹¹⁹

Nevertheless, accepting the lowest price tender 'can have negative repercussions with implications for the achievement of social objectives'.¹²⁰ When accepting a tender with a higher price such a decision must further the social objectives that underscores BEE. The aim should be that these social objectives should include creative ways of furthering the success of disadvantaged black bidders. Obviously there is a need for caution where there is room for abuse in the decision not to award to the bidder with the highest score, particularly now that the Procurement Regulations 2011¹²¹ do not require notice to the National Treasury or Auditor-general of such a decision. What comes to mind is that public officials may collude with a potential bidder and manipulate what will be considered objective criteria, without the other bidders' knowledge. This is possible because there is no statutory requirement that states that objective criteria be stated in the tender documents.¹²² The reason for this is that the Procurement Act clearly specifies specific goals for which points may be awarded; in contrast objective criteria are not specified in

¹¹⁹Arrowsmith S, Linarelli J & Wallace D Jr (2000) 29 notes 'For example, an information technology system purchased to process information for the tax authorities must be capable of handling the volume of information required in a suitable form.'

¹²⁰Hawkins J & Wells J 'Modifying Infrastructure Procurement to Enhance Social Development' (2008) 4 (4)*ATDF Journal* 60 notes: 'If the tender price is very low the successful bidder may be led to cut costs by cheating on materials and taking other shortcuts that can affect the quality of the product. The successful bidder may also cut back on labour costs by pushing down wages, hiring casual workers and failing to meet contractual requirements to ensure the health, safety and welfare of the workers.'

¹²¹Interestingly the draft Regulations 2009 reg 9(2) provided that 'if a bid other than the one that scored the highest number of points is approved, the organ of state must, in writing, within ten (10) working days notify the Auditor-General and the relevant treasury of the reasons for not selecting the bidder that scored the highest number of points.'

¹²²In *Road Mac Surfacing (Pty) Ltd v MEC for the Department of Transport and Roads, North-West Province and Others, Raubex (Pty) Ltd v MEC for the Department of Transport and Roads, North-West Province and Others* (820/05, 821/05) (2006) 54 (ZANWHC) para 33 (hereafter *Road Mac Surfacing*).

the Act but will become apparent during the tender evaluation.¹²³ Moreover the advertised tender should stipulate that the Procurement Act will be considered in the adjudication of the tender.

Furthermore the AGSA report¹²⁴ revealed in a recent study that in the Free State Province four contracts were awarded to contractors that had not scored the highest points and no reasons for these decisions were documented. Two of the four contracts were cancelled due to insufficient progress and in the other two contracts projects were delayed or the workmanship was unsatisfactory.¹²⁵ In addition one of the contractors was previously contacted to the same project and it was terminated due to lack of performance.¹²⁶ This problem was aggravated in the Limpopo Province where the audit team found that 89 percent of the 35 recommendable bids for a tender were incorrectly calculated, leading to contracts awarded to bidders that did not score the highest points.¹²⁷

The objective criteria which should be considered have lent further controversy to the procurement environment. There has been reported misuse of the term 'objective criteria' which will be discussed next.

2.6.1 'Objective criteria' to disregard lowest price

¹²³ *Road Mac Surfacing* (2006) 54 (ZANWHC) para 33. Also see Procurement Act s 2(1) (d); (f).

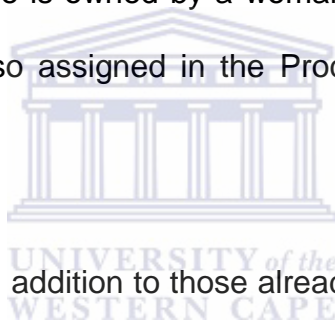
¹²⁴ Report of the Auditor-General of South Africa to Parliament on a performance audit of the infrastructure delivery process at the provincial departments of Education and Health August 2011 para 2.1.5 (a) (hereafter AGSA report on Education and Health Departments) available at <http://www.agsa.co.za/Reports%20Documents/performance%20audit%20of%20the%20infrastructure%20delivery%20process.pdf>

¹²⁵ AGSA report on Education and Health Departments August 2011 para 2.1.5 (a).

¹²⁶ AGSA report on Education and Health Departments August 2011 para 2.1.5 (a).

¹²⁷ AGSA report on Education and Health Departments August 2011 para 2.1.5 (b).

The phrase 'objective criteria' has been the reason for controversy, when deciding what to consider as such. In *Cash Paymaster Services*¹²⁸ the court held that it is important to note, that as important as the use of procurement is as a policy tool, it does not trump the attainment of value for money. For this reason close observation of such 'other' objective criteria is essential, as public officials have displayed a subjective attitude in its interpretation as exposed by the court in *RHI Joint Venture*.¹²⁹ It was held that 'expenditure on local labour and economy' is not considered as 'other' objective criteria as it already ranked in the preference point system (generic scorecard).¹³⁰ In the same vein, the fact that a bidding enterprise is owned by a woman does not qualify as an objective criterion, as this criterion is also assigned in the Procurement Act¹³¹ and the generic scorecard in the BEE Codes.



What are required are criteria in addition to those already considered as specific goals.¹³² Moreover the objective criteria should justify the granting of the tender to another bidder. That is, not only must there be a causal link between these criteria but, most importantly, the objective criteria landing the contract for the tenderer, other than the one with the highest points, must observe the principles of the section 217(1).¹³³

¹²⁸(1999) 1 SA 324 (CkH) para 381. In this case the tender was awarded on the ground of RDP goals, to a tenderer that quoted R200 million more than other tenderers. The Court set aside the award and ordered the process to start *de novo*.

¹²⁹(2003) 5 BCLR 544 (CK).

¹³⁰*RHI Joint Venture* (2003) 5 BCLR 544 (CK) para 27. See BEE Codes (2007) code 500.

¹³¹*Road Mac Surfacing* (2006) 54 (ZANWHC) para 29. See also Procurement Act (2000) s2 (d). In *Road Mac Surfacing* (2005) JDR 1033 (HC) para 25 the court *a quo* held that 'a women owned company/firm is capable of objective assessment'. In *Road Mac Surfacing* (2006) 54 (ZANWHC) para 29 the appeal court rejected this as an objective criterion and said points so awarded will be a duplication of preference points for specific goals. Also see BEE Codes (2007) code series 500.

¹³²*RHI Joint Venture* (2003) 5 BCLR 544 (CK) para 32.

¹³³*Pelatona Projects (Pty) Ltd v Phokwane Municipality and 14 others* (unreported NCD691/04) para 31.

The Court eloquently explained in *Road Mac Surfacing*,¹³⁴ that objective criteria ‘can be ascertained objectively as its existence or worth is not an opinion of a person but rather that it bears some degree of rationality and relevance to the tender.’ Such will be goals not specified and not contained in the Procurement Act and which will normally only become apparent when tenders are adjudicated.¹³⁵ This ‘other’ objective criteria the court in *Road Mac Surfacing*¹³⁶ held, is where a bidder scoring the highest points, is already committed to work on a departmental project, this may be considered as an objective criterion to award the tender to a bidder not scoring the highest points (and who is not engaged in departmental projects).

Of immediate relevance to this is that, should objective criteria be considered for preference points, such criteria must be measurable, quantifiable and monitored for compliance.¹³⁷ The BEE Codes also point out that BEE must be measured and reported according to economic reality rather than legal form.¹³⁸

2.7 BBEE Act and BEE Codes of good practice

¹³⁴ *Road Mac Surfacing* (2006) 54 (ZANWHC) para 33.

¹³⁵ *Road Mac Surfacing* (2006) 54 (ZANWHC) para 33.

¹³⁶ *Road Mac Surfacing* (2005) JDR 1033 (HC) para 24 the court a quo, held that not disclosing the objective criteria in the tender documents warrants the tender being awarded to the bidder with the highest points. However in *Road Mac Surfacing* (2006) 54 (ZANWHC) para 36 the appeal court reject this approach insofar that the tender documents do not need to disclose that objective criteria will be considered, as the Procurement Act tends to this.

¹³⁷ Procurement Act s2 (2) any goals contemplated in subsection 1(e) must be measurable, quantifiable and monitored for compliance.

¹³⁸ BEE Codes (2007) key principles 2.1.

The drive for preferential procurement is only relevant insofar as its main aim is to economically advance disadvantaged black people. For this reason the BBEE Act was introduced to affect a more comprehensive BEE strategy¹³⁹ by drawing the various elements of government's transformation programmes together in a coherent and focused manner.¹⁴⁰ This was necessary in order to direct advantages to as many disadvantaged and impoverished black people as possible in order to obviate the enrichment of only a small black minority.¹⁴¹ The emphasis was on a broad-based approach to spread the sunshine of economic development and prosperity to the majority of black people. This broad-based approach is not embraced by the Procurement Act resulting in discord in the transformation programme.

However the BBEE Act¹⁴² and BEE Codes¹⁴³ have as its main objective the advancement of black people in a holistic way, this is apparent from its various prescripts promoting black people and black women in particular. Moreover the BEE Codes¹⁴⁴ seek to curb fronting¹⁴⁵ by providing a comprehensive list of key principles.¹⁴⁶ In addition the

¹³⁹BBEE Act (2003) s1 defines broad-based black economic empowerment as 'the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include ... (e) preferential procurement.'

¹⁴⁰Bolton P *Law of Government Procurement in South Africa* (2007) 261.

¹⁴¹*Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others* (1999) 1 SA 324 (CkH) para 385 (hereafter *Cash Paymaster Services*).

¹⁴²Section 2 The objectives of this Act are to facilitate broad-based black economic empowerment by-

- (a)promoting economic transformation in order to enable meaningful participation of black people in the economy;
- (d)increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training;
- (e)promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity.

¹⁴³Section 7 'The Elements of B-BBEE in terms of the Generic Scorecard.'

¹⁴⁴Section 2 Ownership.

¹⁴⁵Bolton P (2007) fn 225 explains 'that "window dressing" or "fronting" is also referred to as "tokenism", ie a partnership or employment situation where colour or gender participation is not real or meaningful; the

BEE Codes also try and prevent ownership being claimed by a person that only lends his name to the business in order to gain preferential points for the enterprise. This is done by measuring the active involvement of black participants in the ownership of the enterprise. The idea is to measure and ensure a thorough check of BEE credentials¹⁴⁷ before accrediting preferential points to a bidder (a key aspect in which the Procurement Act differs by measuring preferential points through specific goals and RDP goals).¹⁴⁸

To give credence to this the BEE Codes¹⁴⁹ measures seven core areas for broad-based BEE opportunities namely: ownership, management control, employment, skills development, preferential procurement, enterprise development, and socio-economic development. Through these core measures the BEE Codes appear to provide clearer direction than the Procurement Act for broad-based BEE. To square this off the BEE Codes are aligned with key legislation such as the National Small Business Act,¹⁵⁰ the Skills Development Act¹⁵¹ and the Employment Equity Act.¹⁵² This legislation is all aimed

disadvantaged person or entity is there simply as a convenient “token” concession to a rule or qualifying condition.’

¹⁴⁶Sections 2.1.1 exercisable voting rights in the hands of black people; 2.1.2 exercisable voting rights in the hands of black women. 2.2.2 Economic interest by black people and black women. 2.4 bonus points for involvement in ownership of the enterprise by black new entrants. Also see BEE Codes (2007) code series 100 s2.4.

¹⁴⁷BEE Codes (2007) s3.

¹⁴⁸BEE Codes (2007) s2 para 2.4.2.

¹⁴⁹BEE Codes (2007) code series 100 measures ownership by black people;
code series 200 measures effective control of enterprises by black people;
code series 300 measures initiatives intended to achieve equity in the workplace;
code series 400 measures employers initiatives to develop competencies of black employees;
code series 500 measures the buying of goods and services;
code series 600 measures the extent to which enterprises carry out initiatives intended to assist and accelerate the development and sustainability of other enterprises;
code series 700 measures the extent to which enterprises carry out initiatives that promote access to economic empowerment for black people.

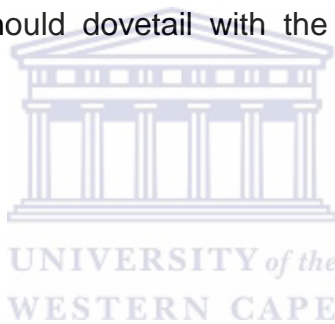
¹⁵⁰Act 102 of 1996.

¹⁵¹Act 97 of 1998.

¹⁵²Act 55 of 1998.

at assisting SMMEs in skills development and creating employment opportunities for black people.

In *Bato Star Fishing*¹⁵³ the Constitutional Court also made it clear that transformation involves more than a simple change of ownership; there must be other aspects of transformation like the creation of employment. This stands to reason that government's strategy for broad-based BEE through the BEE Codes, reaches beyond the redress of past imbalances, by using BEE to broaden the country's economic base and thereby accelerate growth, job creation and poverty alleviation.¹⁵⁴ This vision should be shared by the Procurement Act which should dovetail with the BBBEE Act and BEE Codes to ensure coherency.



2.8 Conclusion

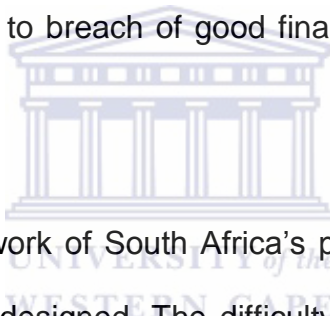
This chapter explored the legislation that dominates public procurement in order to analyse how it impacts on the progress of preferential procurement. In this study the PFMA, MFMA, Procurement Act and Regulations, BBBEE Act and BEE Codes received attention. The objective of this chapter was to examine the frustrations caused by the disharmony in the framework legislation for preferential procurement, namely the Procurement Act and BBBEE Act.

First the PFMA and MFMA are the overarching legislation governing financial management in public spending. This legislation should be observed during the public

¹⁵³(2004) 4 SA 490 (CC); (2004) BCLR 687 (CC) paras 10, 62.

¹⁵⁴DTI Transformation Strategy (2003) para 2.6.4.

procurement of goods or services. According to the AGSA reports¹⁵⁵ large budgets are controlled by official in public tendering. For this reason public officials have a fiduciary duty in their oversight of these funds to ensure its optimal use. This will mean that those officials having oversight must observe the objectives of the PFMA and MFMA in the expenditure of state funds. Furthermore these officials are bound by the principles of fairness, equitably, transparency, competitiveness and cost-effectiveness which the PFMA and MFMA promotes. Their fiduciary duty also extends to being responsible for public procurement processes that subscribe to value for money and the furthering BEE ideologies. These ideologies are not served by by-passing procurement processes as in the lease debacle which points to breach of good financial governance as laid down by the PFMA (and MFMA).¹⁵⁶



Secondly the regulatory framework of South Africa's preferential procurement seems to be in disorder rather than well-designed. The difficulty is that the Procurement Act and Regulations 2011 do not create the cogency which gives a common understanding of what is meant by broad-based BEE, who is to benefit and how. The Procurement Act continues to promote a narrower approach to BEE by measuring specific goals and not the broad-based goals provided for by the BEE Codes. This necessary cogency could not be ensured by the amended regulations. The reason being that although the Procurement Regulations 2011 is in tandem with the BEE Codes in that it does promote broad-based empowerment, it is now in conflict with the Procurement Act in this regard. This is untenable since subordinate legislation (regulations) should not conflict with the

¹⁵⁵AGSA report on Education and Health Departments of August 2011; AGSA report June 2011.

¹⁵⁶Madonsela T 'Public Protector, SAPS lease report' 22 February 2011.

framework Act. The result is that the status quo remain, the two principle Acts to the same group of beneficiaries do not have the same evaluation points.

The reason for the discord is the fact that the BBBEE Act was enacted (2003) without due regard to the difference in interpretation of the target groups for BEE in the Procurement Act. This would have been remedied if the amendments to the Procurement Act were effected whilst the BBBEE Act was still a bill. This recommendation by the National Treasury was ignored and the subsequent implementation of the BEE Codes continued the distortion instead of bringing the necessary cogency that is still needed today. All those years of deliberation to bring about coherency to the promotion of BEE seems like an exercise in futility and a waste of public funds. This clearly created an intolerable situation which left the preferential procurement environment in some disorder. The result is that the different interpretations as to who is to benefit, has left room for individuals that previously benefited from the pre-democracy indulgence, continue to benefit post-democracy. This incoherency between the two frame work Acts (Procurement Act and BBBEE Act) are irreconcilably inconsistent and could be regarded as a case of implied repeal.

Due to the fact that the Procurement Regulations 2011 do not remedy this discord, this disagreement in the measuring of preference points further weakens the procurement environment in that the Procurement Act affords public officials discretion in how to measure goals for transformation. In essence the disharmony between the legislation places limitations on legal regulations as tools which should vindicate the achievement of preferential procurement objectives. The tardiness in finalising the draft Procurement

Regulations of 2009 and then the subsequent end product still lacking, may be construed as lack of proper political oversight in preferential procurement. This proves cause for concern as to the earnestness of government in economically empowering those previously deprived citizens.

As a starting point the Procurement Act and BBBEE Act should be consistent with regards to the intended beneficiaries of BEE and in the evaluation of preferential points. The prompt remedy to this is amendment to the Procurement Act, to bring the framework into harmony with the BBBEE Act and BEE Codes. This should resolve some of the ambivalence in the preferential procurement environment.

Notwithstanding this, the legislation is only a guide to promote the social deliverables of BEE; this must also be complemented by the political will to apply and enforce the laws pertaining to the promotion of disadvantaged black people; failure should meet with penalties for procurement irregularities.¹⁵⁷ Diligent public officials should do the right thing and promote the broad-based focus that the BEE Codes prescribe instead of the narrow approach the Procurement Act presents. This action will serve to accelerate the success of preferential procurement as a policy tool. After all the reason for the implementation of the BBBEE Act is to promote broad-based BEE because the Procurement Act did not aspire to this wider objectives

¹⁵⁷See chapter four para 4.5 for a discussion on remedies for procurement irregularities.

Unfortunately, although BEE has been a focus point since 1994, there has been more disparity than cogency in the strategy for the development of broad-based BEE.¹⁵⁸ Although it seems that South Africa's procurement regime is sufficiently legislated, the discord in its legislation is fragmenting the procurement environment. Essentially, without aligning the key legislation (Procurement Act and BBBEE Act), government will not be in a position to maximise its impact on transformation through preferential procurement. Lest we forget that a well-designed regulatory framework is as important to the success of preferential procurement, as is the political will that enforces those regulatory provisions.



¹⁵⁸BEE Codes (2007) background BEE Strategy 2.

CHAPTER 3

COMMON PRACTICES FRUSTRATING THE EFFECTIVE USE OF PREFERENTIAL PROCUREMENT

3.1 Introduction

The preferential procurement environment is well legislated (despite the cogency challenge). Nevertheless, public procurement is unduly stressed by certain practices. This chapter will elaborate on these practices in order to illustrate its negative impact on preferential procurement and to enquire as to why with so many laws in place these practices are not eliminated. Media headlines are constant reminders that these practices are allowed to flourish and negatively influence public procurement processes.¹ In the main, these practices are threefold namely, fronting,² collusive tendering and tenderpreneurship. This chapter will explain how these practices are used in the public procurement terrain.

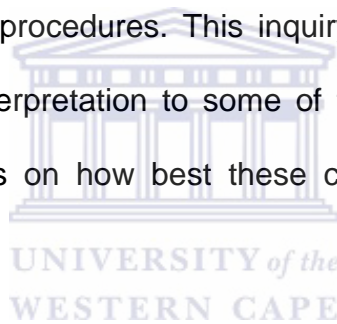
There has been some effort by government to curb malfeasance by implementing both anti-corruption legislation and other measures. But despite these measures, it remains a

¹Hartley W 'Tender investigation tops R20bn *Business Day*' 31 March 2011 1 available at <http://www.businessday.co.za/Articles/Content.aspx?id=138691> (accessed 6 April 2011). The article report that the Special Investigations Unit (SIU) is probing R20 billion worth of tender corruption, in 2011. Stapenhurst F 'The Role of the Public Administration in Fighting Corruption' 10(5) *International Journal of Public Sector Management* (1997) 313 refers to corruption as: 'involving behaviour on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves or those close to them by the misuse of the public power entrusted to them.'

²Williams S 'The Use of Exclusions for Corruption in Developing Country Procurement: The case of South Africa' (2007) 51 *Journal of African Law* 27 describes fronting as fraudulent misrepresentation or use of fictitious or tokenistic person from groups targeted for BEE, when bidding for goods or services.

major thorn in the flesh of competitive bidding to the extent that it is costing the government billions of rand.³ This chapter will present an exposition of these anti-corruption measures to clarify what effect it has on combating willful behaviour in public procurement.

A major contributor to the success of willful practices is that politically connected individuals are offered economic prowess through public tenders without having to follow the tender process. This is so evident that it is even mentioned in blogs such as that of De Vos.⁴ This situation is unsustainable and this chapter will probe how it is possible to by-pass legislated procedures. This inquiry will include the court and the Competition Commission's⁵ interpretation to some of these challenges. In conclusion there will be recommendations on how best these challenges can be handled and minimised.



3.2 The challenge of willful practices in preferential procurement

Conventionally, practices that are defined as the abuse of public office for private gain can be termed as corruption,⁶ and there is hardly a country in the world that has

³Hartley W 'Tender investigation tops R20bn *Business Day* 31 March 2011 1.

⁴De Vos P 'On corruption in South Africa' July 2010 *Constitutionally Speaking* 5 available at <http://constitutionallyspeaking.co.za/on-corruption-in-south-africa/> (accessed 12 March 2011).

⁵Competition Commission Act 89 of 1998 s19 provides for the formation of a Competition Commission to investigate collusive practices in business.

⁶Heliman J et al 'Measuring Governance, Corruption and State Capture' How Firms and Bureaucrats Shape the Business Environment in Transition Economies (2000) 2312 *World Bank Policy Research Working Paper* 19 available at

http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2000/04/24/000094946_00040705412171/Rendered/PDF/multi_page.pdf (accessed 12 March 2011) Westring G & Jadoun G *Public Procurement Manual for Central and Eastern Europe* SIGMA-ILO Project (1996) para E I.

escaped the scourge of corruption in public procurement.⁷ Corruption even extends to those countries on the high end of the honesty index such as the Scandinavian countries, Singapore and New Zealand.⁸ The seriousness of corruption is recognised in the preamble of the Corruption Act which mentions the political, economic, legal, social and moral threat it poses.⁹ One of the reasons for the allure of public sector corruption is due to the large sums of money involved and the presence of unsupervised discretion.¹⁰

The extent of corruption is shown by South Africa being placed at 55 out of 180 countries on Transparency International's 2009 Corruption Perceptions Index, down one place from 2008.¹¹ The scourge of corruption in public procurement leads to collusion in purchasing goods or services from the best briber instead of the best price-quality.¹² Rose-Ackerman raises concern, and Westring agrees, over the tendency of senior public officials only being concerned with extending their personal gain, as this may lead to inefficiencies in the public contract.¹³ An example of this could be where a firm

⁷Westring, G & Jadoun G *Public Procurement Manual for Central and Eastern Europe* SIGMA-ILO Project (1996) para E I.

⁸Rose-Ackerman S *Corruption and Government: Causes, Consequences and Reform* (1999) 30.

⁹Corruption Act 12 of 2004 Preamble *inter alia* states: 'Whereas corruption and related corrupt activities undermine, endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardize sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organised crime; Whereas the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies, ethical values and the rule of law; Whereas as comprehensive, integrated and multi-disciplinary approach is required to prevent and combat corruption and related corrupt activities efficiently and effectively...'

¹⁰Williams S & Quinot G 'Public Procurement and Corruption: The South African Response' (2007) 124 *SALJ* 341.

¹¹Available at http://www.transparency.org/policy_research/surveys_indices/cpi/2010 (accessed 14 April 2011)

¹²Søreide T 'Corruption in Public Procurement: Causes, Consequences and Cures' (2002) *Chr. Michelsen Institute* 1 available at <http://bora.cmi.no/dspace/bitstream/10202/185/1/R%202002-1.pdf> (accessed 30 October 2011)

¹³ Rose-Ackerman S (1999) 30; Westring G & Jadoun G (1996) para E.I.

winning the contract, benefit from inflated prices but skimping on quality.¹⁴ This tie in with the view that corruption in government is necessarily as a result of weak governance since it creates an environment where states are too weak to control their own bureaucrats.¹⁵ Consequently corruption studies focus on the degree of discretionary powers state policies allows its officials.¹⁶ Needless to say, eradicating corruption from public procurement means the awarding of contracts to the most competitive bidder, instead of those preferred for ulterior motives.¹⁷

In essence corruption can take place on the part of the bidder¹⁸ and/or public officials. As such the Corruption Act¹⁹ bears on both such participants whether the corruption amounts to prospective or retrospective gratification. It is important to note that, in most countries corruption by contractors to government attracts the application of criminal law, subject to sanctions such as a fine or imprisonment.²⁰ In compliance with this approach, the Corruption Act²¹ provides for imprisonment of between three years and life, of any tender defaulter who offers or accepts gratifications and the names of such defaulters may be endorsed in a public register. Penalties include a fine equal to five times the value of the gratification involved in the offence.²² In addition endorsement of

¹⁴Rose-Ackerman S (1999) 28.

¹⁵Heliman J (2000) 3

¹⁶Heliman J (2000) 3.

¹⁷Williams S & Quinot G (2007) 124 *SALJ* 339.

¹⁸Green Paper on Public Sector Procurement Reform in South Africa in GG17928 of 14 April 1997 para 4.11 (l) refers to corrupt actions by bidders as 'collusion; influencing the choice of procurement method and technical standards; inciting breaks of confidentiality; influencing the work of evaluators; offering of bribes; over or under invoicing; "fast pay" action; inaccurate disclosures.'

¹⁹ Act 12 of 2004.

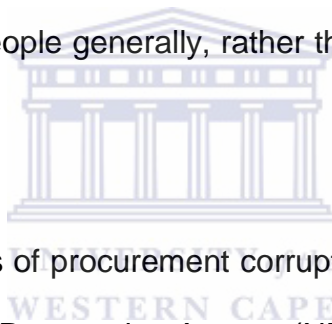
²⁰Arrowsmith S, Linarelli J & Wallace D Jr *Regulating Public Procurement: National and International Perspective* (2000) 49.

²¹Section 28.

²²Section 26 (3).

tender defaulters in the public register can last as long as ten years during which period no tender offer by such defaulters may be entertained by government.²³

Notwithstanding these measures the Public Service Commission (PSC) reported that corrupt practices in public procurement ranks in the top four categories of most common allegations²⁴ in the mismanagement of public administration.²⁵ This is evident from the fact that corrupt practices in public procurement continue to empower historically advantaged conglomerates and the new black-elite.²⁶ This situation undermines the Constitution²⁷ as well as the legislation (BBBEE Act) which promotes broad-based economic prosperity to black people generally, rather than to the small minority feigning disadvantaged credentials.



Noteworthy are the many cases of procurement corruption that have been handed over for investigation to the National Prosecuting Agency (NPA) by the Special Investigations Unit (SIU).²⁸ In addition to this, as many as 20 employees of the SABC have been exposed of being involved in corruption (in tenders) to the tune of R3.4 million. The investigation by the SIU with the Brixton commercial crimes unit resulted in eight

²³Corruption Act (2004) s28(3)(a)(ii) the National Treasury must determine the period (which period may not be less than five years or more than 10 years) for which the particulars of the convicted person or the enterprise referred to in subsection 1 (a), (b), (c) or (d) must remain in the Register and during such period no offer in respect of any agreement from a person or enterprise referred to in that subsection maybe considered by the National Treasury.

²⁴Public Service Commission Report 'Profiling and Analysis of the most Common Manifestations of Corruption and its Related Risks in the Public Service' (April 2011) (hereafter PSC Report April 2011) para 2.4 describes 'bribery, abuse of Government-owned vehicles, procurement and appointment irregularities, as most common' available at <http://www.psc.gov.za/documents/reports.asp> (accessed 3 May 2011)

²⁵PSC Report (April 2011) para 6.

²⁶See para 3.2.3 for a discussion on tenderpreneurs.

²⁷Plasket C 'Tendering for Government Contracts: Public Procurement and Judicial Review' in Glover G (ed) *Essays in Honour of AJ Kerr* (2006)160.

²⁸De Lange D 'Corruption Bombshell' *Cape Times* 31 March 2011 1.

criminal cases, of which five has been referred to the NPA; there have been no prosecutions as yet.²⁹

Quinot argues that the media reporting on the uncovering of corruption in public tenders means that the state tender system is working.³⁰ The exposure of these practices that derail state tenders are welcome and should be enhanced by the political will to enforce the comprehensive sanctions in the Corruption Act.³¹ However despite the media reporting on tender corruption by public officials, the Register for Tender Defaulters has two names of bidders but remains devoid of any corrupt public officials in public tendering.³²

A demonstration of the strong political commitment needed by government in addressing corruption in public procurement³³ was displayed in the case of South Africa's neighbouring country, Lesotho, through the Lesotho Highland Water Project. In this matter, a senior government executive found guilty of taking bribes to distort the tender process³⁴ was sentenced to 15 years imprisonment³⁵ and the briber (the

²⁹De Lange D 'Corruption Bombshell' *Cape Times* 31 March 2011 1.

³⁰Quinot G 'Even the bad news reflects a positive side to public contracting in SA' *Cape Argus* 28 Oct 2010 23.

³¹Section 13.

³²The tender register currently contains two names of bidders convicted by court available at <http://www.treasury.gov.za/publications/other/Register%20for%20Tender%20Defaulters.pdf> (accessed 7 April 2011)

³³Darroch F (2003) para 1.2.

³⁴Information Portal on Corruption and Governance in Africa 'Lesotho Highlands Water Project' (1997) para 4.2 this project came into being by a treaty signed between Lesotho and South Africa in October 1986. The law in Lesotho is in general similar to the laws of the Republic of South Africa. available at http://www.ipocafrika.org/index.php?option=com_content&view=article&id=71&Itemid=66#strip (accessed 16 Feb 2011).

³⁵Darroch F 'The Lesotho Corruption Trials – A case study' Prepared for *Transparency International* (2003). 'Through an extensive, international network of bank accounts and 'agents', bribes were paid to Mr Sole, who was able to materially influence the tendering procedure and outcome through his

company) was also convicted and suspended for three years from doing business with government, thus both parties in the scam convicted.³⁶ This is exemplary of the good governance that is needed by the South African government; they need to enforce strict sanctions on recalcitrant public officials found tampering with tenders intended to empower the poor.

3.2.1 The practice of fronting

The practice of BEE fronting takes place where black people are used to pose as owners or in the management of a business, but in reality they do not reap the financial benefits befitting such a position. Fronting can also be done by white women and disabled white women and men due to these groups being included in the reference to HDIs in Procurement Act.³⁷ The minister of Trade and Industry acknowledged that the act of 'BEE fronting',³⁸ which result in non-empowered companies winning government contracts, by feigning BEE credentials, is 'pretty rife'.³⁹ A further difficulty is that the verification agencies intended to verify proper BEE credentials are often the culprits advising companies, how to front effectively.⁴⁰ This practice is most probably aided by

unchecked power as LHDA Chief Executive. Sole was accused of accepting more than \$6 million in bribes from multinationals. Sole has been convicted and sentenced to 15 years in prison.' http://www.ipocafrika.org/index.php?option=com_content&view=article&id=71&Itemid=66 (accessed 21 April 2011)

³⁶Darroch F (2003) para 1.2.

³⁷See chapter two para 2.5.3.1 a discussion on this.

³⁸Williams S (2007) 27 describes that fronting 'occurs where there is fraudulent misrepresentation or use of fictitious or tokenistic persons from groups targeted for BEE, when bidding for goods or services.'

³⁹Government Communication and Information System 'Accountants, agencies to be targeted for fronting' *BUA News online* 11 November 2010 (hereafter GCIS 'Accountants, agencies to be targeted for fronting') available at <http://www.buanews.gov.za/news/10/10111118151001> (accessed 19 Feb 2011)

⁴⁰GCIS 'Accountants, agencies to be targeted for fronting' 11 November 2010.

the fact that the Procurement Act does not prescribe BEE verification like the BEE Codes do; the newly passed Regulations 2011 do not remedy this.

In *Hidro-Tech Systems (Pty) Ltd v City of Cape Town and Others*⁴¹ declared fronting an offence in terms of misrepresentation and fraud. The court explained that fronting results in the benefit of preferential procurement favouring those not intended to prosper by it. The Constitutional Court's finding is an object lesson on how this problem should be dealt with. In this case the applicant (Viking Pony) and the first respondent (Hidro-Tech) competed for tenders to supply and install equipment for water and sewerage treatment works for the City of Cape Town (the City). Viking Pony was awarded more tenders than Hidro-Tech. Hidro-Tech discovered that this was attuned to the fact that black people held 70% of Viking Pony's shares. They (Hidro-Tech) lodged a complaint with the City, that the black majority shareholder in Viking Pony was a mere token and urged the City to investigate the allegation of fronting. In evidence they alleged that the (white) director was paid R23 500 per month, while the (black) shareholder who was paid only R5 600 per month, exercised no control or influence over the company and neither actively participated in its management. They also alleged that the profits of Viking Pony were routed to its white-owned sister company. The database managing company assigned to investigate the allegations of fronting simply confirmed that the shareholding reflected in Viking Pony's tender documents was correct and the allegation of fronting was not further investigated.

⁴¹(2010) 1 SA 483 (C) para 75 (hereafter *Hidro-Tech Systems*).

The government was castigated by the court because they (the government) neglected their duty by not properly investigating the allegations of fronting.⁴² These allegations point to action that is contrary to the spirit, purport and objectives of the Constitution, the Procurement Act and Regulations.⁴³ The High Court urged that the government should investigate the fronting allegations properly, by acting against the supplier in accordance with regulation 15(1).⁴⁴ The Supreme Court of Appeal⁴⁵ confirmed this finding but still the government persisted in not investigating, the fronting allegations. The Constitutional Court was eventually approached to compel the government to conduct an investigation into these allegations. The Constitutional Court lamented the government's complacency regarding its legal obligations in cases of alleged fronting.⁴⁶ To this end the High Court⁴⁷ agreed that the black directors on the board of *Viking Pony* were a sham intended only to enhance the BEE status for the purpose of scoring preferential points in public tendering. Moreover the government not only displayed reluctance to investigate the fronting allegations, it was also undeterred by the repeated court challenges⁴⁸ and the resultant costs to the fiscus.

⁴²*Viking Pony* (2011) 1 SA 327 (CC) paras 57- 8. The court ordered cost against the government.

⁴³*Viking Pony* (2011) 1 SA 327 (CC) paras 57- 8.

⁴⁴*Hidro-Tech Systems (Pty) Ltd v City of Cape Town and Others* (2010) 1 SA 483 (C) para 66 (hereafter *Hidro-Tech Systems*). The court gave the City two months to complete the investigation.

⁴⁵*Viking Pony* (2010) 3 SA 365 (SCA) para 32.

⁴⁶*Viking Pony* (2011) 1 SA 327 (CC) para 57. In this case an unfair preference was obtained through the bidder's BEE status, which was technically non-existent as the black shareholders were merely fronting, insofar that they did not derive the same benefits as the white share holders. Even after they resigned and left the company, Viking made fraudulent misrepresentations in its tender documents about its BEE profile, in order to secure a preference.

⁴⁷*Hidro-Tech Systems* (2010) 1 SA 483 (C) para 21.

⁴⁸*Hidro-Tech Systems* (2010) 1 SA 483 (C); *Viking Pony Africa Pumps v Hidro-Tech Systems* (2010) 3 SA 365 (SCA) (hereafter *Viking Pony*); *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* (2011) 1 SA 327 (CC) para 57 (hereafter *Viking Pony*).

The tenacity with which *Viking Pony* continued to challenge the allegation of fronting; knowing that its BEE credentials were not a true reflection of the company is particularly disturbing. This shows the extent to which companies will go to continue to keep economic power amongst a few advantaged businesses.⁴⁹ This behaviour will not promote the development and economic growth of black people in the spirit of the seven core elements of the BEE Codes.⁵⁰ This case provides confirmation that there is a constitutional and statutory obligation to take appropriate action against fronting.⁵¹ The Constitutional Court concurred with the Supreme Court of Appeal that an organ of state is obliged to take steps when confronted with the mere awareness of information regarding fraudulent misrepresentation and not conclusive evidence; by applying regulation 15 the City should have investigated the allegations of fronting.⁵² This means that where information is obtained that raises reasonable suspicion that preferential points has been fraudulently obtained, this information has to be acted upon by investigation.⁵³

In addition, should 'fronting' be confirmed upon investigation, a state organ has the discretion to cancel such a contract and debar the business from contracting with the state for a period of up to 10 years.⁵⁴ The Constitutional Court stated that the purpose of the legislative measures put in place for preferential procurement is ultimately to

⁴⁹*Viking Pony* (2011) 1 SA 327 (CC) para 46 states that 'At the heart of this case is the complaint by Hidro-Tech that historically disadvantaged individuals were neither remunerated nor allowed to participate in the management of Viking to the degree commensurate with their shareholding and their positions as directors.'

⁵⁰See chapter two para 2.7 for discussion on the BEE Codes.

⁵¹*Viking Pony* (2011) 1 SA 327 (CC) paras 18, 57.

⁵²*Viking Pony* (2011) 1 SA 327 (CC) para 31; *Viking Pony* (2010) 3 SA 365 (SCA) para 32.

⁵³*Viking Pony* (2011) 1 SA 327 (CC) para 34.

⁵⁴Procurement Regulations (2011) reg 13 (2) (d).

embrace the constitutional imperative of seeking to empower HDI's.⁵⁵ The effect of doing so will root out schemes designed to fraudulently divert economic benefits from black people, historically disadvantaged, and to historically empowered individuals.⁵⁶ Lastly because the City's generally lackadaisical attitude toward the court challenge and fronting allegations, it was ordered to pay the costs of Hydro-Tech and Viking Pony.

It should be noted that if the City used the BEE Codes⁵⁷ which prescribe verification of BEE through verification agencies, the fronting by Viking may have been detected.⁵⁸ The verification process would have been conducted through a verification agent or auditor, who would be familiar with the score card measurements for ownership and management in the BEE Codes.⁵⁹ The use of the City's database management to confirm ownership or BEE credentials simply do not measure up to the BEE Codes prescripts. In addition, if contract maintenance⁶⁰ is observed, a change in shareholders like in *Viking* would in any case have been identified. Therefore, to observe the BBEE Act makes for a stricter procurement environment. Notwithstanding this, the Procurement Act is still the framework act for preferential procurement and it does not prescribe a BEE status verification certificate to enter into a bid for public tendering.

⁵⁵ *Viking Pony* (2011) 1 SA 327 (CC) para 27.

⁵⁶ *Viking Pony* (2011) 1 SA 327 (CC) para 27.

⁵⁷ BEE Codes (2007) s10.1.

⁵⁸ BEE Codes (2007) s2 Key Principles: S 2.3 the basis for measuring BBEE initiatives under the Codes is the BBEE compliance of the measured entities at the time of measurement; s 2.4 any misrepresentation or attempt to misrepresent any enterprise's true BBEE status may lead to the disqualification of the entire scorecard of that enterprise.

⁵⁹ BEE Codes (2007) s7 Elements of BBEE: S7.1 The Ownership Element, as set out in the Code series 100, measures the effective ownership of enterprises by black people; s7.2 The Management Control Element, as set out in Code series 200, measures the effective control of enterprises by black people. Also see chapter two para 2.7 for a discussion on the BEE Codes.

⁶⁰ See chapter 4 para 4.3.4 for a discussion on contract maintenance.

This oversight must be remedied to bring the procurement system closer in achieving broad-based BEE proliferation.

3.2.2 Collusive tendering

Williams and Quinot argues that the second type of corruption found in public procurement is private corruption which comes in the form of collusion, price-fixing, maintenance of cartels or other uncompetitive practices engaged in by suppliers which derails the preferential procurement aims.⁶¹ Collusion occurs when bidders tendering for a government contract, collude and agree on the price to offer for the bid.⁶² They form a cartel whereby the one bidder in the cartel offers a certain price, and all the others in the cartel offer a higher price as covering bids, to create the impression of competition. If successful the bidders in the cartel share monopolistic profits as pre-determined amongst themselves. Although the Competitions Act⁶³ prohibits, collusive tendering in South Africa, a significant increase in bid rigging (tender rigging) cases have been exposed, most notably, in the construction industry.⁶⁴ In January 2010 the Competition Commission⁶⁵ considered 66 applications for corporate leniency, of which 59 were

⁶¹Williams S & Quinot G (2007) 342.

⁶²Bolton P *The Law of Government Procurement in South Africa* (2007) 138.

⁶³Act 89 of 1998 provides in its preamble that 'restrain of particular trade practices which undermine a competitive economy.' Section 4(1) (b) (iii) prohibits all forms of collusive tendering, it states that: 'An agreement between or concerted practice by firms or a decision by an association of firms is prohibited if it is between parties in a horizontal relationship and if it involves... collusive tendering.'

⁶⁴Global Forum on Competition 'Collusion and Corruption in Public Procurement' Contribution from South Africa 18-19Feb 2010 para 3. (hereafter OECD 'Collusion and Corruption in Public Procurement') available at <http://www.oecd.org/dataoecd/19/51/44558091.pdf> (accessed 14 Feb 2011)

⁶⁵Competitions Act s19 provides for the formation of a Competition Commission to investigate collusive practices in business.

involved in collusive tendering.⁶⁶ Most of these cases were exposed due to companies seeking corporate leniency, which means after they engaged in this practice and having profited thereby, they confessed to having unduly profited, paid a fine and thereby escaped any criminal liability.

The following cases paint a picture of this anti-competitive behaviour of collusive tendering:

- in the *Competition Commission v Cobra Concrete (Pty) Ltd*⁶⁷ where collusion on price-fixing⁶⁸ in the pricing of precast concrete products was found in the period of 1987 and 2007; through this collusive practice the companies prevented and limited price competition amongst them.⁶⁹ As a matter of fact for over thirty years in the construction industry, the bosses regarded themselves as 'one big organisation,' a family, rather than competitors.⁷⁰ The thirty year tendency of collusion continues, as recently collusive bid rigging arose in the tendering of World Cup stadiums and the Gautrain.⁷¹ This is despite many companies having been exposed through the Competition Commission.

⁶⁶OECD 'Collusion and Corruption in Public Procurement' (2010) para 4. The report states that 'A further 122 marker applications, the majority in construction, had been received. Three cases involving bid-rigging are currently being 'prosecuted' before the Competition Tribunal' para 4.

⁶⁷Case no 3595 ZACT 25 (31 March 2010) (hereafter *Competition Commission v Cobro Concrete*) para 2.3.1.1 'During the period 1986 until September 2007, Rocia, Infraset, Cobro ("competitors") and during the period 1999 until November 2007, Cobro, Conrite Walls and DND Concrete ["DND"] ("competitors"), competitors in the business of manufacture and sale of precast manholes and pipes in South Africa, acting through their respective representatives in meetings colluded in price-fixing.'

⁶⁸Price fixing - Agreeing with competitors to keep prices at a specific level.

⁶⁹*Competition Commission v Cobro Concrete* (2010) para 2.3.1.3.

⁷⁰Naidoo P: 'Concrete Raiders' *Financial Mail* 17 February 2011 available at <http://www.fm.co.za/Article.aspx?id=134615> (accessed 17 Feb 2011). 'There are 65 bid-rigging cases, involving over 70 public and private projects valued at R29bn, before the commission. Companies implicated and facing possible penalties include Group Five, Murray & Roberts, Aveng, WBHO, Basil Read, Stefanutti Stocks, Grinaker.'

⁷¹Naidoo P 'Concrete Raiders' *Financial Mail* 17 February 2011 the stadia are 'Cape Town's Green Point and Moses Mabhida stadia in Durban'.

- Another big enterprise in the medical supplies, Adcock Ingram Critical Care (AICC), admitted to collusive tendering, in the supply of large volume medical products, to public hospitals across South Africa.⁷² In this case, before submitting their respective tenders, the competitors collaborated and agreed on prices. The Commission settled; this cartel paid admission of guilt fines totaling R55 million.⁷³ The admission of guilt forestalled further prosecutions, thus these companies may continue to do business with government and in fact AICC is in the running for another R5 billion contract for health services to government.⁷⁴
- The tide of collusive tendering also followed in the auctioning of coaches, wagons and tankers by the state-owned rail transport, Transnet.⁷⁵ In this instance the competitors had a general understanding amongst each other, not to push up the prices or bid against each other at Transnet auctions. This corruption was remedied by a penalty of R146 million (6 percent of turnover).

⁷²*The Competition Commission vs Adcock Ingram Critical Care (AICC), Tiger Food, Fresenius Kabi South Africa (FKSA), Thusanong Health Care (Thusanong) and Dismed (Criticare)* (2005Jan1404 and (2007Nov3376) para 7. (hereafter *Competition Commission v Adcock Ingram*)

⁷³*Competition Commission v Adcock Ingram* (2007) para 8.

⁷⁴SAPA 'Black Sash condemns collusive tendering' *IOL* 13 May 2008. This comes after the Department of Health had said that AICC remained in the running for a R5-billion contract for anti-retrovirals and is to be considered for future purchases available at <http://www.iol.co.za/news/south-africa/black-sash-condemn-collusive-tendering-1.400335> (accessed 16 Feb 2011).

⁷⁵*The Competition Commission vs The New Reclamation Group (Reclam), Aberddac Group, Amalgamated Metals Recycling, Ben Jacobs Metals, Power Metals, SA Metal and Universal Recycling* (2007 Aug 3121) para 12.

- In addition to this collusive tendering and price-fixing in the supply of plastic pipes for water and sanitation to municipalities was also exposed and again the Commission considered corporate leniency.⁷⁶

This practice of collusive behaviour in competitive bidding makes it difficult for SMMEs to compete against the prices of a cartel. This detracts from the aims of preferential procurement, that is, to economically empower SMMEs by giving them access to government contracts. Instead collusive behaviour created monopolies which sully not only competitiveness, but also BEE.

To further remedy the plight of collusive behaviour the Competition Act was amended in 2000,⁷⁷ in order to make it possible to impose imprisonment of 10 years and/or a fine of R500 thousand, on directors of a firm engaging in prohibited practices like collusive tendering. South Africa joined the global trend in criminalising cartel behaviour, in tender collusion and price-fixing.⁷⁸ However, the amendment brought no relief to date, because

⁷⁶*The Competition Commission vs DPI Plastics, Petzetakis Africa, Marley Pipes System, Swan Plastics, Amitech South Africa, Flo-Tek Pipes & Irrigation, Macneil Agencies, Andrag and Gazelle Plastics* (2008 Mar 3596) para 14.

⁷⁷Competition Amendment Act 1 of 2000 s13 published GG 32533 of 28 August 2009 section 74 of the principal Act is hereby amended—

(a) by the deletion of “(1)” from the beginning of the section; and
(b) by the substitution for paragraph (a) of the following paragraph:

“(a) in the case of a contravention of section 73(1), or section 73A, to a fine not exceeding R500 000-00 or to imprisonment for a period not exceeding 10 years, or to both a fine and such imprisonment;”

Insertion of section 73A in Act 89 of 1998 s12

The following section is hereby inserted in the principal Act after section 73:

‘Causing or permitting firm to engage in prohibited practice.’

73A. (1) A person commits an offence if, while being a director of a firm or while engaged or purporting to be engaged by a firm in a position having management authority within the firm, such person—

(a) caused the firm to engage in a prohibited practice in terms of section 4(1) (b); or

(b) knowingly acquiesced in the firm engaging in a prohibited practice in terms of section 4(1) (b).’

⁷⁸Naidoo P ‘Concrete Raiders’ *Financial Mail* 17 February 2011.

prosecutions have yet to be visited on those suppliers engaging in monopolistic tendencies. It is argued that the amendment seriously frustrates the Competition Commission's work, because the companies engaging in collusive bid rigging will not expose such practices, if they face personal criminal liability.⁷⁹ The Competitions Commission maintains that offering corporate leniency has proven successful in exposing these cartels and the inclusion of personal liability will prevent cartels coming forward, fearing self-incrimination.⁸⁰

Thus, regardless of the amended legislation, there seems to be reluctance on the part of the Competition Commission to impose criminal sanctions on these companies guilty of collusion. Simply put, criminal prosecution escapes those involved in collusion. Thus, although going through the trouble of amending the Competition Act to include criminal liability, the legislation has yet to be tested in court. This is regrettable, whilst doing good work exposing white-collar crime; the Competitions Commission is really a watch dog without teeth. What is the purpose of a fine to companies that have been well served by capitalism and therefore can afford to pay millions as if it is small change? One simply cannot see why that will act as a deterrent for suppliers engaging in a practice that typically became a habit for 30 years.

The recent exposure on bid-rigging of the world cup stadia necessarily illustrates how white-collar crime has no conscience and the consideration of BEE is really not on their agenda; at least not to the extent that they will make space for SMMEs to grow into real

⁷⁹Naidoo P 'Good act but is it right?' *Financial Mail* 17 February 2011 available at <http://www.fm.co.za/Article.aspx?id=134615> (accessed 17 Feb 2011).

⁸⁰Naidoo P 'Concrete Raiders' *Financial Mail* 17 February 2011.

time competitors. Instead they keep black competitors on the perimeter to feast on the crumbs after they rigged the lucrative tenders. The importance of economic growth in South Africa is universally accepted. It will thus serve the aspirations of preferential procurement as a policy tool, if the Competition Commission helps to root out corruption in business in appropriating the necessary criminal sanction provided for by the amendment Act; thereby create a level playing field for new entrants to business. More importantly, it will serve it (the Competition Commission) well to develop the expertise to uncover collusive tendering instead of waiting for a whistleblower with a vested interest and an inflated bank account.

3.2.3 The new cartels: tenderpreneurs



The practice of tenderpreneurship is a modern day cartel practice which takes place where a public official colludes with a bidder (known to him) to control prices of the bid and manipulates the tender process. These culprits are in pursuit of government contracts and conspire with public officials to undermine principles of competitive bidding.⁸¹ These bidders undermine value for money by overpricing, non delivery or poor workmanship; thereby violating the principles of cost-effectiveness and competitiveness in section 217 (1). The process unfolds by; validating the favourite tenderpreneur in return for kick-backs; sharing of confidential information to enable the

⁸¹Mac Gregor K 'Tenderpreneurs and cartels: The devil is in the detail... *De Rebus* July 2010 16.

tenderpreneur to win the bid or by influencing the bidding process to benefit the tenderpreneur.⁸²

This is in essence the transfer of wealth from the financially strong to the financially weak,⁸³ without them having to initiate or finance a new enterprise. These bidders do not have to compete equally with other bidders because their political connections are what favour them as recipients of tender awards⁸⁴ This practice of tenderpreneurship has become known as BEE in South Africa which 'is in reality an attempt to siphon savings from private-sector operators.'⁸⁵

Emerging out of this is a new, elite class of black millionaires, who acquired their wealth as beneficiaries of black empowerment without conforming to the strict procurement regulations. This has earned them the term 'tenderpreneurs'.⁸⁶ The problem with this practice is that the seven core elements of the BEE Codes⁸⁷ are not observed. The reason for this is that the business does not need to be measured in terms of skills development or enterprise development. The consequence of which has given rise to 'a black-elite that continues to be perpetual junior support players to white-controlled

⁸²Mac Gregor K 'Tenderpreneurs and cartels: The devil is in the detail... *De Rebus* July 2010 16.

⁸³Mbeki M *Architects of Poverty: Why African Capitalism Needs Changing* (2009) (2009) 69.

⁸⁴SAPA 'ANC MEC in tender fraud arrest' *Times live* 5 November 2010 available at <http://www.timeslive.co.za/local/article745121.ece/ANC-MEC-in-tender-fraud-arrest> (accessed 10 January 2010).

⁸⁵Mbeki M (2009) 65.

⁸⁶Laurence P 'Malema and the tenderpreneurs' *Politicsweb* 25 February 2010 available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=162758&sn=Detail> (accessed 21 February 2011). The term 'tenderpreneur' was coined by Blade Nzimande, general-secretary of the South African Communist Party and Minister of Higher Education and Training).

⁸⁷BEE Codes (2007) code series 100-700. See chapter two para 2.7 for discussion on these elements.

corporations.⁸⁸ This situation exists because these elite black groups shy away from being producers, therefore they do not engage in entrepreneurship.⁸⁹ It should be observed that the BEE Codes seek to encourage entrepreneurship through the contracting of SMMEs with government for goods or services. This is government's vision of growing the economy by encouraging entrepreneurship, in particular because private entrepreneurship is the driver of modern economies.⁹⁰ The concern is that tenderpreneurship has replaced entrepreneurship as the economic liberation of the black-elite.⁹¹ This is so because financing new commercial enterprises is not the driving ideology behind this black-elite, but rather the joining of existing enterprises (previously advantaged) by them (black-elite) in the quest to gather riches⁹² and not to start as emerging new businesses with the view to develop skills and economic power.

Tenderpreneurship is a reflection of unfair wealth accumulation leading to narrow empowerment, which means BBEE is not proliferating to the majority of black people. This narrow empowerment that discourages entrepreneurship points to a crisis in BBEE.⁹³ This is so because tenderpreneurship imposes a cost on state services and

⁸⁸Mbeki M (2009) 71.

⁸⁹Mbeki M (2009) 73.

⁹⁰Mbeki M (2009) 11.

⁹¹Mbeki M (2009) 95.

⁹²Mbeki M (2009) 72.

⁹³Laurence P 'Malema and the tenderpreneurs' *Politicsweb* 25 February 2010. (Malema is the President of the ANC youth league). Naidu B 'How Malema made his millions- Malema the "Tenderpreneur" *Sunday Times* 21 Feb 2010 1. In Malema's case the *Sunday Times*, 'citing official tender and government documents, reported that Malema's companies were awarded more than 20 contracts, each worth between R500,000 and R39 million between 2007 and 2008. A number of these were in Limpopo, his home province.' Tenders were awarded to Malema ranging from road and pavement construction to bulk water supply and upgrading cemeteries with documentation confirming that while some of the projects were completed on schedule, the majority of them were not, available at <http://www.timeslive.co.za/sundaytimes/article318330.ece> (accessed 21 Feb 2011).

confers no benefit; as a result it is branded as 'economic terrorism'.⁹⁴ They also provide shoddy services to communities at the expense of genuine entrepreneurs with proper skills and services,⁹⁵ as required by the BEE Codes. This way the public resources are being used superficially, instead of developing the majority of black people.

It rather benefits the black-elite in private accumulation of wealth in the name of preferential public procurement. This practice compromises the preferential procurement process, by not following the fair process prescribed by the procurement system. This prescribes that a competitive bidding process must be followed to allow for competition at large, thereby observing the principles of preferential procurement, in the Constitution. They do not need to pass the scrutiny of the BEE Codes scorecard grid, because proper tender procedures are not followed. This means that the performance of the tenderpreneur in term of social deliverables was not evaluated, since promotion of skills, rural and enterprise development, as the BEE Codes envisage, is not a priority. The difficulty with rooting out this behaviour is that those tasked to bring about economic change to the population at large are seemingly feathering their own nests by joining in this cartel.

3.3 Remedies for procurement transgressions

⁹⁴Pressly D 'Tenderpreneurs are Economic Terrorists' *Information portal on corruption and governance in Africa* 01 March 2010 available at http://www.ipocafrika.org/index.php?option=com_content&view=article&id=298:tenderpreneurs-are-economic-terrorists-&catid=109:news-archive-2010&Itemid=101 (accessed 11 Feb 2011).

⁹⁵SAPA 'Cosatu lashes out at "tenderpreneurs"' Mail and Guardian online 4 March 2010 available at <http://www.mg.co.za/article/2010-03-04-cosatu-lashes-out-at-tenderpreneurs> (accessed 21 Feb 2011)

The Procurement Act⁹⁶ makes provision for the cancellation of any tenderer found tendering false information. In addition the Procurement Regulations⁹⁷ provides for penalties which are to be meted out to those found transgressing procurement procedures and laws. But, despite accounting authorities being empowered by these provisions they are found lacking in its application. Moreover, in the wake of the willful behaviour of public official and suppliers that this study suggests, it causes concern why so few are falling prey to the penalties that apply in public procurement.

A very useful mechanism to apply to those that manipulate tender processes is debarment from doing business with the state. The European Community and the USA use exclusions as well-known legal mechanism.⁹⁸ In South Africa the Procurement Regulations 2011⁹⁹ provides for a non-judicial process through which exclusions can be implemented by all three spheres of government and organs of state. This process provides that those engaging in corrupt practices may be excluded from doing business with government, for up to 10 years.¹⁰⁰ If the situation warrants it, an accounting officer is empowered to impose penalties by debarring the enterprise and in addition laying criminal charges against any bidder or public official.¹⁰¹ Should an accounting officer fail to act, the National Treasury may direct an institution to lay criminal charges against

⁹⁶Procurement Act s2-

1(g) Any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.

⁹⁷(2011) reg 13.

⁹⁸Williams S & Quinot G 'To Debar or not to Debar: When to Endorse a Contractor on the Register for Tender Defaulters' (2008) 125 *SALJ* 250.

⁹⁹Regulation 13 (2) (d) the tenderer or contractor, its shareholders and directors, or only the shareholders and directors who acted on a fraudulent basis, from obtaining business from any organ of state for a period not exceeding 10 years. Also see Regulations 16A9.2 (a) (i) ;(ii) ;(iii).

¹⁰⁰ Procurement Regulations (2011) reg 13 (2) (d).

¹⁰¹Treasury Regulations (2005) reg 4.2.1. Regulations (2011) reg13 (2) (d) ;(e).

such a person.¹⁰² Furthermore, debarring a bidder using the empowering provisions of the Procurement Regulations can result in such names being listed in the National Treasury Database of Restricted Suppliers.¹⁰³ Contrary to the Register of Tender Defaulters (which works through the Corruption Act) this list does have a number of suppliers restricted for up to 10 years.

It is the responsibility of the organ of state to verify if a preferred bidder is black listed on the National Treasury Database of Restricted Suppliers¹⁰⁴ and Register for Tender Defaulters. In the case of *De Sols Trading CC and Anitha Dubaram Singh v the Government of South Africa and Others*¹⁰⁵ a tender was awarded to the applicant which was blacklisted on the restricted suppliers database. After the contract was concluded the respondent discovered that the applicant was on the data base and after due process cancelled the contract. Upon the threat of cancellation of the contract the applicant approached the court but to no avail because she was listed. Valuable time and money could have been spared if the respondent did the right thing in the first place and verified the status of the preferred bidder. Setting aside the contract means that a new supplier needs to be sourced which could entail a new tender process.¹⁰⁶

¹⁰²Treasury Regulations (2005) reg 4.2.2.

¹⁰³National Treasury Database of Restricted Suppliers and available at <http://www.treasury.gov.za/publications/other/Database%20of%20Restricted%20Suppliers%202011.pdf> (accessed 9 November 2011).

¹⁰⁴Bolton P 'Tender Processes and Blacklisted Suppliers' (2010) 12 *LGB* 18.

¹⁰⁵North Gauteng Division, Pretoria, Case No:13762/10 (5 October 2010)

¹⁰⁶Bolton P (2010) 18.

It is recommended that these internal remedies should be used in a more aggressive way in order to make inroads on those that wilfully undermine preferential procurement laws. In particular where fronting is alleged, due process should ensue by invoking the provisions of the Procurement Regulations. In *Hidro - Tech Systems (Pty) Ltd v City of Cape Town and Others*¹⁰⁷ the application of section 15 of the Regulations 2001¹⁰⁸ came under scrutiny in an allegation of fronting. The court was approached to explain the nature and extent of the duty of an organ of state, when presented with allegations of fraudulent manipulation of the preferential procurement system in order to secure a preference in terms of a bidder's black economic empowerment profile. The court was asked for an order directing the City to act upon the allegation in accordance with Regulation 15¹⁰⁹ or that the City is ordered to initiate an investigation into the allegation of fronting. The court challenge came in the wake of allegations of fronting, leveled against one of the City's service providers (Viking), which the City refused to thoroughly investigate. The court held that bidders caught tendering false information to secure preference points face unilateral termination of their contract by organs of state.¹¹⁰ Viking was found guilty of fraudulent misrepresentation and the City was ordered to

¹⁰⁷(2010) 1 SA 483 (C). (hereafter *Hidro-Tech Systems*). Also see para 3.2 1 for a discussion on this case on fronting; also see *Viking Pony* (2010) 3 SA 365 (SCA); *Viking Pony* (2011) 1 SA327 (CC).

¹⁰⁸Now provided in Procurement Regulations (2011) s13.

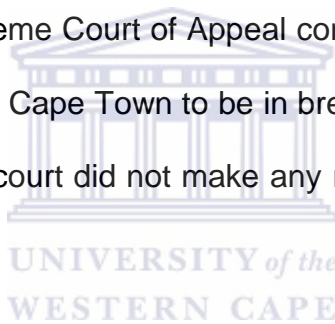
¹⁰⁹Procurement Regulations (2001) 15 (2) An organ of state may, in addition to any other remedy it may have against the person contemplated in sub-regulation (1)-

- (a) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;
- (b) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;
- (c) impose a financial penalty more severe than the theoretical financial preference associated with the claim which was made in the tender; and
- (d) restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years. Also see Procurement Regulations (2011) reg 13 (2) which provide the same provision.

¹¹⁰*Hidro-Tech Systems* (2010) 1 SA 483 (C) para 17.

engage the appropriate steps in terms of regulation 15.¹¹¹ The court said these steps should be taken as soon as possible and there is no need to wait until after final conclusion of the investigation.¹¹² It must be noted that should the City wait for conclusive investigation the fronting continues and contracts are tendered for with these bogus credentials as happened in this case.

In the subsequent Supreme Court of Appeal¹¹³ challenge against the High Court¹¹⁴ decision, the court held that no organ of state should remain passive in the face of evidence of fraudulent preferment, but is obliged to employ the appropriate steps to remedy the situation. The Supreme Court of Appeal concurred with the approach of the High Court but found the City of Cape Town to be in breach of its duty to investigate the allegations of fronting.¹¹⁵ This court did not make any recommendations compelling an investigation.



This dispute was put to bed by the Constitutional Court setting aside the Supreme Court of Appeal's order and replacing it with an order compelling the City to investigate the allegations (fronting) leveled against Viking.¹¹⁶ It is unfortunate that the City was not vigilant in the face of allegations of fronting, which could easily have been established by calling in the shareholders and directors with recent proof of shareholding. It seems that government lacks the *appétit* to impose exclusions on corrupt suppliers. As it stands there are only five suppliers listed for fronting on the Database for Restricted

¹¹¹ *Hidro-Tech Systems* (2010) 1 SA 483 (C) para 75.

¹¹² *Hidro-Tech Systems* (2010) 1 SA 483 (C) paras 65-6.

¹¹³ *Viking Pony* (2010) 3 SA 365 (SCA) para 32.

¹¹⁴ *Hidro-Tech Systems* (2010) 1 SA 483 (C).

¹¹⁵ *Viking Pony* (2010) 3 SA 365 (SCA) para 36.

¹¹⁶ *Viking Pony* (2011) 1 SA327 (CC) para 59.

Suppliers.¹¹⁷ These suppliers are debarred from 2010 to 2015; regrettably they were not debarred for the maximum of 10 years.

Of importance is that the power of the public official is limited to debarring a bidder for tender irregularities or corrupt practices, but only the court may impose conviction for those practices. Furthermore the Corruption Act¹¹⁸ also makes provision for debarment of contractors found criminally liable. Williams prefers this approach in that courts have better investigative powers and expertise to deal with exclusions for corruption and in this regard can provide a central source for dissemination of information.¹¹⁹ Consequently the court is the preferred authority to deal with corruption where criminal sanction may be imposed.¹²⁰

This was also the view in *Viking Pony*, where the court held that the proper way to deal with an allegation of fraud is to report it to the police or the NPA.¹²¹ As such, should charges of corruption in public tendering be laid, this should be done through the Corruption Act. Therefore the Corruption Act provides that a court may convict a person for corrupt activities in relation to procuring and withdrawal of tenders and in addition, may order that the particulars of the convicted person, the conviction and the sentence be endorsed in the Register for Tender Defaulters for a period between five and 10 years.¹²² In the case where an 'enterprise' is convicted, the court may order

¹¹⁷These suppliers are all debarred from 2010 to 2015 see National Treasury Database of Restricted Suppliers.

¹¹⁸Sections 12; 13; 28 (1) (a).

¹¹⁹Williams S (2007) 20.

¹²⁰Williams S (2007) 12.

¹²¹*Viking Pony* (2011) 1 SA327 (CC) para 48.

¹²²Corruption Act (2004) s28 (3) (a) (ii).

endorsement on the register of the particulars of that enterprise; the particulars of any partner, manager or director.¹²³ However the Corruption Act provides that an endorsement on the register should only commence after an appeal against the conviction or sentence is finalised by the court.¹²⁴

Criticism has been raised against the debarment procedures in the Corruption Act in that it creates uncertainty as to its rationale and proper place in public procurement regulation.¹²⁵ The contention is that whilst the court deals with the issue of conviction for corruption, the National Treasury has to carry out the order of debarment. Thus the time of debarment is controlled by the Treasury and not the court. This means the Treasury has the discretion of choosing the date of endorsing the convicted supplier;¹²⁶ the court order do not provide the date when endorsement should start. However, once debarred, there is no derogation from the orders attached to debarment, which means these suppliers cannot do business with the government and public officials have no discretion in this regard.¹²⁷ This is in contrast with the internal debarment under the Regulations 2011, which operates under the discretion of the procurement entity.¹²⁸

Williams and Quinot suggest that the alternative (internal) debarment measures should trump court process.¹²⁹ Furthermore government should use exclusions as an

¹²³Corruption Act (2004) s28 (1) (b).

¹²⁴Section 28(3) (b).

¹²⁵Williams S & Quinot G (2008) 249.

¹²⁶Williams S & Quinot G (2008) 249.

¹²⁷Williams S & Quinot G (2008) 255.

¹²⁸Williams S & Quinot G (2008) 255.

¹²⁹Williams S & Quinot G (2008) 256.

administrative remedy¹³⁰ with the view to conserve the integrity of the procurement system which is better suited than judicial intervention, for debarment.¹³¹ As it is the Corruption Act provides for debarment with the view of punishment of corrupt activities and as a deterrent for corruption in general and not to preserve the integrity public procurement.¹³² Consequently protecting the integrity of the procurement system should be the preferred view for a flexible and effective procurement system.¹³³

This study cautions that, should the court should not be used to police corruption in government procurement it will mean discretion to debar is left to public officials who may have the potential to act arbitrarily. On the other hand the court order does not lend room for any arbitrary discretion, because the order must be followed. However, using the Procurement Regulations for debarment could prove to be less sluggish than court process. It must also be born in mind that the primary reason for debarment is to protect the organ of state against risk and thereby lend protection to the fiscus.¹³⁴

Furthermore Bolton argues that debarment of contractors' shrinks the pool of competitors in the procurement process and thereby defeats the principles of competitiveness and cost-effectiveness.¹³⁵ Thus the decision by public officials to debar (using the Procurement Regulations) should not be capricious but rather follow due process. This will be served by giving affected contractors the opportunity to be heard

¹³⁰Williams S (2007)1.

¹³¹Williams S & Quinot G (2008) 256.

¹³²Williams S & Quinot G (2008) 254.

¹³³Williams S & Quinot G (2008) 258.

¹³⁴Bolton P (2006) 38.

¹³⁵Bolton P 'The Exclusion of Contractors from Government Contract Awards' (2006) 10 *Law, Democracy and Development* 29.

before debarment takes place.¹³⁶ This will maintain procedural fairness as provided by the PAJA which provides the audi alteram partem rule that gives affected bidders an opportunity to defend themselves when faced with debarment.

Despite the fact that government is protected against ruthless contractors by the debarment mechanisms,¹³⁷ none of those companies found guilty of collusive behaviour have been debarred from doing business with government. (admission of guilt fines put the matter to rest for them). The purpose of including debarment in the procurement legislation accounts for the fact that it was deemed necessary to guard against the practice of corruption which works against reputable economic reform. This thesis suggests a more aggressive approach in debarring those found guilty of corrupt behaviour in order to secure a tender award. Vacillation in debarring of those bidders found to be willful will not serve preferential but rather frustrate its success in economic empowerment.

3.4 Other Anti-corruption measures implemented by the state

Although the end to malfeasance is not nigh, it does seem that government is taking the issue of corrupt practices very seriously. The battle against the scourge is also evident in the other anti-corruption efforts implement by government.

¹³⁶Bolton P (2006) 43. Procurement Regulations (2011) reg13 (2) (d) provides for application of the audi alteram partem rule before debarment. Also see *Supersonic Tours (Pty) Ltd v The State Tender Board NO and Another* (2007) 11 BCLR 1271 (T); *Chairman of the State Tender Board and Another v Supersonic Tours (Pty) Ltd* (2008 (6) SA 220 (SCA).

¹³⁷Williams S & Quinot G (2008) 254.

First there is the recently established, National Anti-Corruption Forum,¹³⁸ created by the Department of Public Service and Administration (DPSA) to help stamp out corruption.¹³⁹ One of the major concerns relates to irregular expenditure in SCM.¹⁴⁰ This is attributed to the fact that the public service is lacking in record-keeping and compliance with statutes.¹⁴¹ Through this forum the DPSA is adopting a 'zero tolerance of corruption' approach.¹⁴²

Secondly, and probably the most notable of these anti corruption agencies is the SIU which was appointed in March 1997 to probe corruption and maladministration in government.¹⁴³ The SIU had been mandated by the president to investigate non-compliance with procurement procedures and procurement-related fraud, in various government departments.¹⁴⁴ The president mandated the SIU in 2010¹⁴⁵ through various proclamations to investigate certain government departments, *inter alia* the SAPS¹⁴⁶ and DPW.¹⁴⁷ The proclamations mandated the SIU to conduct investigations into the procurement of goods, work or services including lease accommodation by the

¹³⁸Parliamentary Monitoring Committee 'Public Service & Administration Anti-Corruption Initiatives: Discussion with Public Service & Administration Minister, Public Service Commission & Auditor General' 3 Nov 2010 3. (hereafter PMG 'PSA Anti-Corruption Initiatives'). The report states that: 'Of the 1204 financial misconduct cases reported (2008/9), 86% were found guilty. The cost to the State exceeded R100 million of which only R9, 9 million was recovered' available at www.pmg.org (accessed 2 Dec).

¹³⁹The National Anti-Corruption Forum will be officially launched on the 25 November 2010.

¹⁴⁰PMG 'PSA Anti-Corruption Initiatives' (2010) 3.

¹⁴¹PMG 'PSA Anti-Corruption Initiatives' (2010) 3.

¹⁴²PMG 'PSA Anti-Corruption Initiatives' (2010) 4.

¹⁴³Special Investigating Unit available at

<http://www.info.gov.za/aboutgovt/structure/justice/npa.htm#specialinv> (accessed 27 April 2011).

¹⁴⁴Speeches and Statements: 'President Zuma orders several anti-corruption investigations' (12 August 2010) 4 available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=12101&tid=14737> (accessed December 2010). Those departments under investigation are: Health, Human Settlements National Department of Public Works, the South African Social Security Agency (SASSA) and the South African Police Service (hereafter Speeches and Statements)

¹⁴⁵Speeches and Statements (12 Aug 2010).

¹⁴⁶SAPS Proclamation No R.42 GG 33451 10 August 2010.

¹⁴⁷DPW Proclamation No R38 GG 33425 30 July 2010.

SAPS. The investigation focuses on the fact that procurement procedures were not fair, equitable, transparent, competitive and or cost-effective; and or contrary to applicable legislation manuals, guidelines, practice notes and instructions issued by the national treasury.¹⁴⁸

Thirdly, a working group on SCM was established to improve management of the SCM system as a whole.¹⁴⁹ This working group comprises of representatives of the National Treasury, the South African Revenue Services, the Financial Intelligence Centre, the Auditor-General and the Special Investigation Unit.¹⁵⁰ This group will identify high-risk clusters of tenders in order to integrate investigations, to enforce actions, which include criminal investigations.¹⁵¹

Fourthly, the national treasury has also recently established a specialised audit service unit that focuses on developing fraud detection guidelines for supply chain management processes and provides fraud awareness and investigative capacity in government departments.¹⁵² The reason for this unit is the National Treasury's commitment to properly manage the 57 transversal contracts¹⁵³ (tenders) that costs R16 billion annually, and in doing so ensuring proper observance of the rules of public

¹⁴⁸Speeches and Statements (12 Aug 2010).

¹⁴⁹National Assembly Question for Written Reply Question Number: 1522 (9 October 2009) available at www.gov.za (Accessed 11 December 2010).

¹⁵⁰National Assembly Question for Written Reply Question Number: 1522 (9 October 2009).

¹⁵¹National Assembly Question for Written Reply Question Number: 1522 (9 October 2009).

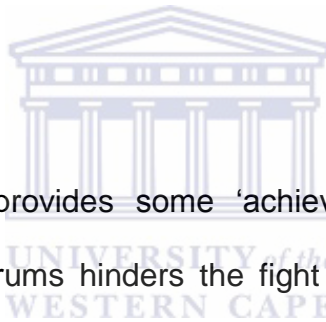
¹⁵²National Treasury Strategic Plan 1020 (13 March 2010) 4 available at <http://www.treasury.gov.za/publications/other/MinAnsw/2010/na.aspx> (accessed 11 December 2010).

¹⁵³Transversal contracts refer to one supplier being appointed to supply goods or services for all the departments in a provincial government.

procurement.¹⁵⁴ This will include measures employed by the national treasury to boost public awareness of those found guilty of transgressions in public procurement.¹⁵⁵

These are all the additional endeavors the government has made in its quest to combat corruption, mismanagement and maladministration in all spheres of government.¹⁵⁶

There is not much information recorded on the success of these establishments. The SIU has been the most vigilant in investigating corruption in public procurement. This is substantiated by its report on rampant tender corruption in the SAPS.¹⁵⁷ However it must be stressed that prosecutions are not succeeding at the same rate that corruption is being uncovered.



The PSC¹⁵⁸ report of 2010 provides some 'achievements' but laments how the incoherency of the different forums hinders the fight against corruption in the public service. The PSC reports that further structures had been established to help fully integrate and coordinate the fight against corruption.¹⁵⁹ The National Anti-Corruption Forum was established in 2001 to contribute towards a national consensus for strategies against corruption.¹⁶⁰ This was complemented by cabinet approving in 2002 the establishment of an Anti-Corruption Coordinating Committee to achieve a

¹⁵⁴National Treasury Strategic Plan 1020 (13 March 2010) 4.

¹⁵⁵National Assembly Question for Written Reply Question Number: 1522 (9 October 2009).

¹⁵⁶Speeches and Statements (12 August 2010) 1.

¹⁵⁷The Public Service Commission State of The Public Service Report 2010 *'Integration, Coordination, and Effective Public Service Delivery'* October 2010 (hereafter PSC Report 2010). This PSC Report 2010 also reported corruption in social welfare grants uncovered by the SIU.

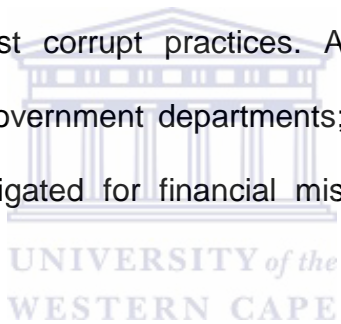
¹⁵⁸The PSC is required by section 196(4) (e) of the Constitution to provide an evaluation of the extent to which the values and principles in section 195 are complied with.

¹⁵⁹PSC Report (2010).

¹⁶⁰PSC Report (2010) p7.

coordinated approach towards anti-corruption in government.¹⁶¹ This committee was mandated to ensure the fight against corruption is fully coordinated and integrated between all spheres of government.

However the effectiveness of this collaboration is frustrated by the lack of both funds and political commitment; public officials have constantly missed meetings, and as a result the Committee has withered into inactivity.¹⁶² The PSC urged the executive of government to commit to delegate representatives to these forums for it to remain active.¹⁶³ This uncoordinated approach adopted between government departments handicaps the struggle against corrupt practices. A major problem is a lack of information sharing between government departments;¹⁶⁴ this can be seen from the fact that officials being investigated for financial misconduct resign and join other departments in government.



The PSC also manages the National Anti-Corruption Hotline, through which it refers cases of corruption to government departments to investigate. The feed back rate of **all** cases of corruption referred to departments since 2004 is 36 percent.¹⁶⁵ The lack of capacity to investigate and follow up cases is cited as the impediment to success. The most recent effort by government to coordinate the anti-corruption forums is the

¹⁶¹PSC Report (2010) p6.

¹⁶²PSC Report (2010) p9.

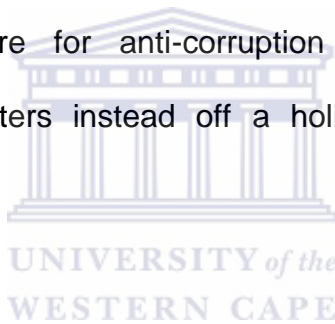
¹⁶³PSC Report (2010) p9.

¹⁶⁴PSC Report (2010) para 11.

¹⁶⁵PSC Report (2010) para 10 states that 'out of 100 allegations of corruption received through the hotline and referred to departments for investigation, the PSC has no idea what happens to 64 of it.'

establishment of an Anti-Corruption Inter-Ministerial Committee in 2009. This committee considers the corruption recommendations that the PSC and other bodies issue.¹⁶⁶

The PSC reports in 2011 that corrupt practices in procurement ranks in the top four categories of most common¹⁶⁷ allegations in public administration.¹⁶⁸ Amongst its key findings is that 60 percent¹⁶⁹ of the government departments have either no anti-corruption policies or very basic policies of poor quality.¹⁷⁰ In addition to this, these departments have no basic investigative capacity, no forensic investigative plans and protocol documents for investigating cases of corruption.¹⁷¹ Moreover those departments with infrastructure for anti-corruption are mainly focused on the investigation of particular matters instead of a holistic approach of investigation, detection and prevention.¹⁷²



Furthermore feedback on disciplinary action against those public officials found guilty of corruption and fraud, show that departments are often very lenient.¹⁷³ The common sanctions against disciplinary action in this regard, are written or final written warnings.¹⁷⁴ This situation exists, despite the requirement that departments should report offences relating to fraud and corruption involving an amount of R100 000 or

¹⁶⁶PSC Report (2010) para 12.

¹⁶⁷PSC Report (2010) para 2.4 describes 'bribery, abuse of Government-owned vehicles, procurement and appointment irregularities' as most common.

¹⁶⁸PSC Report (April 2011) para 6.

¹⁶⁹PSC Report (April 2011) para 6 found that only fifteen percent (15%) of the departments have advanced investigative capacity, while twenty-five (25%) have basic capacity.

¹⁷⁰PSC Report (April 2011) para 6.

¹⁷¹PSC Report (April 2011) para 2.3.8.

¹⁷²PSC Report (April 2011) para 6.

¹⁷³PSC Report (April 2011) para 6.

¹⁷⁴PSC Report (April 2011) para 6.

more, to the SAPS section 34(1) of the Prevention and Combating of Corrupt Activities Act, 2004.

There is clearly no shortage on agencies or forums that deal with corruption. The concern is that, despite this, corruption nevertheless seems to swamp the procurement environment. This is evidenced by the many media reports and more importantly from the SIU and the PSC reports. The political will to enforce the Corruption Act and other legislative measures enacted to deal with corruption, seems like a good starting point to deal with the scourge. However this will entail political commitment to report those found engaging in corruption to the authorities, in order for the court to deal with their fate.

3.5 Conclusion



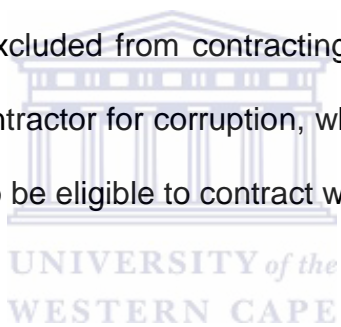
Those that drink from the cup of corruption should face the might of the comprehensive provisions of the Procurement Regulations or the Corruption Act against any wilful action that deliberately hinders economic empowerment. Aggressive action is warranted in light of the fact that the SIU can only investigate the top 20 cases of corruption in the police force, which already amounts to R2 billion.¹⁷⁵ Moreover the PSC report confirms that 'corruption transcends institutional boundaries, and it is, therefore, beneficial for different departments and sectors of society to collaborate to fight it.'¹⁷⁶ This means in attempting to put a restraint on corruption, an organ of state should promptly investigate allegations of corruption and if necessary, apply Regulation 13. This will enable

¹⁷⁵De Lange D 'Corruption Bombshell' *Cape Times* 31 March 2011 1.

¹⁷⁶PSC Report (2010) 76.

corruption to be caught at an early stage and remedied by excluding the bidder from public tendering. This will entail that government enforce the regulations in order to promote their own policies in the infrastructure for procurement.¹⁷⁷

In addition the exposure of collusive tendering over the past 30 years has shown the unabated tenacity of 'big business' to corrupt the procurement environment. To break the chain of collusive tendering, bidders should have the Competition Amendment Act¹⁷⁸ brought to bear on them. Thereby South Africa will join the global trend which entails imprisonment and naming such corruptors in the tender register. In addition those found guilty should be excluded from contracting with government. It makes no sense to impose a fine on a contractor for corruption, which is easily paid from ill-gotten gains, and then they continue to be eligible to contract with government.



To exclude corrupt suppliers from tendering for government contracts is immediately detrimental to the reputation of such supplier, as it will affect its ability to obtain business from other sectors. This is precisely why the publication of the names of suppliers, is such an attractive anti-corruption tool.¹⁷⁹ Excluding corrupt suppliers brings credibility to the preferential procurement process and this tie in with international best practice that recommends the automatic exclusion of those involved in collusive tendering, or those providing false information to secure a tender.¹⁸⁰ Regrettably it is possible that the exclusion of a company will not prevent a sister company from bidding for government

¹⁷⁷Hawkins J (2008) 60 states that the government fails to enforce their own regulations and policies.

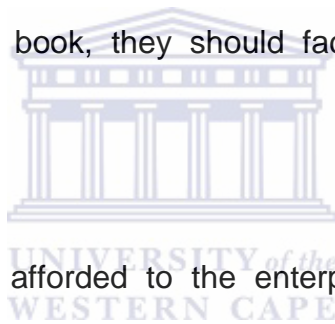
¹⁷⁸Act 1 of 2000.

¹⁷⁹Williams S (2007) 11.

¹⁸⁰Arrowsmith S, Linarelli J & Wallace D Jr (2000) 41.

tenders.¹⁸¹ This means that corrupt firms still have access to government contracts, which raises questions about the efficacy of the exclusion provisions.¹⁸² This seems like an oversight and legislation in this regard is necessary which should see the suspension those related companies for a limited period from contracting with government.

The monetary fines paid to the fiscus by bid-riggers, is not a deterrent in itself as those individuals responsible for crooking the procurement system are not brought to book in this way. The business enterprise takes the rap and bears the financial burden. The real perpetrators remain faceless and nameless behind the name of the enterprise. In order to bring those perpetrators to book, they should face prosecution in terms of the Competitions Amendment Act.



Corporate leniency should be afforded to the enterprise 'first through the door' in exposing collusion, resulting in immunity to that enterprise in exchange for full disclosure of the cartel. The rest of the cartel should meet with the might of the Competition Amendment Act.¹⁸³ This should have them pay a fine and be prosecuted for their ill gotten gains. Moreover, because of the secretive nature of collusion, one is unable to tell whether these businesses will abstain from collusive behaviour in the future. Therefore, corporate leniency should not be on offer for the same transgression by the same enterprise.

¹⁸¹Williams S (2007) 17.

¹⁸²Williams S (2007) 17. 'For instance, empirical evidence from the US has shown that even when firms have been excluded from government contracts, they are still often able to secure contracts through a complex network of subsidiaries, affiliates and related companies owned by the same proprietors of the excluded firm.'

¹⁸³Act 1 of 2000.

The most prominent bid-riggers, the cartels in the construction industry amount to four percent of the GDP.¹⁸⁴ The fact that they wield such economic power is all the more reason to break this monopoly in order to extend prosperity to those justified. If not, these same companies, that manipulated tender processes during apartheid, will continue to prosper, almost two decades into democratic rule. This displays such a blatant disregard for South Africa's economic growth and development policies that the government should stamp out this practice as a matter of national interest.

It is also rather distressing that the DTI refers at least three to four fronting complaints per week to the SIU for further investigation.¹⁸⁵ Thus fronting is pervasive and those found guilty should be named and shamed in the tender default register. Furthermore an effective way to deal with fronting is that it should be detected and investigated at an early stage and in debarring the bidder, government may nip the practice in the bud, without a lengthy court trial. The starting point to insulate the procurement environment against fronting is to apply only the BEE Codes¹⁸⁶ verification method, which provide for verification biennially.

This will be best served if every bidder passes scrutiny of their BEE credentials by being issued with a BEE status level certificate, which is updated biennially. Adhering to this practice may alert procurement entities of any change in shareholding or the active

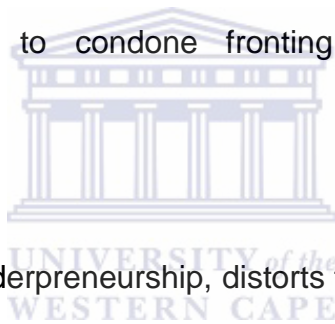
¹⁸⁴Naidoo P 'Concrete Raiders' *Financial Mail* 17 February 2011.

¹⁸⁵GCIS 'Accountants, agencies to be targeted for fronting' (Nov 2010).

¹⁸⁶See chapter two para 2.7 for a discussion on the BEE Codes.

employment of directors. Therefore post-award monitoring of tender performance is a necessary process to try and combat fronting. This vigilance of checking up on the social deliverables attached to the tender award should restrain bidders from using outdated BEE credentials as was the case in *Viking*. Moreover, if Viking Pony is found guilty of exploiting the practice of fronting, both Viking and the sister company (Bunker) should be endorsed on the register.

Nevertheless the complacency to investigate fronting, displayed by the government in *Viking Pony* is cause for concern. The failure to enforce punitive measures available in the procurement process is to condone fronting and thereby negate proper transformation



Furthermore the practice of tenderpreneurship, distorts the tender process by selling the tender to the highest bidder, without following proper tender proceedings, thereby bringing a credible economic empowerment program, like BEE into disrepute.¹⁸⁷ This means that public resources are not optimally used for development and growth but rather to simply transfer wealth to a new elite- black oligarchy. As noted, the problem with this development in preferential procurement is that it does not promote entrepreneurship which is what the BEE Codes encourage. The way to deal with this scourge is to extend the Competitions Commission Act to include this practice. As it is there has to be collusion between the procurement entity and the tenderpreneur in order

¹⁸⁷Young Communist League: *Bottom Line Issue 2*, Vol 7: (9 February 2010).

for this practice to succeed. This type of collusion defeats fair competition and as such should fall under the jurisdiction of the Act.

Lastly, there are too many agencies with overlapping duties on investigating corruption in public procurement and not enough application of preventative measures. Despite all these forums, this year started with reports of accounting officers of SAPS and DPW bypassing tender procedures, unlawfully. Fortunately the government has finally re-acted to these reports by suspending the Police Commissioner and removing the responsible cabinet minister. The efficiency of preferential procurement will be better served by focusing on measures for early detection of corruption and thereby preventing its full blown operation. This should prove more valuable than trying to investigate corruption already at an advanced stage, where the tender contract is in progress and monies received. Thus the focus should be on preventative rather than reactive measures. This means that corrupt suppliers should be detected before they start to work on a contract instead of trying to recover monies irregularly paid to such bidders. This situation proves untenable because only insignificant amounts of moneys are recovered.¹⁸⁸

In any case, by preventing corruption from flourishing in public procurement, South Africa will prevent negative growth in BEE, and non-meritorious bidders will not be awarded tenders. The government should let the legislation guide it in the quest to combat willful practices.

¹⁸⁸PMG 'PSA Anti-Corruption Initiatives' (2010). The report states that: 'Of the 1204 financial misconduct cases reported (2008/9), 86% were found guilty. The cost to the State exceeded R100 million of which only R9, 9 million was recovered.'

CHAPTER 4

THE PROBLEMS EVIDENT IN COMPETITIVE BIDDING

4.1 Introduction

The previous chapters¹ enquired into the challenges that the legislation and willful practices pose to the preferential procurement domain. The lens of this chapter will extend the enquiry into the challenges experienced in the execution phase of preferential procurement. The objectives set out in the legislation are to be realised through this phase, competitive bidding (tendering) and it is important to analyse whether the objectives of preferential procurement are supported through the execution phase. A bone of contention is that the competitive bidding terrain is more often than not challenged by bad management. The Auditor General of South Africa (AGSA) reports that the tender committees neglect to properly consider the prescribed procurement legislation and regulations when evaluating, scoring and awarding bids.²

This is cause for inquiry because it is during this phase that those broad-based BEE ideals of the BEE Codes are tested, because when a potential bidder wants to contract

¹See chapter 2 for discussion on the legislative regime for procurement and chapter 3 for discussion on malpractices.

²AGSA report to Parliament on a performance audit of the infrastructure delivery process at the provincial departments of Education and Health (August 2011) para 2.1.4 (a) (hereafter AGSA report on Education and Health Departments) available at <http://www.agsa.co.za/Reports%20Documents/performance%20audit%20of%20the%20infrastructure%20delivery%20process.pdf> (accessed 20 October 2011). AGSA Report on Investigation into the Procurement of Various Contracts at the Gauteng Provincial Department of Roads and Transport (June 2011) para 1.2.2(c) also decry the same non-compliance. (hereafter AGSA Report June 2011) also

with government for goods or services, this must be done by participating in a competitive bidding process.³ Those potential bidders wishing to benefit from preferential procurement should become compliant to the specifications required in order to submit an acceptable tender. The objective of the exercise of competitive bidding is to provide access to black people as potential bidders to preferential procurement. If accepted the tender will have been adjudicated through a competitive bidding process that determines the prescribed credentials of bidders at certain stages. This makes competitive bidding undeniably part of preferential procurement.

This study will commence with explaining the concept of competitive bidding insofar as the procurement of goods or services in the South African setting. Furthermore competitive bidding is adjudicated by a committee system⁴ and this chapter will elaborate on the constitution of the committees and how they dispose of their tasks under the auspices of the legislation.

In addition competitive bidding is also laboured by other nefarious practices displayed by public officials. This conduct sees the processes of competitive bidding often ignored which can be seen as disregard of the procurement and BEE laws. This study will look into the repercussions of this behaviour on the competitive bidding process. Lastly, the recourse for aggrieved bidders affected by tender decision will receive attention together with the judicial review for procurement transgressions.

³This depends on the value of the tender as not all tenders need to follow a formal competitive bidding process only from R500 000.

⁴See Treasury Regulations reg16A in GN R225 GG 27388 of 15 March 2005; as amended by GN R146 GG 29644 of 20 February 2007 SCM

4.2 Competitive bidding- the procurement of goods or services

The South African Government refers to a tender as an offer to do work or supply goods at a fixed price.⁵ Securing goods or services from a bidder is also referred to as 'procurement'. Furthermore procurement procedures are usually referred to as 'tendering, 'competitive tendering/bidding', or 'a call for tenders'.⁶ When government 'puts out a tender' or 'invites bids' it means the public is asked for price offers to do work or supply goods to the state.⁷ This postulates a process where government assesses who to choose based on preferential points, price and various technical aspects.

Plasket draws attention to the fact that a polycentric decision is needed when evaluating tenders which boils down to the fact that price, although most important, is not the decisive factor.⁸ In *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others*⁹ the court noted that, annually government contracts notionally run into billions of rands. The court therefore lamented the fact the government's budget is undermined where public officers fail to recognise that their primary task is to ensure that competitive bidding ensues at the least possible cost to the state, and to be mindful of BEE demands.¹⁰ Their task will be fulfilled if tenders are awarded to the most advantageous

⁵Cape gateway 'What is a tender' 17 August 2010 available at <http://www.capegateway.gov.za/eng/tenders/#20> (Accessed 5 September 2010).

⁶Bolton P *Law of Government Procurement in South Africa* (2007) 134.

⁷Cape gateway 'What is a tender' 17 August 2010.

⁸Plasket C 'Administrative Law' 2006 *Annual Survey of South African Law* 179.

⁹(1999) 1 SA 324 (CkH) 393(hereafter *Cash Paymaster Services*).

¹⁰*Cash Paymaster Services* (1999) 1 SA 324 (CkH) 393.

offer,¹¹ which is based on a balance between the tendered price and the tendered deliverables in respect of targeted groups.¹² Obviously, if value for money is determined by price alone, this will hamper the envisaged socio-economic objectives for targeted groups.

Competitive bidding processes or the lack thereof is not given the optimal attention needed in the context of the importance attributed to preferential procurement. To this extent the disregard of procurement policies and procedures is treated with flippancy as demonstrated by the investigation into the lack of procurement procedures by a government agency entrusted with R106 million.¹³ A forensic investigation confirmed that no proper bookkeeping was followed and procurement lacked proper tendering in that most suppliers failed to provide tax clearance certificates as required. The procurement entity felt it was sufficient to justify how the money was spent (without regard for formal tendering).

Importance should also be shed on a fair and transparent tender process, which must give rise to a competitive public procurement system. Therefore government contracts

¹¹Green Paper on Public Sector Procurement Reform in South Africa. *Government Gazette* no 17928,14 April 1997 para 3.4.4 (hereafter Green Paper) states: 'The successful tenderer would, normally, be the one who is awarded the most points, subject to technical factors, previous contractual performance, financial references, unit rates and prices, alternative offers, qualifications etc., being acceptable. The premium, if any, which an organ of the State is prepared to pay to meet certain specific socio-economic / development objectives is defined in the formulation of the development objective / price mechanism which could be standardised throughout South Africa.'

¹²Watermeyer R 'The Use of Targeted Procurement as an Instrument of Poverty Alleviation and Job Creation in Infrastructure Projects' (2000) 9 *Public Procurement Law Review* 230.

¹³Pauw J 'Grootse bedrog en diefstal kenmerk jeugfees' Die Burger 9 October 2011 available at <http://www.dieburger.com/Suid-Afrika/Nuus/Grootse-bedrog-en-diefstal-kenmerk-jeugfees-20111009> (accessed 30 October 2011).

should only be awarded after an adequate number of suppliers were able to compete.¹⁴ The attraction of the biggest pool of competitors ensures optimal competition which underscores value for money,¹⁵ the ultimate aim for public procurement. Furthermore the court describes the very essence of tender procedures as a procedure that ensures proper evaluation is done of 'what is available, at what price and whether or not that which is produced serves the purposes for which it is intended'.¹⁶ Furthermore the principle of transparency dictates that public procurement procedures cannot be held behind closed doors and generally tenders must be opened in public.¹⁷ Moreover, after conclusion of a tender the parties may not vary the terms of the contract.¹⁸ This makes the publication of tender information of the utmost importance.

As it is, competitive bidding gives rise to four entitlements for bidders namely; sufficient access to tender competitions; timely notification of the closing date for submission of tenders; information on evaluation and selection criteria; and the right to expect and require the organ of state calling for tenders, to abide by the tender criteria.¹⁹ As a result public procurement decisions are fertile grounds for review of rationality; therefore the necessary legal controls over the adjudication of tenders must be in place to ensure that public interest is furthered when drawing from the public purse.²⁰ In addition, should

¹⁴Bolton P (2007)131.

¹⁵Bolton P (2007) 131.

¹⁶*Cash Paymaster Services* (1999) 1 SA 324 (CkH) para 385.

¹⁷Bolton P (2007) 131.

¹⁸Bolton P 'Scope for Negotiating and/or Varying the Terms of Government Contracts Awarded by Way of a Tender Process' (2006) 2 *Stell LR* 270.

¹⁹Bolton P (2006) 272. In *Grinaker LTA Ltd and Another v Tender Board (Mpumalanga) and Others* (2002) 3 All SA 336 (T) para 54-5 (hereafter *Grinaker*) the court set aside the tender board's decision and awarded the tender in accordance with the advertised tender conditions which the tender board deviated from.

²⁰Plasket C (2006) 179.

public officials act capriciously, unsuccessful or aggrieved bidders have locus standi in court to review such action.

Nevertheless upon acceptance of a tender by government, a binding contract ensues and the bidder awarded the tender has to provide the goods or services agreed to and government must pay the agreed price at the agreed time. Public officials manage competitive bidding within a SCM system which is explored next to determine how well officials dispose of this task.

4.2.1 Supply Chain Management (SCM)

Supply chain management can be described as: '[a] function that ensures that goods and services are delivered to the right place, in the right quantity, with the right quality, at the right cost and at the right time.'²¹ A policy shift has seen procurement powers being vested in procurement entities of each government department or organ of state. This resulted in a SCM system²² entrusted to each procurement entity²³ instead of a centralised tender board which also extend to local government where competitive bidding is tied into SCM regulations²⁴ providing for a committee system. Consequently this evolved in a more hands-on approach in competitive bidding, which creates

²¹Malinga M 'Zero Tolerance Against Fraud and Corruption Conference' National Treasury: Supply Chain Management 25 – 26 September (2007) 11. (hereafter Malinga M 'Fraud and Corruption Conference).

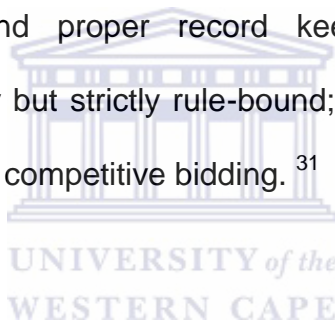
²²Treasury Regulations 16A3.2 (b); (c); 16A6.2 (a); (b).

²³Plasket C (2006) 163.

²⁴Municipal Supply Chain Management Regulations in GN 868 GG 27636 of 30 May 2005 reg 2(3); 26. Municipal Finance Management Act 56 of 2003(hereafter MFMA) s111 provides that every municipality must have and implement a SCM policy.

uniformity in the process,²⁵ thereby giving effect to the provisions of the Constitution, the PFMA,²⁶ Procurement Act²⁷ and BBBEE Act.²⁸ This serves to combat inconsistency in policy application, fragmented bid procedures and insufficient training of staff, as was the situation with tender boards.²⁹

Ordinarily a SCM policy must provide for procedures for each of the stages of the competitive bidding process, that is: the compilation of bid documentation; the public invitation of bids; site meetings or briefing sessions where necessary; the handling of bids after submission; the evaluation of bids; the award of contracts, and the administration of contracts and proper record keeping.³⁰ Evidently, preferential procurement is not discretionary but strictly rule-bound; therefore a public tender is the preferable means of engaging in competitive bidding.³¹



4.2.2 SCM Committees

The Treasury Regulations³² require the establishment of a committee system that comprises of at least three committees; namely, a bid specification committee (BSC), a bid evaluation committee (BEC) and a bid adjudication committee (BAC). It is common knowledge that these committees should oversee the adjudication of tenders. The

²⁵Malinga M 'Fraud and Corruption Conference' (2007) 11.

²⁶Act 1 of 1999.

²⁷Act 5 of 2000.

²⁸Act 53 of 2003

²⁹Malinga M 'Fraud and Corruption Conference' (2007) background.

³⁰Bolton P 'The Committee System for Competitive Bids in Local Government' (2009) 2 *Potchefstroom Electronic Law Journal* 90.

³¹Bolton P *The Legal Regulation of Government Procurement in South Africa the Legal Regulation of Government Procurement in South Africa* (published LLD thesis, University of the Western Cape, 2005) 61.

³²Regulation 16A.

importance of the constitution of these committees was highlighted in *Actaris South Africa (Pty) Ltd v Sol Platjie Municipality and Another*³³ where the court pointed out the importance of properly constituted SCM committees. The court reviewed and set aside three awarded tenders, because the SCM evaluation and adjudication committees were not properly constituted and their procedures were questionable. In setting aside the tender awards, the court afforded peremptory status to the different provisions of SCM, which serves to enhance the integrity of bid procedures thereby promoting public confidence.³⁴

In order to achieve positive results in preferential procurement, the SCM committees should be constituted from the most honourable, incorruptible and objective people that government can find for that purpose and they must also hail from the department calling for the goods or services.³⁵ Furthermore, in satisfying a bidder's legitimate expectation of fair tendering, the SCM officials must dispense of their discretion in a fair, responsible and honest way.³⁶ Competitiveness and fairness in public tendering is undermined by accounting officers found 'tampering' with tenders. These were the findings of the AGSA in reporting to parliament that two unsuccessful bidders in a state tender complained they were not given the same information and that the successful bidder was given confidential business information not given to the other bidders.³⁷ Despite the

³³2008) 4 All SA 168 (NC) para 58 (hereafter *Actaris SA*).

³⁴Bolton P (2009) 90.

³⁵*Cash Paymaster Services* (1999) 1 SA 324 (CkH) para 385; *Actaris SA* (2008) 4 All SA 168 (NC) para 58.

³⁶*Aquafund (Pty) Limited v Premier of the Western Cape* (1997) 2 All SA 608 (C) 617.

³⁷SAPA 'CIPRO in tender trouble' *Times live* 18 May 2010 available at <http://www.timeslive.co.za/local/article456008.ece/Cipro-in-tender-trouble> (accessed 30 April 2011). As a result of malpractices the CEO of CIPRO was suspended.

confirmation of the minister that fraud and corruption had taken place in this tender, the successful bidder was neither suspended nor debarred.³⁸ This position prevailed despite the power of accounting officers to restrict suppliers from doing business with government, should irregularities occur during tender procedures.³⁹

4.3 Competitive bidding: The effect of skills deficiency on the different stages of procurement

The promotion of skills development in public procurement, which dates back to the 1997 Green Paper on public sector procurement reform, makes specific reference to the sort of training needed; this includes basic procurement training, the development of management and advanced specialist procurement skills.⁴⁰ Notwithstanding this, the National Treasury stated in a policy document in 2003⁴¹ that public procurement practitioners are not adequately trained in the application of the Procurement Act and its associated Regulations.

In Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo

³⁸SAPA 'CIPRO in tender trouble' *Times live* 18 May 2010 the minister confirmed that R1 million had already been paid to the supplier.

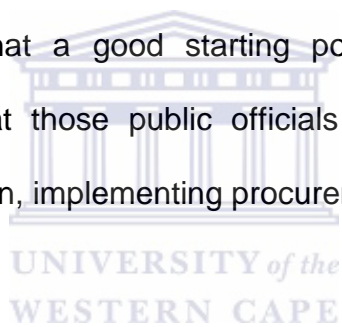
³⁹Supply Chain Management Practice Note Number 5 of 2006 issued on 09 October 2006.

⁴⁰Green Paper (1997) para 2.2.2 states: 'Collectively, procurement personnel in organs of State possess a great deal of knowledge and experience. Ensuring that this is fully shared within and between organs of state will be of major benefit to all. As few procurement problems are unique, solutions developed in isolation will, at best, involve duplication and, at worst, mean failure to secure the best available solution.'

⁴¹National Treasury *Policy Strategy to Guide Uniformity in Procurement Reform Processes in Government* (2003) 3 (hereafter National Treasury Policy Strategy) available at <http://www.treasury.gov.za/> (accessed 3 February 2011). The National Treasury states that 15000 officials are directly or indirectly involved in public procurement throughout government.

*Province & Others*⁴² the court pointed out that this situation is still prevalent, leading to the principles of fairness, equitability, transparency, competitiveness and cost-effectiveness being compromised by gross incompetence in SCM. This is due to the lack of understanding of the procurement laws which leads to unnecessary court challenges by aggrieved bidders.⁴³ The Supreme Court of Appeal held that ‘the tender committee lacked not only the necessary skills to adjudicate the tender, but also an understanding of legislative principles.’ These inadequacies have seen meritorious bidders being disqualified.⁴⁴

Watermeyer makes it clear that a good starting point for the successful use of preferential procurement is that those public officials evaluating tenders should be conversant with and competent in, implementing procurement laws and policies.⁴⁵



4.3.1 Planning stage

Arrowsmith points out that the most transparent of all procurement methods is the single stage formal tendering.⁴⁶ This process entails planning which includes identification,

⁴²(2008) 2 SA 481 (SCA) para 33 (hereafter *Millennium Waste Management*). Also see *Intertrade Two (Pty) Ltd v Mec for Road and Public Works* (2008) 1 All SA 142 (CK) (hereafter *Intertrade Two*).

⁴³*Millennium Waste Management* (2008) 2 SA 481 (SCA) para 33.

⁴⁴*Millennium Waste Management* (2008) 2 SA 481 (SCA). In this case incompetence led to the applicant's tender being wrongly disqualified. The appellant had tendered to provide the needed service at a cost of R444 244, 43 per month whereas the winner had quoted and was awarded the tender at the amount of R3 642 257, 28 per month.

⁴⁵Watermeyer R (2000) 228.

⁴⁶Arrowsmith S, Linarelli J & Wallace D Jr *Regulating Public Procurement: National and International Perspective* (2000) 460.

design, finance and procurement strategy, tender selection and contract agreement.⁴⁷ Essentially a well planned procurement process is the start of a successful procurement environment. This route should pursue adequately prepared documentation with thoughtful drafting and specifications which promotes value for money.⁴⁸ The degree of competition is determined by well-drafted specifications, documentation, and scope of the work and evaluation criteria.⁴⁹ It is furthermore incumbent on the BSC to ensure that bid documentation include evaluation and adjudication criteria, which must include criteria prescribed by the Procurement Act and the BBBEE Act.⁵⁰

Supply chain management policies must make provision for a tendering process for contracts above R30 000 and long-term contracts.⁵¹ However to promote maximum competition and value for money⁵² procurement from R500 000⁵³ must pursue a formal public tendering process, which is compliant with the legal prescripts pertaining to preferential procurement. The BSC is tasked with the duty to plan for the invitation of tenders as prescribed by the Procurement Regulations.⁵⁴ Should poor planning occur, this may result in waste, inefficiency and disputes with bidders over vague specifications,

⁴⁷Hawkins J, & Wells J 'Modifying Infrastructure Procurement to Enhance Social Development' (2008) 4 (4) *ATDF Journal* (2008) 56.

⁴⁸Arrowsmith S, Linarelli J & Wallace D Jr (2000) 355. The author defines specifications as: 'the technical requirements which define, in an objective manner, the characteristics of the goods, works or services to be purchased. There are three types of specifications namely design, performance and functional' 407.

⁴⁹Arrowsmith S Linarelli J & Wallace D Jr (2000) 355.

⁵⁰Bolton P (2006) 273; Treasury Regulations 16A6.3 (c).

⁵¹Bolton P (2007) 152.

⁵²Bolton P (2007) 143.

⁵³Procurement Regulations (2011) reg 5 (1) (a) prescribes that a tender has to be arranged for bids from R30 000. However tenders under R500 000, do not need to go out on public tender but can be sourced from a supplier data base).

⁵⁴Section 3 provides that 'An organ of state must, prior to making an invitation for tenders- (a)properly plan for, and as far as possible, accurately estimate the costs of the provision of services, works or goods for which an invitation for tenders is to be made.

terms and conditions.⁵⁵ For this reason BSC must be convened as required by the Treasury Regulations,⁵⁶ to compile detailed bid specifications in anticipation of a call for tenders. The failure to establish a BSC compromises the process of tendering; consequently it is disconcerting that the AGSA⁵⁷ found that a BSC was not always established for each occasion when bid specifications were compiled. The importance of drawing up properly expressed bid documents is pivotal because vague tender documents does not only frustrate administrative fairness but may also lead to the process having to start afresh.⁵⁸

To stave off this practice tender documents should be distinct and inform tenderers with reasonable and sufficient certainty of the requirements for a valid and acceptable tender.⁵⁹ In addition to this the BSC must ensure that the bid documents and general conditions of contract (GCC)⁶⁰ are in accordance with the National Treasury instructions.⁶¹

Bolton warns that organs of state should be mindful not to draft vague and ambiguous provisions for tendering.⁶² In *Aurobindo Pharma (Pty) Ltd v Chairperson, State Tender*

⁵⁵Arrowsmith S, Linarelli J & Wallace D Jr (2000) 355.

⁵⁶Regulation 16A6.2 (b).

⁵⁷AGSA Report on Investigation into the Procurement of Various Contracts at the Gauteng Provincial Department of Roads and Transport (June 2011) para 1.2.2(c) (hereafter AGSA Report June 2011).

⁵⁸*Minister of Social Development v Phoenix Cash & Carry* (2007) 3 All SA 115 (SCA) (2007) 3 All SA 115 (SCA) para 9 (hereafter *Phoenix Cash & Carry*). In this case the Court found that the tender documents did not clearly state whether financial statements were required or not and thus ruled the specifications to be vague and that the process should start *de novo*.

⁵⁹*Phoenix Cash & Carry* (2007) 3 All SA 115 (SCA) para 7.

⁶⁰National Treasury General Conditions of Contract (Practice Note Number SCM 1 of 2003) para 2.1 (hereafter National Treasury GCC).

⁶¹Treasury Regulations 16A6.3 (a).

⁶²*Bolton P 'Bid Amendments and the Disqualification of Unresponsive bids* (2011) 13 LGB 19.

*Board and Others*⁶³ an unsuccessful tenderer in the supply of antiretroviral drugs attacked the tender process after the BAC regarded the bid as non-compliant and thus unresponsive thereby rendering it invalid. The court agreed (with the applicant) that the terms which excluded the bidder were ambiguous and therefore misleading.⁶⁴ This bidder would have scored the tender due to its significantly lower price which would have saved the tax payer a considerable amount of money.⁶⁵ The BAC should have sought clarity from the bidder instead of disqualifying the bid as unresponsive.⁶⁶ Due to the fact that the contract had run its course the setting aside of the award was moot. The court was obliged to dismiss the application but ordered the government to pay costs.⁶⁷

In response to this the Aids Law Project writes that there is an urgent need for the best available prices for anti-retroviral drugs (ARV) and this requires the fair application of fair tender rules by appropriately constituted bid committees.⁶⁸ This needs to translate into more skillful committees because the lack of astute adjudication could have seen the tender for supplying important life prolonging drugs, set aside and this could have had dire results. Concern was expressed that the National Treasury should guard against similarly flawed tender procedures in future.

⁶³(59309/2008) (2010) ZAGPPHC 51 (27 May 2010) para 21 (hereafter *Aurobindo*).

⁶⁴*Aurobindo* (59309/2008) (2010) ZAGPPHC 51 (27 May 2010) para 37.

⁶⁵*Aurobindo* product was to be delivered to the state at R142.50 for 30 days' supply – some 52% lower than MSD's 2008 price (R297.22) for the same product.

⁶⁶*Aurobindo* (59309/2008) (2010) ZAGPPHC 51 (27 May 2010) para39.

⁶⁷*Aurobindo* (59309/2008) (2010) ZAGPPHC 51 (27 May 2010) para 60.

⁶⁸Section 27 incorporating the Aids Law Project 'Transparency and fairness must be enforced in 2010 ARV tender process' 1 July 2010 available at <http://www.section27.org.za/2010/07/01/transparency-and-fairness-must-be-enforced-in-2010-arv-tender-process/> (accessed on 1 November 2011).

Furthermore, in *Casalinga Investments CC t/a Waste Rite v Buffalo City Municipality*⁶⁹ the respondent (the government) admitted that particulars of the services to be rendered were vaguely expressed in the advertised bid and the bidders would not have known the criteria or full details of the work required.⁷⁰ Adding to the woes was that no technical specifications were adequately detailed.⁷¹ After the tender award a forensic audit found that procurement elements and values had been transgressed by the public officials adjudicating the tender and this rendered the award unlawful.

The unlawful conduct of the public officials was aggravated by the person signing the agreement not being clothed with the authority to do so.⁷² Further transgressions include the opening, registering and recording of bids in the presence of interested persons.⁷³ This evolved from non-compliance with the legal and regulatory framework, SCM policies and other prescripts which rendered the agreement void ab initio.⁷⁴

It must be pointed out that uncertain criteria in a tender process run the risk of excluding meritorious tenders, thus negating competitiveness.⁷⁵ The importance of including the envisaged criteria was accentuated by the court in *RHI Joint Venture v Minister of Roads and Public Works*⁷⁶ where the tender board failed to inform prospective bidders that

⁶⁹(2009) JOL 23397 (ECG) paras 16 - 7 (hereafter *Casalinga Investments*).

⁷⁰*Casalinga Investments* (2009) JOL 23397 (ECG) para 14.

⁷¹*Casalinga Investments* (2009) JOL 23397 (ECG) para 14.

⁷²*Casalinga Investments* (2009) JOL 23397 (ECG) para 10.

⁷³*Casalinga Investments* (2009) JOL 23397 (ECG) para 20.

⁷⁴*Casalinga Investments* (2009) JOL 23397 (ECG) para 3.

⁷⁵*Phoenix Cash & Carry* (2007) 3 All SA 115 (SCA) para 2.

⁷⁶(2003) 5 BCLR 544 (CK) para 37 the court held that 'every tenderer was entitled to know, prior to tendering for the contract that preference would be given to tenderers who had not been awarded a contract previously. From a practical and financial point of view the necessity for this to have been

preference will be afforded to contractors who had never been awarded a contract. The court set aside the award and relegated the matter to the tender board for re-adjudication.

Nonetheless, government should ensure that tender specifications are not too restrictive as this will limit the number of tenders received, which in turn thwarts competition as the biggest pool of competitors are not engaged.⁷⁷ Although the Treasury Regulations provide that tender specifications should be drawn up in an unbiased manner, it does not veto restrictive specifications.⁷⁸ Bolton affirms that restrictive specifications discourage emerging enterprises in particular from tendering.⁷⁹ In this regard organs of state are prohibited from mentioning, for instance, trademarks, trade names or particular processes of manufacturing.⁸⁰ International guidelines recognise that, precise and clear specifications in tender documents are a prerequisite to realise economic objectives, efficiency and fairness in procurement.⁸¹ Moreover in planning for preferential procurement BSC should always be aware of attracting BEE compliant businesses. Therefore preferential points and any 'specific goals' as provided for in the Procurement Act⁸² must be clearly stated as this will alert potential bidders that only tenders with an empowerment component will enjoy preference.

disclosed is obvious. Those contractors who had previously been successful would then have been able to decide whether or not the expense of preparing and submitting a tender was warranted.'

⁷⁷Bolton P (2007) 144.

⁷⁸Bolton P (2007) 144.

⁷⁹Bolton P (2007) 144.

⁸⁰Bolton P (2007) 144.

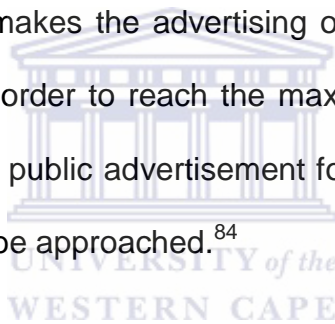
⁸¹World Bank Standard Bidding Document Procurement of Works (1995) available at www.worldbank.com (accessed 12 December 2010).

⁸²Sections 2 (1) (a); s1 (b) (i) (ii). See Chapter two para 2.5.3 for discussion on the discord of the procurement legislation.

4.3.1.1 The advertising of bids

The call for tenders gives rise to four entitlements for bidders, namely: adequate access to tender competitions; timeous notification of the closing date for submission of tenders; information on evaluation and selection criteria. Furthermore the competitive bidding process should kick off by calling for tenders and in this adequate notice must be given of the bid's nature and purpose. In pursuit of spreading economic splendor the advertising of bids should reach as many black bidders as possible.⁸³

The quest for competitiveness makes the advertising of bids crucial in the run-up to a competitive bidding process. In order to reach the maximum amount of bidders formal procurement procedures require public advertisement for the calling of tenders, through which the general public should be approached.⁸⁴



A good point of departure is to follow the Treasury Regulations⁸⁵ which provide that a call for tenders must be advertised at least 21 days before closure of the bid, in at least the Government Tender Bulletin. Dereliction from this time frame has been disclosed in the AGSA report in that some provinces impaired the principles in section 217(1) by not advertising bids or not adhering to the minimum of 21 days, resulting in a small number

⁸³World Trade Organisation (WTO) Agreement on Government Procurement article XVII (1) available at www.wto.org (accessed 13 December 201) confirms the timeous advertising of bids.

⁸⁴Regulation 16A6.3(c).

⁸⁵Regulation 16A6.3 (c). Longer time may be necessary for more complex tenders. Regulation 16A6.3 (d) provides that the result of the tender process should be published in the Government Tender Bulletin and the same other media by which the bids were advertised. Also see the tender bulletin available at www.treasury.gov.za. MFMA Regulations (2005) reg 22(1) (b) (i) provide that closure date for submission of bids may not be less than 30 days for transactions over R10 million and 14 days for any other case from date which advertisement is placed.

of prospective bidders.⁸⁶ In some instances those time frames ranged between seven and 52 days.⁸⁷ This was evidenced by the award of a contract worth R3.1 million for a tender that was only advertised for seven days.⁸⁸ This inappropriate conduct did not serve competitiveness because the most eligible bidder was not elected, resulting in the award to a bidder lacking capacity. The element of cost-effectiveness was compromised by the bidder not honouring timeframes for delivery; the project took 13 months to complete instead of the promised period of three months.⁸⁹

A further difficulty is that tender committees have a propensity for deviating from the specifications of advertised bids. In *Moseme Road Construction CC and others v King Civil Engineering Contractors (Pty)*⁹⁰ the appellant and respondent both submitted tender applications for which the latter did not qualify whereas the former did. The problem was that the advertised bid specifications applied only to bidders with a certain classification. The respondent did not conform to this classification, but at a site meeting the public official informed the bidder that it qualifies to tender, despite its lower classification.⁹¹ The bidder, whom offered the lowest price, was subsequently disqualified because the advertised bid did not make provision for bidders with a lower classification.⁹²

⁸⁶AGSA report on Education and Health Departments (August 2011) para 2.1.4 (a). AGSA report June 2011 para 1.2.2(b) also decry the same non-compliance.

⁸⁷AGSA report on Education and Health Departments (August 2011) para 2.1.4 (a). AGSA Report June 2011 para 1.2.2(b).

⁸⁸AGSA report on Education and Health Departments (August 2011) para 2.1.4 (a).

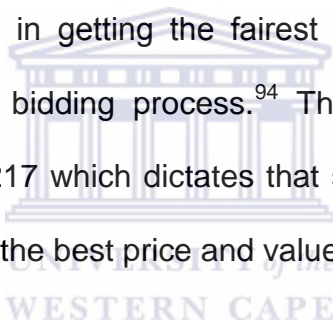
⁸⁹AGSA report on Education and Health Departments (August 2011) para 2.1.4 (a).

⁹⁰(2010) (4) SA 359 (SCA) para 21 (hereafter *Moseme Road Construction*).

⁹¹*Moseme Road Construction* (2010) 4 SA 359 (SCA) para 4.

⁹²Also see *Grinaker* (2002) 3 All SA 336 (T) para 54-5. *Coolcat Restaurante BK h/a Die Kafeteria UOVS v Vrystaatse Regering*(1999) 2 SA 635 (O) para 644I-J (hereafter *Coolcat Restaurante*). *Mamlambo Construction CC v Port St John's Municipality & Others* (2010) JOL 26063 (ECM) para 6.

Poor planning on advertised bid specification has also seen tender committees having to ask the court to entertain condonation to deviate from the advertised bid. This was the case in *South African Container Stevedores (Pty) Ltd v Transnet Port Terminals and Others*.⁹³ The applicant tendered for port container procurement on a port by port basis as was advertised, whereas the organ of state awarded the tender on a national basis in support of cost-effectiveness. The court was tasked to pronounce on whether an administrative error in deviating from an advertised tender may be condoned. In this instance the court viewed the reason for the deviation as fair. The reason for this conclusion is that the organ of state is legally and constitutionally obliged and entitled to some 'commercial arm twisting' in getting the fairest price when procuring goods or services through a competitive bidding process.⁹⁴ This is especially important as it echoes the purpose of section 217 which dictates that subject to affirmative action, the government should still maintain the best price and value for money.⁹⁵



4.3.2 The bidding stage

The BEC must ensure that 'acceptable tenders' are evaluated as provided for in the Procurement Act;⁹⁶ this means that tenders must be judged against the principles fairness, equity, transparency, competitiveness and cost-effectiveness.⁹⁷ Therefore miscalculation in the points for certain criteria during bid evaluations should not be

⁹³(2011) 22 (ZAKZDHC) para 88 (hereafter *Stevendores*).

⁹⁴*Stevendores* (2011) 22 (ZAKZDHC) para 100.

⁹⁵*Stevendores* (2011) 22 (ZAKZDHC) para 104.

⁹⁶Section 1 (i).

⁹⁷*Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* (2005) 4 All SA 487 (SCA) para 14 (hereafter *Chairperson: Standing Tender Committee*).

tolerated.⁹⁸ As it also conflicts with the BEE Codes which prescribe how criteria should be evaluated. It stands to reason that tender procedures are intended to ensure that proper evaluation is done where all bidders are treated fairly to ensure that the tender that suits the requirements best, wins the award.⁹⁹ This will entail that the tender should in all aspects comply with the bid specification and conditions as advertised and as set out in the contract documents,¹⁰⁰ in compliance with the Procurement and BBBEE legislation.

Further difficulty is created in competitive bidding reports which reveal that laws were contravened in about 47 percent of projects audited.¹⁰¹ There is repeated breach of Procurement Regulations¹⁰² insofar as the submission of tax clearance certificates by potential bidders. This important regulation ensures that only bidders, whose tax affairs with the South African Revenue Services are sound, qualify to tender. It is evidently necessary to submit this certificate together with the tender application, and if omitted, the subsequent submission of such tax clearance certificate will be considered a fatal error and acceptance of such a bid application is invalid.¹⁰³ The acceptance of such a tender will be indicative of the process being unfair, non-transparent and non-competitive¹⁰⁴ and thus, be contrary to the principles in section 217 (1) of the Constitution.

⁹⁸AGSA report on Education and Health Departments (August 2011) para 2.1.5.

⁹⁹*Cash Paymaster Services* (1999) 1 SA 324 (CkH) para 350. Also see *Menzies Aviation South Africa (Pty) Limited v South African Airways and Others* (2009) 08/22988 (ZAGPJHC) 65 para 36.

¹⁰⁰*Chairperson: Standing Tender Committee* (2005) 4 All SA 487 (SCA) para14. Also see *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* 2004 (1) SA 16 (SCA) para15.

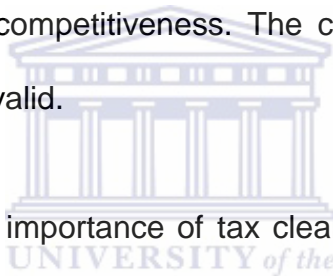
¹⁰¹AGSA report on Education and Health Departments (August 2011) para 2.1.1.

¹⁰²Procurement Regulations (2011) reg 14.

¹⁰³*Imvusa Trading 134CC and Another v Dr. Ruth Mompoti District Municipality and Others* (2008) 46 ZANWHC para 1 (hereafter *Imvusa Trading*)

¹⁰⁴*Imvusa Trading* (2008) 46 (NW) para 3.

Notwithstanding this, in *Casalinga Investments*¹⁰⁵ where the bid advertisement provided that standard procurement conditions will apply, the BEC did not ensure that the applicant was tax compliant and on close scrutiny the applicant's tax clearance certificate did not have VAT registration, taxation of PAYE or UIF. This contravened the Procurement Regulations¹⁰⁶ and the Municipal Systems Act missing the attributes required by section 217 (1).¹⁰⁷ Moreover the bidding process was fraught with non-compliance in that the applicant had access to information on the bid specifications to which the other bidders were not privy; this led to the exclusion of other potential bidders,¹⁰⁸ thereby diminishing competitiveness. The court deemed the agreement as unconstitutional and therefore invalid.



This practice of overlooking the importance of tax clearances was again challenged in *Mpumalanga Steam & Boiler Works CC v Minister of Public Works & Others*¹⁰⁹ where the tender committee awarded a tender to a bidder that submitted an invalid tax clearance certificate. The committee was of the opinion that they do not have to verify a tax certificate, but the court held that the legislation puts such a duty on the committee.¹¹⁰ This display of ignorance by the tender committee resulted in a punitive cost order against the state which unfortunately does not bond with cost-effectiveness.

Although state entities are obliged to implement a preferential procurement policy and

¹⁰⁵(2009) JOL 23397 (ECG) para 20.

¹⁰⁶Regulation 14.

¹⁰⁷*Casalinga Investments* (2009) JOL 23397 (ECG) para 22. Also see MFMA s111; s112.

¹⁰⁸*Casalinga Investments* (2009) JOL 23397 (ECG) para 40.

¹⁰⁹(2011) JOL 27018 (GNP) (hereafter *Mpumalanga Steam*).

¹¹⁰*Mpumalanga Steam* (2011) JOL 27018 (GNP) para 16.

then apply the BEE Codes during procurement processes¹¹¹ these legislative prescripts are in some instances ignored. This was also suggested in the AGSA report where SCM was using the Procurement Act to calculate preferential points thereby ignoring the BEE Codes.¹¹² In some instances the BEC miscalculated the points for certain criteria during bid evaluations.¹¹³ This conduct conflicts with the BEE Codes which prescribe how criteria should be evaluated.

Further propensity of contravening legislative prescripts was disclosed in *Sekgobela v State Information Technology Agency (Pty) Ltd*¹¹⁴(SITA) where the court emphasised the importance of following the proper procurement procedures and policies. The applicant was dismissed after making a protected disclosure¹¹⁵ in that formal procurement processes should have been followed in terms of the respondent's procurement policy and procedures. The applicant (the programme manager project) maintained that a request for quotations went out on 16 October 2003, days before the motivation for this project was finally approved on 24 October 2003.¹¹⁶ This resulted in quotations submitted on 20 October 2003, four days before the final approval.¹¹⁷ According to the SITA procurement policy a request for quotations can only be made if

¹¹¹BEE Codes (2007) background.

¹¹²See AGSA Report (2011)

¹¹³AGSA report on Education and Health Departments (August 2011) para 2.1.5.

¹¹⁴(2009) JOL 23676 (LC) para 19 (hereafter *Sekgobela*). Note *Sekgobela* is discussed again in para 4.4 dealing with ethical behaviour of public officials.

¹¹⁵ Protected Disclosures Act 26 of 2000 s1 'disclosure' means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:(a)that a criminal offence has been committed, is being committed or is likely to be committed; (b) that a person has failed is failing or is likely to fail to comply with any legal obligation to which that person is subject" (own emphasis).

¹¹⁶*Sekgobela* (2009) JOL 23676 (LC) para 20.

¹¹⁷ *Sekgobela* (2009) JOL 23676 (LC) para 20.

the procurement price is less than R100 000.¹¹⁸ This procurement was for R9 million and according to the SITA policy it should have followed formal competitive bidding procedures and not a request for quotations. The respondent (SITA) argued that there was no legal obligation for it to follow a specific procurement policy or procedure since it had discretionary power to deviate from these processes in cases deemed internal.¹¹⁹ The court rejected this argument that a state entity has no duty to have procurement and provisioning system.¹²⁰ The court stated unequivocally that SITA is an organ of state and therefore bound by the PFMA¹²¹ which imposes a 'legal duty or obligation upon an organ of state to maintain a procurement and provisioning system'.¹²²

Furthermore the SITA accused the applicant of laying criminal charges on corruption against SITA employees without first raising the alleged conduct with senior management and without having authority to lay such a complaint.¹²³ This will mean if a public official who has knowledge of maladministration wants to criminally report this, he should first check with his superiors. If this is so it is not clear what purpose the Protection Act serves. The court held that an employee of the state should not face employment detriment should he dare to question the procurement operations of his employer, especially where the employer is an organ of state.¹²⁴

¹¹⁸ *Sekgobela* (2009) JOL 23676 (LC) para 22

¹¹⁹ *Sekgobela* (2009) JOL 23676 (LC) para 7.

¹²⁰ *Sekgobela* (2009) JOL 23676 (LC) Para 11.

¹²¹ Act 1 of 1999 s51 (a) (iii).

¹²² *Sekgobela* (2009) JOL 23676 (LC) Para 11.

¹²³ *Sekgobela* (2009) JOL 23676 (LC) para 27.

¹²⁴ *Sekgobela* (2009) JOL 23676 (LC) para 33.

There is however occasions where government can dispense with procurement obligations, where two organs of state wish to enter into a procurement arrangement in support of cost-effectiveness. In *CEO of the South African Social Security Agency N.O and Other v Cash Paymaster Services (Pty) Ltd*¹²⁵ the court a quo upheld an application in setting aside an agreement between two organs of state, the Social Security Agency (SASSA) and the South African Post Office Ltd (SAPO) because they failed to follow a procurement process compliant with section 217 of the Constitution, the PFMA and the Treasury Regulations. The Supreme Court of Appeal differed with this and held that the Treasury Regulations do allow an accounting officer or accounting authority to deviate from inviting competitive bids.¹²⁶ The agreement was reinstated as it was deemed to be cost-effective to the fiscus. Of interest is that the AGSA report¹²⁷ found that when deviating from the competitive bidding process, reasons for the deviation are not recorded as prescribed by Treasury Regulations¹²⁸ and departmental SCM policies.

Instances of skills deficiency during competitive bidding were also displayed in *Millennium Waste Management*¹²⁹ where the tender committee disqualified the bidder for not signing a duly completed declaration of interest. The court lamented the fact that the tender committee did not know it was clothed with the power to condone this peremptory requirement;¹³⁰ the omission of the signature was not fatal because the bidder had already completed the declaration of interest in full. The lack of signature was

¹²⁵(2011) 3 All SA 233 (SCA). (hereafter *CEO of SASSA*).

¹²⁶*CEO of SASSA* (2011) 3 All SA 233 (SCA) para 21 (SASSA and the SAPO are both organs of state).
Treasury Regulations 16A6.4.

¹²⁷AGSA Report June 2011 para 1.2.2 (e).

¹²⁸Regulation 16A6.4.

¹²⁹*Millennium Waste Management* (2008) 2 SA 481 (SCA) para 35.

¹³⁰*Millennium Waste Management* (2008) 2 SA 481 (SCA) para 16.

an honest omission. This ignorance led to the applicant's tender being wrongly disqualified. Nevertheless a tender which is invalid in terms of the tender conditions should not even be considered by the bid committees.¹³¹

4.3.3 The contract maintenance stage

The main reason why contract maintenance is important is to provide information on how successful preferential procurement has been, in order to make an assessment of how long the current preferential procurement policies should remain in force.¹³² Despite legislation and regulations substantiating contract maintenance in public procurement, there is a paucity of statistics on black people that have been successfully empowered through preferential procurement. This situation prevails despite reference to contract maintenance in several of the procurement legislation pertaining to national, provincial and local government level.

The requirement of contract maintenance is mentioned in the following acts: first the Procurement Act¹³³ provides that goals (deliverables) for preferential points must be monitored. This section necessarily promotes contract maintenance in that those goals or performance should be monitored after the award of the tender. The importance

¹³¹ *Steenkamp NO v Provincial Tender Board of the Eastern Cape* (2007) 3 SA 121 (CC); (2007) 3 BCLR 300 (CC) para 54 (hereafter *Steenkamp*).

¹³² Manchidi T 'Targeted Procurement in the Republic of South Africa- An independent assessment by International Labour Organisation, Development Bank of SA, Department of Public Works'(2002) 122 (hereafter Manchidi T 'Targeted Procurement in RSA) available at www.ilo.org/public/english/employment/recon/ (accessed 4 December 2010).

¹³³ Section s2 (2) any goals contemplated in subsection 1(e) must be measurable, quantifiable and monitored for compliance.

placed on BEE for economic development dictates that the procurement process should include contract maintenance in order to monitor the success of transformation as a service provider's bad performance may be detected through contract maintenance. Therefore the service provider must be notified of its bad performance, as failure to do so will result in the organ of state not being able to rely on 'bad track record' to exclude or debar the supplier.¹³⁴ The importance of contract maintenance should perhaps be more clearly addressed in the framework legislation because the provincial and municipal SCM legislation in particular elicit the importance of post tender- award monitoring in no uncertain terms.



Secondly the MFMA Regulations¹³⁵ provide for performance of contract management to determine whether SCM processes are followed in order to monitor whether desired objectives are met. Thirdly the City of Cape Town SCM Policy¹³⁶ also provides that the contract manager should ensure that contractors fulfill their obligations and monitor continued performance against contract obligations.

Contract maintenance needs a two-pronged approach as it is as important to monitor contract performance by the successful bidder, as it is to monitor government's performance, particularly with regards to payment for goods and services to such

¹³⁴ *Renaissance Security and Cleaning Services CC v Rustenburg Local Municipality and Others* (2008) 29 (ZANWHC) para 10 (hereafter *Renaissance Security*) See Chapter four par 4.5 for a discussion on exclusions.

¹³⁵ Regulation 43.

¹³⁶ 27 March (2008) regs 332; 336.4.

bidders. Delay in payments for goods and services may impact negatively on the cash flow of SMMEs and thereby affect service delivery. Noted is that the National Treasury has made provision through the Treasury Regulations¹³⁷ that payments due to creditors must be settled within 30 days from receipt of invoices.

The Treasury Regulations¹³⁸ also stipulates that accounting officers must establish procedures for quarterly reporting on tender contract performance, as this will be facilitate effective performance monitoring, evaluation and corrective action (should a breach ensue). This tie in with the goals of economic empowerment that should see SMME's progressively nurtured and trained by organs of state to progress to professional business people of the future.¹³⁹ Therefore contractual obligations must be monitored and enforced through incentives and/or sanctions. This should necessitate monitoring that the bidder delivers the promised goods or services synonymous to the contractual agreement and any default, or poor performance on the contract which affects value for money should attract sanctions against the bidder concerned.

In the call for tenders, resource specifications are used to define social deliverables and the acceptance criteria thereto.¹⁴⁰ This will enable the administrators to the contract, to audit whether the promised social deliverables were in fact delivered, in the performance of the contract, by the successful bidder.¹⁴¹ As such targeted procurement and targeted labour should be tracked in performance of the contract, this way the social deliverables

¹³⁷Treasury Regulations 8.2.3.

¹³⁸Regulation 5.3.1.

¹³⁹*Renaissance Security* (2008) 29 (ZANWHC) para 12.

¹⁴⁰Watermeyer R (2000) 233.

¹⁴¹Watermeyer R (2000) 233.

of BEE is encouraged and employment equity is being addressed.¹⁴² The BEE Codes promotes the core social deliverables. This encompasses *inter alia* ownership of capital, which include enterprise development, employment equity and skills development.¹⁴³ Contract maintenance will detect any inadequate performance on these social deliverables, early enough to remedy the situation¹⁴⁴ and therefore this practice should be encouraged.

4.4 Conflict of Interest in SCM erodes ethical standards

The court in *Grinaker*¹⁴⁵ affirmed that the submission of tenders by bidders entitles them to fair administrative action which leads to a legitimate expectation that their tenders will be evaluated 'fairly, properly, justly and without bias'. Fairness and equity should ultimately dictate that the bidder, who best can meet the socio-economic goals and obligations of the services in question, will be awarded the tender.¹⁴⁶ What will demonstrate fairness is that SCM officials should not be entitled to bid for government contracts whilst employed by government.

Generally the Treasury Regulations¹⁴⁷ dictate compliance with ethical standards as part of the conduct expected of public officials and as such public officials must disclose their

¹⁴²Watermeyer R (2000) 234.

¹⁴³BEE Codes (2007) code series 100 to 600.

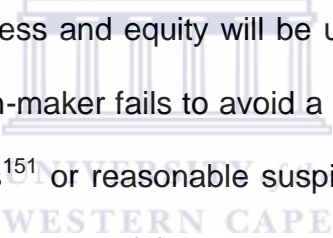
¹⁴⁴Watermeyer R (2000) 250.

¹⁴⁵(2002) 3 All SA 336 (T) para 32.

¹⁴⁶Bolton P *The Legal Regulation of Government Procurement in South Africa* (published LLD thesis, University of the Western Cape, 2005) 262.

¹⁴⁷Regulation 16A8.3 A supply chain management official or other role player –
(a) must recognise and disclose any conflict of interest that may arise;

personal interest in where competitive bidding is concerned. This requirement is also extended to the Municipal Supply Chain Management Regulations (Municipal SCM Regulations).¹⁴⁸ Furthermore the Western Cape Procurement (Business Interest of Employees) Act¹⁴⁹ provides for a data base of all business interests disclosed by employees (and relatives) doing business with the provincial government. Ethical behaviour is viewed as a main ingredient to fortify preferential procurement, therefore the Corruption Act¹⁵⁰ proscribes 'a private interest in any contract, agreement or investment emanating from or connected with the public body in which he or she is employed or which is made on account of that public body.



Essentially the principles of fairness and equity will be undermined and section 217 will be contravened where a decision-maker fails to avoid a conflict of interest or the bidding process is tainted by actual bias¹⁵¹ or reasonable suspicion of bias.¹⁵² Such disclosure ensures compliance with the principles of fairness, impartiality and transparency. This approach ties in with the requirement of procedural fairness (as in the PAJA) which validates the rule against bias.¹⁵³ The Supreme Court of Appeal has held that, where a tenderer is able to reduce its price due to inside information about work not needed for

Regulation 16A8.4 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. Also see

Municipal SCM Regulations reg 44 in GN 868 GG 27636 of 30 May 2005;

¹⁴⁸Regulations 46 (2) (e); 45.

¹⁴⁹Act 8 of 2010 s 4 in Provincial Gazette Extraordinary 6832 of 10 December 2010.

¹⁵⁰Section 17 (1).

¹⁵¹Bolton P (2007) 295 states that there are four types of bias identified: financial interest, personal interest, bias in relation to the subject matter and institutional bias.

¹⁵²Klaaren J & Penfold G 'Just Administrative Action' Chaskalson M et al (eds) *Constitutional law of South Africa* (2002) 64, 32.

¹⁵³Bolton P (2005) 268.

the tender, this would not only be procedurally unfair to other bidders, but also offend against section 217(1) insofar as fairness and equitability is concerned.¹⁵⁴

Another thorny issue in preferential procurement is that the expectation of ethical compliance is dashed by perpetual non-compliance with legislated prescripts. This is evidenced by those public officials responsible for SCM neglecting to declare their financial interest in bids. The result of this auto-corruption leads to public officials unjustly securing privileges which belong to the public, for themselves.¹⁵⁵ This behaviour is reflected in them by-passing or manipulating those compulsory procedures to earn those privileges.¹⁵⁶ This effect of this leads to the lowest prices not being considered; no quotations being received from winning bidders and payments to suppliers exceeding the budgeted costs.¹⁵⁷ Effectively this often amounts to the awarding of contracts to unsuitable firms or payment of higher prices.¹⁵⁸ An example of such conflict is where an official favours the company in which he has an interest.¹⁵⁹ The consequences of not declaring interest, is that an unfair advantage over technical knowledge and pricing of the bid, may see an accounting officer setting up companies to suit the bid specifications, thereby winning the tender award,¹⁶⁰ or simply by-passing certain tender procedures.

¹⁵⁴ *Chairperson: Standing Tender Committee* (2005) 4 All SA 487 (SCA). Also see *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* (2004) 1 All SA 504 (SCA) (hereafter *Metro Projects*) para 14.

¹⁵⁵ Williams S & Quinot G 'Public Procurement and Corruption: The South African Response' (2007) 124 SALJ 342.

¹⁵⁶ Williams S & Quinot G (2007) 342.

¹⁵⁷ De Lange D 'Corruption Bombshell' *Cape Times* 31 March 2011 1.

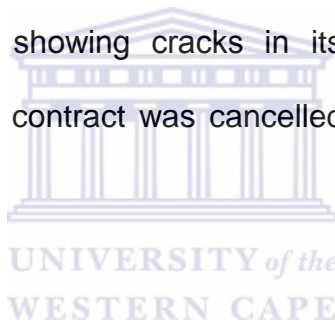
¹⁵⁸ Arrowsmith S, Linarelli J & Wallace D Jr (2000) 37.

¹⁵⁹ Williams S & Quinot G (2007) 342.

¹⁶⁰ SAPA 'ANC MEC in tender fraud arrest' *Times live* 5 November 2010.

This behaviour was depicted in *Minister of Finance and Another v Gore NO*¹⁶¹ where the Cape Provincial Administration (CPA) called for tenders in the quest to privatise the pension payments of South Africa. But this pilot project was ruined because the tender process was tainted with fraudulent behaviour by a deputy director and senior official who served on the BEC during the tender adjudication.¹⁶²

Their underhand tactics during the tender process led to them giving a glowing report on a bidder¹⁶³ in which they had a vested interest. As fate had it, the bidder proved incapable of performing the required functions and one year into the five-year contract the 'successful bidder' started showing cracks in its capacity to deliver. After an investigation into the tender the contract was cancelled due to incapacity and tender irregularities.¹⁶⁴



The waywardness of the two state officials exposed that they had put the tender together ten days before the closing date using the CPA office and computer.¹⁶⁵ Moreover they manipulated the tender process with lies and distortions to secure the award in favour of this bidder.¹⁶⁶ Their fraud and manipulation paid off in that they secured jobs for

¹⁶¹

¹⁶² *Gore* (2007) 1 All SA 309 (SCA) para 7 Louw, the CPA deputy director for social security in the welfare directorate, chaired CPA's evaluation committee, Scholtz were a senior official in CPA welfare department.

¹⁶³ *Gore* (2007) 1 All SA 309 (SCA) para 7 Nisec CC, a corporation its sole member, Mr Michau Huisamen (a Port Elizabeth businessman with no previous experience of information technology), acquired 'off the shelf' from an accounting firm just days before the tender invitation.

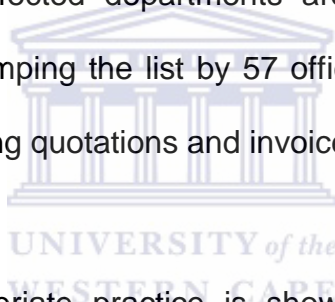
¹⁶⁴ *Gore* (2006) 97 (SCA) para 9. The only qualifying bidder with the required software for the pension payout system was sidelined in favour of this bidder.

¹⁶⁵ *Gore* (2007) 1 All SA 309 (SCA) para 10

¹⁶⁶ *Gore* (2007) 1 All SA 309 (SCA) para 10.

themselves with the bidder even before the tender was awarded.¹⁶⁷ The court held the government vicariously liable for the fraudulent conduct of its employees.¹⁶⁸ In an attempt to stunt this practice the Western Cape provincial government implemented the Western Cape Procurement Act¹⁶⁹ whereby employees of CPA must disclose their business interests before the province enters into any contract.

The Gauteng province was also urged to set up legislation that stops officials doing business with the provincial government.¹⁷⁰ This came in the wake of findings which exposed public servant not declaring interest in companies that had won tenders to the tune of R26 million.¹⁷¹ The affected departments are education, health and social development with education trumping the list by 57 officials found conducting business with their own department, signing quotations and invoices personally.¹⁷²



The frequency of this inappropriate practice is shown by the latest SIU report to Parliament: this report revealed evidence of collusion between senior managers in the Department of Public Works and a contractor. Noted also were the acts of maladministration, financial misconduct and corruption by several managers in the department.¹⁷³ The SIU also confirmed that the close relationship between an

¹⁶⁷ *Gore* (2007) 1 All SA 309 (SCA) para 26(e).

¹⁶⁸ *Gore* (2007) 1 All SA 309 (SCA) para 30.

¹⁶⁹ Act 8 of 2010 s2(1) Before the Provincial Government enters into any contract with an entity for the sale, lease or supply of goods or services, the entity must provide an affidavit in the prescribed manner disclosing any business interest that an employee or a family member of an employee has in that entity.

¹⁷⁰ Ndaba B 'Province duped out of R26m' *The Star* 7 September 2011

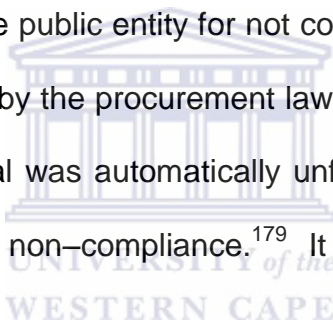
¹⁷¹ Ndaba B 'Province duped out of R26m' *The Star* 7 September 2011 available at C:\Documents and Settings\TTC\Desktop\SCM INTEREST DECLARE IOL 8SEP.mht

¹⁷² Ndaba B 'Province duped out of R26m' *The Star* 7 September 2011

¹⁷³ Mokone T 'Special unit probes R374m tender' *The Times live* 13 October 2011 available at <http://www.timeslive.co.za/politics/2011/10/13/special-unit-probes-r374m-tender> (accessed 13 October 2011)

accounting officer and a bidder had undermined the procurement process thereby exposing the Department of Correctional Services (DCS) to civil claims by unsuccessful bidders.¹⁷⁴ This matter was referred to the National Prosecuting Authority (NPA) for a decision on criminal prosecutions and the DCS for disciplinary action.¹⁷⁵ Despite the NPA investigation being underway, this supplier¹⁷⁶ is currently in the running for a tender to render security services to the NPA.¹⁷⁷

Ethical behaviour is not totally alien to public officials as shown in *Sekgobela v State Information Technology Agency (Pty) Ltd.*¹⁷⁸ In this matter a state official demonstrated moral behaviour by reporting the public entity for not complying with its legal obligations and responsibilities provided for by the procurement laws. He was dismissed as a result. The court held that the dismissal was automatically unfair in that he made a protected disclosure when he reported the non-compliance.¹⁷⁹ It is unfortunate that an employee



¹⁷⁴Parliamentary Monitoring Committee: Special Investigations Unit findings on investigation into the Department of Correctional Services 17 Nov 2009 (hereafter PMG: SIU findings on DCS (2009) available at <http://www.pmg.org.za/report/20091117-special-investigations-unit-findings-their-investigation-department-c> (accessed 30 April 2011).

¹⁷⁵PMG: SIU findings on DCS (2009).

¹⁷⁶Basson A 'Bosasa in line for another state tender' *Mail & Guardian online* 19 March 2010 available at <http://mg.co.za/article/2010-03-19-bosasa-in-line-for-another-state-tender> (accessed 30 April 2011) 'Whilst [the department] is aware of allegations and possible investigations that may or have been instituted against Bosasa and or individuals associated with it, our view is that currently there is nothing that disqualifies them from consideration by the department as the company has ostensibly met tender requirements," said Tlali. Bosasa is now aiming to win the contract, apparently worth almost R1-billion, to protect more than 600 buildings under the Justice Department's control, including most of the magistrate's and high courts.'

¹⁷⁷Basson A 'Bosasa in line for another state tender' *Mail & Guardian online* 19 March 2010 this report was sent by SUI to NPA on the alleged corruption and fraud at the Department of Correctional Services relating to the Bosasa group on 30 September 2009.

¹⁷⁸(2009) JOL 23676 (LC) para 33 (hereafter *Sekgobela*). This matter is discussed anew with reference to ethical behavior.

¹⁷⁹*Sekgobela* (2009) JOL 23676 (LC) para 31. The employee was awarded 24 months remuneration para 33. Section 187 of the LRA a dismissal will be automatically unfair if the *reason* is, for example, an employee's pregnancy or the fact that the employee made a protected disclosure (see section 189 (1)(a)–(h); 187(1)(a)–(h) of the LRA).

reporting on a breach in procurement laws was ostracised. Public officials should generally feel comfortable to report such derogation of duty without fear or favour.

In addition, in a rare act of censure, parliament's ethics committee has disciplined a senior official in provincial government who failed to disclose her personal interests and lied about its value.¹⁸⁰ This was a senior accounting officer who lied under oath and submitted false and misleading evidence with regards to her personal interests in a company benefiting from contracts she had signed. As Head of the department and accounting officer for the Northern Cape Department of Social and Population Development, she signed R98 million in lease agreements without adhering to tender procedures.¹⁸¹ This official could not explain why she did not recuse herself from the process, knowing that she and her family members were unduly receiving benefits from the company. The ethics committee found her guilty and fined her one month's salary. In addition they referred the matter to the Public Protector for investigation into her tenure as state employee and also to the SAPS for criminal investigation. Unfortunately the report was returned to the ethics committee to re-table and if this is not done before the end of November 2011 the case could be buried.¹⁸²

¹⁸⁰Faull L 'Parliament's ethics committee eviscerates top ANC MP' Aug 25 2011 available at <http://amabhungane.co.za/article/2011-08-25-parliaments-ethics-committee-eviscerates-top-anc-mp> (accessed on 8 October 2011). Noted, Ms Botha is no ordinary MP -- she also chairs the portfolio committee for social development. As portfolio committee chair, Botha sits at the top of the social development sphere in one of South Africa's three branches of government.

¹⁸¹Report of the Panel of the Joint Committee on Ethics and Members' Interests to Consider the Complaint against hon. YR Botha, MP (August 2011).

¹⁸²Faull L 'Botha report could be mothballed' Mail & Guardian online of 11 November 2011 available at <http://mg.co.za/article/2011-11-11-botha-report-could-be-mothballed/> (accessed 11 November 2011)

This rare act of self censure and especially the referral to the SAPS is commendable and investigation should be swift so as not to lose momentum of the seriousness of the transgression of this state official, who remains employed by the state. The problem of conflict of interest is exacerbated by the absence of post-employment restrictions in the anti-corruption framework, which leaves public servants free to join a company to which they beforehand irregularly awarded a public tender contract.^{183 184}

The state machinery was also at work in that a senior government executive was arrested in the latest corruption in tender fraud¹⁸⁵ The tender fraud allegations against him relates to the purchase of water purification equipment for a state hospital at allegedly inflated prices (R112 million) and without following proper tender procedures.

Due to the unfair advantage those in SCM have on bid specifications, as against the general public participating in the bid, it is incumbent on accounting officers to enforce a code of conduct. However, generally SCM officials were not compelled to sign relevant

¹⁸³Pienaar G 'Governance and Public Ethics: Public servants still profit from state procurement' *IDASA* 15 July 2009 1 available at <http://idasa.krazyboyz.co.za/media/uploads/outputs/files/Public%20servants%20still%20profit%20from%20state%20procurement.pdf> (accessed 30 March 2011)

¹⁸⁴Green Paper (1997) para 4.11 (i) refers to corrupt actions by bidders as 'Collusion; influencing the choice of procurement method and technical standards; inciting breaks of confidentiality; influencing the work of evaluators; offering of bribes; over or under invoicing; "fast pay" action; inaccurate disclosures.' Refers to corrupt action by public officials as *inter alia* 'the preparation of slanted tender specifications; the approval of inappropriate tenders; tampering with tenders; breaching confidentiality; taking bribes; the use of position to obtain a private benefit; an/or the lax administration of a contract after its conclusion.' Darroch F 'The Lesotho Corruption Trials – A case study' prepared for Transparency International (2003) para1.2 states that: 'Whilst there is no universal definition of corruption, it is generally accepted to be the payment of money, to a public official, in return for favoured treatment.'

¹⁸⁵SAPA 'ANC MEC in tender fraud arrest' *Times Live* 5 November 2010 available at <http://www.timeslive.co.za/local/article745121.ece/ANC-MEC-in-tender-fraud-arrest> (accessed 10 January 2010).

code of conduct.¹⁸⁶ Besides this, it is generally understood that a declaration of interest is only necessary when the public official is an employee of the procurement entity.¹⁸⁷ This has recently been remedied by the National Treasury issuing a practice note.¹⁸⁸ This practice note prescribes that accounting officers and accounting authorities must ensure that officials in SCM adhere to formally signing the relevant code of conduct and thereby observe its requirements.¹⁸⁹

4.5 Remedies

When public officials exercise public power such as in competitive bidding, the law at minimum requires them to do so authorized by an empowering provision, in the language of the PAJA.¹⁹⁰ Thus tender documents should always inform a tenderer of his right to request reasons for procurement decisions.¹⁹¹ This relates to the fact that an unsuccessful bidder be furnished with reasons for the award or non-award of a tender.¹⁹² Thereby fairness is promoted in that bidders have the right to be heard¹⁹³ Thus no

¹⁸⁶National Treasury Practice Note Number 7 of 2009/2010 Supply Chain Management: Declaration of interest: Amendment and augmentation of standard bidding document (SB 4) Para 3.3 (This practice note is issued in terms of section 76(4) (c) of the PFMA.)

¹⁸⁷National Treasury Practice Note Number 7 of 2009/2010 Supply Chain Management para 3.2.1.

¹⁸⁸National Treasury Practice Note Number 7 of 2009/2010 Supply Chain Management para 1.1. 'The purpose of this practice note is to provide guidance to accounting officers of departments and constitutional institutions and to accounting authorities of public entities listed in Schedules 3A and 3C to the Public Finance Management Act (PFMA), 1999 on how to regulate the environment within which bids should be considered when such bids are submitted by persons employed by the state or by persons connected with or related to persons employed by the state.'

¹⁸⁹National Treasury Practice Note Number 7 of 2009/2010 Supply Chain Management para 4.2.2.

¹⁹⁰Wakwa-Mandlana W 'The Common Law, The Constitution and The Promotion of Administrative Justice Act 3 of 2000' *Administrative law (2006) Annual Survey of SA Law* 82.

¹⁹¹Bolton P (2007) 223. Also see PAJA s5

¹⁹²*Goodman Brothers (Pty) Ltd v Transnet Ltd* (1998) 4 SA 989 (W).

¹⁹³Pretorius DM 'Procedural Fairness and Legitimate Expectation: *Walele v The City of Cape Town* (City of Johannesburg as Amicus Curiae) (2008) ZACC 11 (case CCT 64/07)' (2009) 72(2) *THRHR* 316.

dissatisfied bidder should be condemned unheard.¹⁹⁴ If this is not forthcoming there will be grounds for judicial review.¹⁹⁵

4.5.1 Judicial review of public procurement decisions.

Judicial review may be used to address unlawful administrative action and to limit the scope of unscrupulous practices in the public procurement domain.¹⁹⁶ The usual grounds of review for public procurement processes are the lack of lawfulness, procedural fairness or reasonableness.¹⁹⁷

However Nugent JA expressed concern over the frequency of public tenders seeking judicial review.¹⁹⁸ In addition in *Moseme construction*¹⁹⁹ it has been held that tender processes do not necessarily have to be perfect, and that not every slip in the administration of tenders has necessarily to be visited by judicial sanction. Notwithstanding this, in reviewing the exercise of discretionary powers of an administrative authority with regards to a tender award, a court will not readily substitute its own opinion for that of such an authority.²⁰⁰ In fact the courts are cautioned, when considering the validity of administrative action, not to intrude without justification on

¹⁹⁴ *Masetlha v President of the Republic of South Africa and Another* (2008)1 SA 566 (CC); (2008) 1 BCLR 1 (CC) para 183. (hereafter *Masetlha*)

¹⁹⁵ PAJA s 6.

¹⁹⁶ *Plasket C* (2006) 161.

¹⁹⁷ *Plasket C* (2006) 171. Also see PAJA.

¹⁹⁸ *SAPO v De lacy* (2009) 3 All SA 437 (SCA) para 3.

¹⁹⁹ (2010) 4 SA 359 (SCA) para 21.

²⁰⁰ *Cash Paymaster Services* (1999) 1 SA 324 (CKH) para 367.

terrain reserved for the administrative branch of government.²⁰¹ Such restraints on the powers of the courts are universal in democratic societies like South Africa.²⁰²

This synchronises with the fact that the Constitution does not give courts the power to perform administrative function themselves.²⁰³ The courts are rather the final instruments ensuring the accountability of the exercise of public power.²⁰⁴ The idea is to adhere to the tender requirements and observe constitutional imperatives in order to avoid the court's interference with such decisions taken.²⁰⁵

This will entail that during tender adjudication the administrative authority must exercise discretion without delegation; not be subjected to the unauthorised advice of another; follow the correct prescribed procedures and applies its mind to the matter.²⁰⁶ In applying its mind the administrative authority must comply with tender requirements for a valid administrative act, for example it should not entertain wholly irrelevant or improper considerations.²⁰⁷ As it stands the court will not entertain overturning a decision taken by an administrative authority who acted lawfully and honestly. Effectively this means, that there are limits on the power of the courts insofar as repairing damage that has been caused by a breakdown in the administrative process of competitive bidding.²⁰⁸ Should a

²⁰¹ *Intertrade Two* (2008) 1 All SA142 (CK) para 46.

²⁰² *Intertrade Two* (2008) 1 All SA142 (CK) para 46.

²⁰³ *Carephone (Pty) Ltd v Marcus NO & others* (1999) 3 SA 304 (LAC) para 35.

²⁰⁴ *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* (2000) 12 BCLR 1322 (E) paras 1328H-1329B.

²⁰⁵ *Bel Porto School Governing Body v Premier of the Province Western Cape* (2002) 3 SA 265 (CC) para 87. Also see Beukes M 'Do Bad Cases Make Hard Law?' *Bel Porto School Governing Body v Premier of the Province Western Cape* (2002) 9 BCLR 891 (CC) (2003) 18 SAPR 516.

²⁰⁶ *Cash Paymaster Services* (1999) 1 SA 324 (CkH) paras 367-68.

²⁰⁷ *Cash Paymaster Services* (1999) 1 SA 324 (CkH) paras 367-68.

²⁰⁸ *Intertrade Two* (2008) 1 All SA142 (CK) para 46.

bidder be by the means to litigate, the following remedies may arise from applications for review.

4.5.2 Re - awarding the tender (contract)

In *Eskom Holdings Ltd & Another v The New Reclamation Group*²⁰⁹ the Supreme Court of Appeal noted that an irregularity in the award of a tender is reviewable by the unsuccessful bidder who can call for the award to be set aside. Therefore, should exceptional circumstances warrant it, the court may set aside a tender and re-award it to the unsuccessful bidder.²¹⁰ This was the circumstances in *Grinaker*²¹¹ where the tender board displayed such naked preference and gross incompetence, that fairness demanded the matter not to be referred back to them, but rather that the courts substitute their decision and award the tender to the unsuccessful bidder.

In *Shearwater Construction v City Tshwane Metropolitan Municipality & Others*²¹² the tender was awarded subject to the applicant forming a joint-venture with BEE bidders in order to promote SMMEs. The court ironically set aside and re-awarded the tender, despite the applicant being disqualified for refusing to embrace any specific goals in empowering black people. It was found that these requirements were not spelt out in the bid specifications during the bid adjudication and the deserving bidder scored the highest

²⁰⁹(2009) 4 SA 628 (SCA) para 11.

²¹⁰PAJA s 8(1) (c) (i) (aa).

²¹¹(2002) 3 All SA 336 (T)

²¹²(2006) JOL 16809 (T) para 8. (hereafter *Shearwater Construction*).

points although zero points was scored for special goals. The court re-awarded the tender because it appeared that the outcome was a foregone conclusion, in that the contract should have been granted to the applicant.²¹³

Lest we forget, not every mishap in public administration will be met with negative sanction; it will always depend on the circumstances of each case.

4.5.3 Invalidity

The court is also clear that failing to adhere to constitutional principles and legislative measures during the process of public procurement will lead to invalidity and setting aside of such decisions.²¹⁴ However there is always the difficulty whether new tenders should be called or whether the existing bidders should be reconsidered.²¹⁵ Moreover it must be borne in mind that the court may refuse to set aside the invalid award of a tender, in that work had been performed and that it was impractical to re-start the tender process for the remaining work.²¹⁶ The court in *Tecmed (Pty) Ltd v Eastern Cape Provincial Tender Board and Others*²¹⁷ referred the decision back to the relevant body for reconsideration of the existing tenders, this remains the preferred course. In contrast

²¹³ *Shearwater Construction* (2006) JOL 16809 (T) para 11.

²¹⁴ See *Grinaker* (2002) 3 All SA 336 (T) where the tender award was set aside and re-awarded by court to the applicant joint –venture; in *Metro Projects* (2004) 1 All SA 504 (SCA) the court struck down the award; in *Cash Paymaster Services* (1999) 1 SA 324 (CKH) the court held that the calling of new tenders were warranted.

²¹⁵ Penfold G & Reyburn P 'Public Procurement' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2ed (2004) 25-35.

²¹⁶ *Chairperson, Standing Tender Committee* (2005) 4 All SA 487 (SCA) para 29.

²¹⁷ (2001) 3 SA 735 (SCA) para 10. Also see *Chairperson, Standing Tender Committee* (2005) 4 All SA 487 (SCA) para 29. Penfold G & Reyburn P (2004) 25-35.

the court in *Cash Paymaster Services*²¹⁸ ordered that new tenders be called where circumstances had changed since original submission of the tenders.

4.5.4 Interdict and damages

Should a defective procurement process ensue, an unsuccessful or aggrieved tenderer may, by way of an interdict, freeze the award of the impugned tender.²¹⁹ In *Darson Construction (Pty) Ltd v City of Cape Town*,²²⁰ it was pointed out that where a bidder becomes aware of a 'successful' tenderer beginning work on an impugned tender, pending appeal, it is advisable to have such tenderer interdicted to suspend work. The advantage in this regard is that an interdict could anticipate and eliminate loss to the complainant. However, approaching the court after performance by the 'successful' tenderer, for loss suffered, has proven to be difficult.²²¹ Notwithstanding this, public bodies may be held delictually liable if they are derelicting their duty to perform their functions properly.²²²

This may have the result of an unsuccessful bidder having a delictual claim for damages suffered, due to an unlawful tender procedure by a public body.²²³ It is difficult to obtain damages for pure economic loss for administrative errors during tender adjudication;

²¹⁸(1999) 1 SA 324 (CKH).

²¹⁹*Olitzki Property Holdings v State Tender Board* (2001) 3 SA 1247 (SCA) para 1265F-H (hereafter *Olitzki*).

²²⁰(2007) 4 SA 488 (C) paras 506F-H. (hereafter *Darson Construction*).

²²¹*Darson Construction* (2007) (4) SA 488 (C) paras 506F-H.

²²²*Carmichele v Minister of Safety and Security and Another* (2001) 4 SA 938 (CC); (2001) 10 BCLR 995 (CC).

²²³Penfold G & Reyburn P (2004) 25-36.

success is underpinned by whether the administrative action was tainted with dishonesty or fraud. In *Steenkamp*²²⁴ a tender for automated cash payments for social welfare grants was granted to the lowest bidder (Balraz). After performing on the contract and incurring expenses, the award was set aside by the court at the behest of the unsuccessful bidder.²²⁵ This resulted in the liquidation of Balraz. The liquidators applied to court to recover damages comprising of out-of-pocket expenses.²²⁶

The stance of the court was that the law is conservative regarding where the boundaries of delictual liability lay, particularly in cases dealing with pure economic loss.²²⁷ Therefore the breach of administrative justice do not give rise to a delict, which simply means that administrative law duties do not translate into private law duties in raising delictual liability.²²⁸ If not there will be a duplication of the same payment by the state in that the successful bidder will be paid for the goods or services delivered on the contract and the aggrieved bidder gets delictual compensation for the same tender contract.²²⁹ It follows that immunity to a damages claim will only be upheld if the administrative error was negligent but an honest decision.²³⁰

²²⁴(2007) 3 SA 121 (CC).

²²⁵*Steenkamp v Provincial Tender Board, Eastern Cape* (2006) 3 SA 151 (SCA) paras 5-6 the appellant's claim was that economic efficiency was ignored and the principles of the RDP was over emphasised and in aggravation Balraz was not registered as a company at the time the tender was submitted (hereafter *Steenkamp*).

²²⁶*Steenkamp* (2006) 3 SA 151 (SCA) para 3 states that the bulk of the expenses incurred pertained to salaries of directors and consultants.

²²⁷*Steenkamp* (2006) 3 SA 151 (SCA) para 27.

²²⁸*Steenkamp* (2007) 3 SA 121 (CC) para 29.

²²⁹*Olitzi* (2001) 3 SA 1247 (SCA) para 30. In this case the court was concerned with an unsuccessful tenderer who sought to claim loss of profits.

²³⁰*Steenkamp* (2007) 3 SA 121 (CC) para 55.

The court maintained that the evaluation and awarding of tenders are in the domain of administrative law²³¹ and as such a public law remedy should pre-empt, correct or reverse an irregular administrative act.²³² This is to afford the aggrieved party administrative justice for effective and efficient public administration.²³³ Thus a negligent administrative error in statutory obligations which leads to loss is not enough to invoke a delictual claim.²³⁴ The court held that it cannot discriminate between unsuccessful and successful bidders because this approach will allot different legal rights to parties to the same tender process.²³⁵

The minority judgment in *Steenkamp*²³⁶ draws a comparison between a successful bidder losing the contract post employing contractual obligations and an unsuccessful bidder not winning the tender claiming for loss of profit, for not winning. The minority judgement reasoned that in the first instance, the successful bidder should be able to claim back out-of-pocket expenses as this will be more modest and less exposure to the fiscus, whereas the latter claim is untenable.²³⁷ Where out-of-pocket expenses are not being recoverable it could very well place small and less financially viable bidder at risk of liquidation.²³⁸ This may not be the intention but those vulnerable SMMEs, the government wishes to promote through BEE may fall prey as an unintended consequence.

²³¹ *Steenkamp* (2007) 3 SA 121 (CC) para 21.

²³² *Steenkamp* (2007) 3 SA 121 (CC) para 29.

²³³ *Steenkamp* (2007) 3 SA 121 (CC) para 29.

²³⁴ *Steenkamp* (2007) 3 SA 121 (CC) para 37.

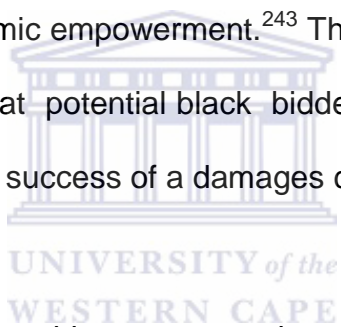
²³⁵ *Steenkamp* (2007) 3 SA 121 (CC) para 54.

²³⁶ *Steenkamp* (2007) 3 SA 121 (CC).

²³⁷ *Steenkamp* (2007) 3 SA 121 (CC) para 82.

²³⁸ *Steenkamp* (2007) 3 SA 121 (CC) para 82.

Quinot favours the minority judgment in *Steenkamp*²³⁹ because the majority judgment places the risk of government contract that are administratively unjust and therefore set aside, on the successful bidder. This creates a risk unique to South Africa in that contracting with government carries an administrative injustice risk.²⁴⁰ Such administrative injustice may pose potential obstacles to new black entrants desirous of doing business with government.²⁴¹ This will limit access to government business and restrict it to a small number of established and financially stronger black businesses.²⁴² This will surely go against the aims of preferential procurement which plays a key role in the development of black economic empowerment.²⁴³ This approach will deflect from the broad based nature of BEE in that potential black bidders may be discouraged to tender under such risk which limits their success of a damages claim.



Roos and De la Harpe support this argument that a successful bidder is placed differently than an unsuccessful bidder.²⁴⁴ The variant between the two is that a successful bidder must incur expenses to perform on the tender award whereas an unsuccessful bidder does not have this obligation.²⁴⁵ Tenders in private and public

²³⁹ *Quinot G 'Worse than Losing a Government Tender: winning it' 2008 STELL LR 101.*

²⁴⁰ *Quinot G (2008) 112.*

²⁴¹ *Quinot G (2008) 112.*

²⁴² *Quinot G (2008) 112.*

²⁴³ *Steenkamp (2007) 3 SA 121 (CC) para 82.*

²⁴⁴ *Roos R & De La Harpe 'Good Governance in Public Procurement: A South African Case Study' (2008) 11 PER 38/47.*

²⁴⁵ *Roos R & De La Harpe (2008) 38/47.*

sector differ in that the latter has to subscribe to constitutional principles and the former not.²⁴⁶

In any case should tenderers be allowed to negotiate a contract which includes a damages claim as the Constitutional court suggested, this will bear on the fiscus in the same manner should a claim for damages succeed.²⁴⁷ Moreover the possibility for a damages claim in *Steenkamp* may have been possible if the claim had been based on applicable statutes. But the PAJA was not in existence at the start of the *Steenkamp* case.²⁴⁸ In any case now that the PAJA²⁴⁹ is relied upon for administrative justice the courts are empowered to make a finding that is just and equitable which may therefore include a damages claim. Besides under the PAJA the litigation time and costs are reduced because the claim is limited to causation and quantum.²⁵⁰

In *Moniel Holdings (Pty) Ltd v Premier of Limpopo Province and Others*²⁵¹ in the wake of an unsuccessful bidder claiming for loss of profit due to not being awarded the contract, the court remained steadfast in the approach of *Steenkamp*.²⁵² In this instance

²⁴⁶Roos R & De La Harpe (2008) 38/47

²⁴⁷Roos R & De La Harpe (2008) 40/47.

²⁴⁸Roos R & De La Harpe (2008) 42/47.

²⁴⁹Section 8(1) (c) (ii) (bb).

²⁵⁰Roos R & De La Harpe (2008) 41/47.

²⁵¹*Moniel Holdings (Pty) Ltd v Premier of Limpopo Province and Others* (2007) 3 All SA 410 (T) (hereafter *Moniel Holdings*).

²⁵²(2007) 3 SA 121 (CC).

the bidder was disqualified for non-compliance²⁵³ and as a result was unsuccessful in the tender award. The argument that a delictual claim on the ground of pure economic loss was bad in law and cannot be entertained was accepted by the court.²⁵⁴

Furthermore in *South African Post Office v De Lacy and Another*²⁵⁵ the court awarded damages due to the misconception that dishonesty and fraud had occurred during the tender deliberations. The Supreme Court of Appeal,²⁵⁶ using *Steenkamp*, held that due to the lack of dishonesty or fraud a damages claim could not be entertained.

Along similar lines to this is *Gore*²⁵⁷ where the dishonest and fraudulent behaviour of the state officials during tender adjudication led to the Province having to accept vicarious liability for damages. In this case the public officials colluded with the bidder (a newly purchased shelf company) and tailored the tender offer on the Cape Provincial Administration's (CPA) computer at the premises of the CPA. Although not well versed in the services offered the bidder landed the award thanks to the cunning manipulation of the public officials. The court granted a claim for damages against the officials for which the employer (provincial government) was vicariously liable. In the subsequent quantum trial damages was ordered in the amount of R215 517 500, 00.²⁵⁸

²⁵³ *Moniel Holdings* (2007) 3 All SA 410 (T) the bidder failed to submit a copy of a public indemnity insurance policy which was compulsory.

²⁵⁴ *Moniel Holdings* (2007) 3 All SA 410 (T) para 9.

²⁵⁵ (2009) 3 All SA 437 (SCA) (hereafter *SAPO v De Lacy*).

²⁵⁶ *SAPO v De Lacy* (2009) 3 All SA 437 (SCA) para 439.

²⁵⁷ (2007) 1 All SA 309 (SCA). See discussion of this case in para 4.4 in conflict of interest.

²⁵⁸ *Gore NO v Minister of Finance and Others* (11190/99) (2008) ZAGPHC 338 para 246. Also see *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 1 SA 299 (SCA) where the tender was fraudulently awarded, the unsuccessful bidder sued the organ of state for damages and was successful to the tune of R57,6 million plus interest.

Thus it should not be misconstrued that organs of state and administrators have delictual immunity but rather that the intention of judicial review of administrative decisions is not for compensation but to ensure the law is upheld and there is effective decision-making processes.²⁵⁹ Key to this is a procurement system managed by public officials that display a keen willingness to meticulously enforce the procurement laws and policies.

4.6 Conclusion

In this chapter the challenges experienced during competitive bidding was discussed. The findings are that the management of preferential procurement by public officials are not of the standard expected, to maximise the success of this policy tool. The objectives of the legislation are lost in the myriad of defective conduct displayed by public officials. This has the result of worthy bidders losing out on tenders and thereby economic transformation is deferred. Such eligible bidders often end up in court having to challenge a flawed bidding process.

The study found that incompetence in the state machinery exists despite the Constitution demanding that, good human resources management and career development be cultivated in the public administration in order to maximise human potential.²⁶⁰ Evidently skills and ethical standards are so necessary for the success of preferential procurement. It could be said that without these attributes the successful implementation of preferential procurement may be deferred. Essentially there should be a pursuit for standard bidding documents as issued by National Treasury, and changes, if any, should

²⁵⁹ *Steenkamp* (2006) SA 151 (SCA) paras 27 – 8.

²⁶⁰ Section 195 (1) (h).

be minimal.²⁶¹ This must be supplemented by skilful tender committees that are thoroughly conversant with the legislative prescripts.

Schooner argues that 'the tension between social policies and commercial purchasing has seen government buyers disregarding social policies in place of greater customer satisfaction.'²⁶² This means that for government buyers customer service comes first and legislatively-mandated procurement policies are of lesser importance during procurement negotiations.²⁶³ This highlights the importance of ensuring bidders that are the most compliant is chosen which should result in greater customer satisfaction. However it still requires that government departments concerned with tender procedures, to be thoroughly acquainted with the requirements for their respective departments. Regrettably the SCM system seems fragmented by the many unlawful practices employed by the SCM officials. This is apparent when looking at the AGSA reports;²⁶⁴ it seems that there are different interpretations lent to the laws that are meant to guide competitive bidding in a coherent way. This practice prevails because SCM officials seem to be chosen without regard whether they can master the all important task of tender adjudication. The pace at which preferential procurement succeeds is compromised by this attitude of non-compliance with legislative prescripts.

²⁶¹National Treasury GCC (2003) para 2.1

²⁶²Schooner S 'Commercial Purchasing: The Chasm Between the United States Government's Evolving Policy and Practice' (2003) in Arrowsmith S & Thybus M (eds) *Public Procurement: The Continuing Revolution* (2003) 166.

²⁶³Schooner S 'Commercial Purchasing: The Chasm Between the United States Government's Evolving Policy and Practice' (2003) in Arrowsmith S & Thybus M (eds) *Public Procurement: The Continuing Revolution* (2003) 166.

²⁶⁴AGSA report on Education and Health Departments (August 2011); AGSA report June 2011.

This difficulty is compounded by the fact that contract maintenance is not receiving the attention required. BEE will remain unchecked, whilst it is not compulsory for public entities engaging in preferential procurement, to monitor the achievements of social performance post - award stage. This will not only prolong BEE initiatives but also defer economic development of South Africa as a whole. Contract maintenance post – award stage should be employed vigorously, as such social performance audits should be conducted with the same rigour as financial audits.²⁶⁵ For this reason there is a need for legislation that compels contract maintenance insofar as measuring the performance of the core elements the bidder have to deliver on in terms of the BEE Codes.

This should keep government abreast of the goals reached in the empowering of, SMME's and black people, particularly insofar as capital ownership, employment opportunities and skills development. Thus the main reason why contract maintenance should be observed is to provide information on how successful preferential procurement has been, in order to make an assessment of how long the current preferential procurement policies should remain in force. The government should ensure there is a viable method available for tracking the procurement legislation deliverables, particularly insofar as, the socio-economic and empowerment deliverables flowing from the RDP.²⁶⁶ Contract monitoring and inspection also safeguard the attainment of value for money and cost-effectiveness.²⁶⁷

²⁶⁵Hawkins J (2008) 63.

²⁶⁶Manchidi T 'Targeted Procurement in RSA' (2002) 122.

²⁶⁷Bolton P (2007) 129.

What should follow on the heels of this should be a display of optimal ethical standards in the procurement domain by public officials. This will not be served where competitive bidding is compromised by lack of proper oversight by accounting officers and the willful practice of self-interest in SCM. It is rather unfortunate that declaration of interests and the prevailing code of conduct are simply disobeyed. Regrettably it does not seem that the National Treasury practice note compelling adherence to relevant code of conduct has the desired effect because regardless of its implementation, habitual non-compliance in declaring interests continues to create disparity in public procurement. Various incidents of public officials behaving unethically in the procuring of goods and services have been uncovered. Moreover, in the face of any conflict of interest, officials should not participate in the procurement process in any way.²⁶⁸ Most importantly, ideally sanctions should be imposed on officials for non-disclosure and breach of conflict of interest rules. Williams and Quinot recommends the rotation of staff in combating conflict of interest.²⁶⁹ Worrisome though is that this approach may be undermined by the supply of staff that is adequately schooled in the procurement processes and laws.

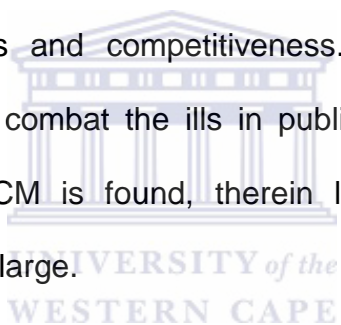
Another point of concern is, despite the myriad of legislative regulations that control preferential procurement; the courts are continuously approached to review tender irregularities. Whilst judicial review of procurement procedures is invaluable, when needed, it is regrettable that competitive bidding faces so many court challenges, which no doubt bears heavily on the public purse because cost orders are often made against the state. Moreover, although the constitutional right to administrative justice is a reality,

²⁶⁸Arrowsmith S, Linarelli J & Wallace D Jr (2000) 39.

²⁶⁹Williams S & Quinot G (2007) 343.

accessing the right to review administrative action may be a pipe dream for some due to the length of time afforded to government to furnish reasons.²⁷⁰

A preferred approach should be that SCM officials engage procurement rules without fear or favour. Where breach of procurement processes is present those officials willing to expose such breach should enjoy protection and as such they should not be intimidated by the fear of losing their livelihood. This will give bidders a sense that their bids are fairly measured and public officials care about following the rules. In any case, the whole system of competitive bidding should observe the principles equity, fairness, transparency, cost-effectiveness and competitiveness. Observing these prescripts should be the starting point to combat the ills in public procurement because where compliance and honesty in SCM is found, therein lays the success of economic empowerment for the citizens at large.



²⁷⁰PAJA s 5 (1) provides:

Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

(2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

As outlined in chapter one the object of this thesis is to examine and assess the efficacy of preferential procurement as a policy tool, to promote BEE. In doing so, this thesis seeks to analyse the practices that hinder the effective use of preferential procurement as instrument that encourage black owned enterprises to contract with government. Indications such as the report of the Auditor-General of South Africa (AGSA)¹ and the Special Investigations Unit (SIU)² have shown that the procurement industry is rife with practices that beleaguer rather than advance the success of preferential procurement.

5.2 The challenges

5.2.1 Disharmony of legislation

Chapter two analyses the legal regime that dominates preferential procurement and its effect on the success of preferential procurement processes. The PFMA that oversees financial management in government provides clear guidelines for public procurement, but this is not enough for the success of preferential procurement. It is the Procurement

¹See chapter four.

²See chapter three.

Act³ and Regulations⁴ and the BBEE Act⁵ and BEE Codes⁶ that is central to the success of this policy tool. This legislation determines how the process of public tendering should take place and who should be the target groups it should benefit. The implementation of these laws was necessary in order for the government to mend some of the economic disparities created during the apartheid era. These laws encourage preferential treatment of black people for the purpose of public tendering in goods and services, due to the fact that previously their economic participation in the economy was restricted. This is an indication of how essential these laws are in the transformation of the economy.

The Procurement legislation⁷ provides the framework for the procurement policies that state entities and organs of state need to implement, together with a preferential points system. Preferential points of 10 or 20 are to be allocated to target groups for BEE by measuring specific and RDP goals. These preferential points are to accrue to HDIs. To complement this legislation, the BBEE laws⁸ were enacted to identify more broad-based BEE than the specific and RDP goals contemplated by the Procurement Act. This broad-based approach was defined in the BEE Codes and has a wider reach to BEE which includes but is not limited to ownership, management, skills development and enterprise development. In addition the BEE Codes provide a score card that predetermines how goals for preferential points are calculated. The other fundamental

³Act 5 of 2000.

⁴Regulations (2011).

⁵Act 53 of 2003.

⁶BEE Codes (2007). See chapter two para 2.7

⁷See chapter two for discussion on the legal regime of procurement.

⁸See chapter two para 2.7 for discussion on the BEE laws.

provision is that the BBBEE Act provides that the recipients of these preferential points should be black people.

The Procurement Act has been under scrutiny since before the ascension of the BBBEE Act in that the former needed amendments to be cogent with the latter. This cogency was to be brought about by the new Procurement Regulations of 2011.⁹ The Regulations have effected some positive changes in that the Procurement Act now extends to all those entities under the PFMA. This was a welcome change because now all three spheres of government, that is national, provincial and local, are obliged to consider policies in line with the framework Act and no deviation is allowed as was previously the case.

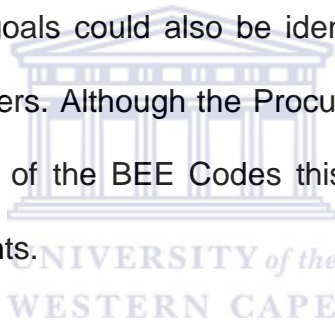


However the cogency¹⁰ between the Procurement Act and BBBEE Act and Codes are still lacking despite the new Regulations. A major bone of contention is that the two Acts still differ in the definition of who is to benefit, with the Procurement Act still referring to HDIs as the target group for BEE and the BBBEE Act referring to black people as the target group for BEE. In addition the Procurement Act measures preferential points by specific goals and RDP goals, but the BEE Codes measures BBBEE through a generic scorecard. This study suggests that this discord promotes confusion rather than coherent legislation for the empowerment of black people.

⁹See chapter two para 2.5.3.2 for amendments.

¹⁰See chapter two para 2.5.3.

Furthermore, following the BEE Codes and applying the scorecard to evaluate BEE status places more constraints on supply chain management (SCM),¹¹ in the allocation of preference points. This means that public officials cannot exercise their discretion with regards to the calculation of preferential point, because the BEE Codes tend to this. Therefore the BEE Codes make provision for the verification of BEE credentials through acquisition of a verification certificate (by potential bidders) which predetermines the preferential points of a BEE compliant bidder. This is in contrast to the Procurement Act that leaves the measuring of RDP goals open to the discretion of SCM. In this regard the Procurement Act is permissive rather than prescriptive in what to consider as specific goals.¹² Since other goals could also be identified, this leads to disputes by aggrieved or unsuccessful bidders. Although the Procurement Regulations 2011 award preference points on the basis of the BEE Codes this does not remedy the way the Procurement Act measures points.



The implementation of the Regulations 2011 in December 2011 can be met with muted enthusiasm because the main thrust behind the amendment, that is to bring cogency to the framework Acts is not achieved. This tension between the framework legislation should be remedied by amending section 2 (1) (d) of the Procurement Act to refer to the consideration of the BEE Codes when calculating preferential points. In addition section 1 definitions should be amended to include the term 'black' as the target group for broad-based empowerment. It will also serve the preferential procurement vision (BEE)

¹¹See chapter four para 4.2.1 for a discussion on SCM.

¹²Section 2 (d) the specific goals may include – (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability; (ii) implementing the programmes of the Reconstruction and Development Programme as published in the *Government Gazette* No. 16085 dated 23 November 1994.

to remove the term HDI¹³ from the Procurement Act. As noted in chapter two this term has led to confusion in the recipients of preferential procurement in that those economically discriminated are sidelined in favour of those that suffered societal discrimination. Government needs to arrange for amendment of the Procurement Act, if not the preferential procurement processes will not serve the people it intended.

Further care should be taken in awarding a tender to a bidder which did not score the highest points¹⁴ as provided for by the Procurement act and Regulations 2011. The thrust behind this provision is that price is not the most important element to score the tender. Should there be other objective criteria that a makes a bidder more eligible then this will be considered above the lowest priced tender. This 'other' objective criteria¹⁵ is what may be problematic in that this is left to the discretion of SCM officials and could prove a challenge for fairness, as has been illustrated by this study. A fairer evaluation is to provide a description of such criteria in the bid specifications to encourage bidders to go beyond the legal prescripts for BEE, and to be creative in how to add more value to advance black people. Nevertheless coherency in public procurement can only be achieved in applying one set of cogent rules.

5.2.2 Willful practices

¹³See chapter two para 2.5.3 for a discussion on the confusion this term leads to.

¹⁴See chapter two para 2.6

¹⁵See chapter two para 2.6.1

The Public Service Commission (PSC)¹⁶ notes that ‘the global discourse on good governance expects that the government should be proactive in fighting the spread of corruption and promoting an integrity-driven form of administration.’¹⁷ This thesis suggests that despite the number of policies and laws that support the public administration of government procurement, the procurement environment is tainted with a number of unsavory practices.¹⁸ The main reason for this is that the public administration lacks the capacities to not only investigate but also to prevent corruption as evidenced by the SIU report. The SIU is straining under the pressure in that they can only investigate the top scale of corruption in the police.

This is aggravated by the fact that departments do not refer cases where corruption is confirmed to the South African Police Service (SAPS) for criminal prosecution. This is despite the Corruption Act¹⁹ prescribing that fraud over R100 000 must be criminally charged. There should be a clear commitment by government to discipline those public officials found acting with malice in preferential procurement. Such disciplining should take place speedily and those found guilty of corruption in excess of R100 000 should be criminally charged. Anything short of this approach will leave preferential procurement vulnerable to corruption by those meant to promote it.

¹⁶See chapter three.

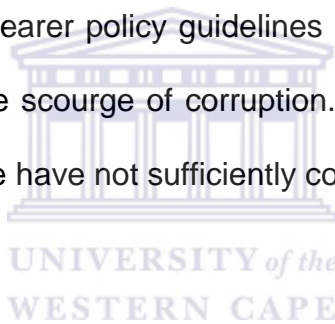
¹⁷Public Service Commission report: ‘Profiling and Analysis of the most Common Manifestations of Corruption and its Related Risks in the Public Service’ April 2011.

¹⁸Public Service Commission report: ‘Profiling and Analysis of the most Common Manifestations of Corruption and its Related Risks in the Public Service’ (April 2011) para1.1. See chapter three for a discussion on bad practices.

¹⁹Act 12 of 2004 s34 (1).

Moreover most of the corrupt practices are either displayed by collusion between bidders (collusive tendering)²⁰ or collusion between public officials and bidders (tenderpreneurship)²¹ and fronting.²² These practices have established cartel behaviour in the procurement environment. This collusive behaviour of public officials have not only been uncovered by the SIU but also reported on by the PSC. Hence the starting point for rooting out corruption in public procurement is to remove those public officials that are colluding in taking bribes or setting up tenders to financially benefit themselves from public procurement.

The PSC²³ recommends that clearer policy guidelines and review of disciplinary codes and procedures will mitigate the scourge of corruption.²⁴ Cognisance should be taken that all the rules already in place have not sufficiently combated procurement corruption.



5.2.3 Skills deficiency and ethics in SCM

The economic transformation of South Africa is far too important for the public service to display the lack of skills as suggested in this thesis.²⁵ To embrace international standards and practices, SCM officials must be skilled in the laws and procedures for public tendering. Skills deficiencies can and should be remedied by government, by properly screening academic and other practical qualifications of those in SCM. Without

²⁰See chapter three para 3.2.2

²¹See chapter three para 3.2.3

²²See chapter three para 3.2.1.

²³Public Service Commission report :‘Profiling and Analysis of the most Common Manifestations of Corruption and its Related Risks in the Public Service’ (April 2011) para1.1

²⁴See chapter three para 3.4 for anti-corruption measures.

²⁵See chapter four para 4.3

the adequate skills to interpret laws and policies, SCM officials are subjective in their discretion, as happened in the case of *Millennium Waste Management*²⁶ where the public officials did not know they may condone the oversight (by a bidder) of signing a duly completed declaration of interest.²⁷ Another negative impact on procurement is that those officials engaged in SCM are not declaring their interest, despite a practice note²⁸ compelling obedience to this. It is not enough to just declare your interest in the tender and then recuse yourself from the process. Public officials will always be advantaged by the 'inside' information and thus will always have an unfair advantage over any other bidder not connected to such official. The short answer to this is that public officials should not be allowed be active in private business whilst working for the government as required by the Western Cape Procurement (Business Interest of Employees) Act.²⁹



5.3 Remedies and anti-corruption measures for procurement transgressions

There is certainly not a lack of anti-corruption measures overseeing public procurement. The most prominent is the Procurement Act and Regulations which makes provision for sanctions and debarment of mischievous bidders. Then there is the Corruption Act that sees to errant public officials or bidders and their debarment.

²⁶(2008) 2 SA 481 (SCA)

²⁷See chapter four para 4.4 for a discussion on conflict of interest.

²⁸Supply Chain Management Practice Note Number 5 of 2006 issued on 09 October 2006.

²⁹Act 8 of 2010 s 4 in Provincial Gazette Extraordinary 6832 of 10 December 2010 (hereafter Western Cape Procurement Act). See chapter four para 4.4.

The inclusion of preferential procurement in the Constitution is evidence of the need for economic reform encompassing the majority of citizens in South Africa. Thus the success of preferential procurement as a policy tool is in the interest of the public at large and therefore the integrity of the procurement system should be jealously guarded. Public officials should uphold the integrity of the public procurement system and if not, legislated-penalties as provided for in the Regulations 2011,³⁰ need to be enforced on bidders and public officials found to be in breach thereof. It does not make sense that tender irregularities are not dealt with in terms of the law. This will mean, if an irregularity occurs, contracts should be cancelled, damages claimed (if any) and if necessary those found guilty should be excluded from government contracts and public officials should meet with the might of the law. As it is corrupt bidders cannot thrive if there are no public officials on the take. Moreover corrupt officials put strain on the public purse because the government is vicariously liable to compensate for their malfeasance.³¹

Furthermore there is too much emphasis on investigating corruption and not enough on how to prevent the practice. This is so because lack of capacity and funds has seen some of these anti-corruption initiatives lapse into redundancy.³² The most vigilant amongst these forums is the SIU which has accounted for most of the shocking revelations with regard to corruption in public procurement. This unit has conclusively

³⁰Regulation 13 (1).

³¹See chapter four para 4.4. Also see *Gore NO v Minister of Finance and Others* (11190/99) (2008) ZAGPHC; *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 1 SA 299 (SCA).

³²See chapter three para 3.4.

found that corruption flourished in the department of correctional services (DCS) with bid rigging, and over-pricing, but the NPA has not embarked on any prosecutions.

5.4 Conclusion

This thesis has undertaken a survey of preferential procurement and found that the success of the policy tool is very much dependent on whether those willful practices are contained. This has to start with those in the public service striving for the success of broad-based BEE in the interest of those disadvantaged by the past. Public officials should ensure that preferential procurement as a policy tool is conducive to delivering the promised economic equality to black people. This can only be realised through a cogent regulatory framework, which must be enforced with honesty and without bias. It stands to reason that the success of preferential procurement will depend to a large extent on the ethics of those that over-see the processes of tendering. Consequently this will be easier to realise if public officials are barred from having business interests whilst employed by the state. Whilst the status quo remains, self-interest in procurement gain will be difficult to curb and the proper proliferation of BEE will be undermined.

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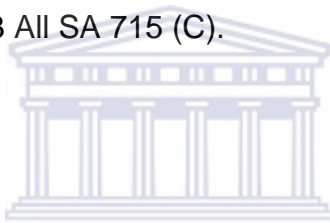
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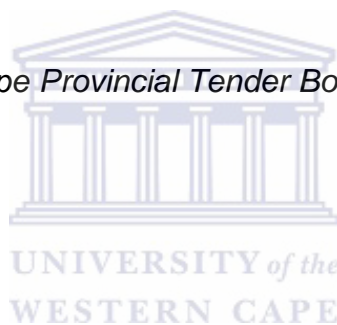
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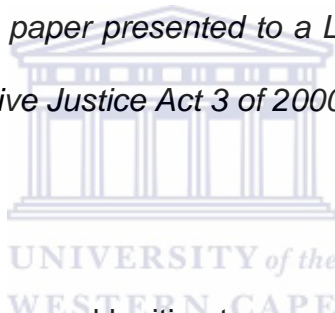
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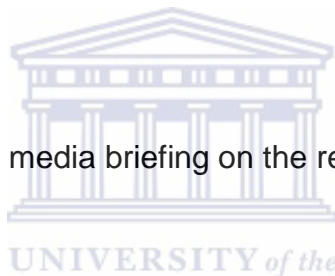
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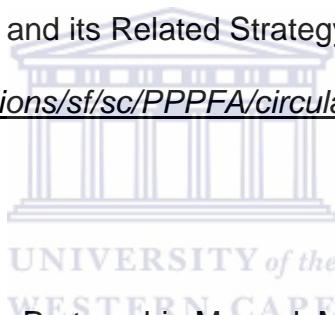
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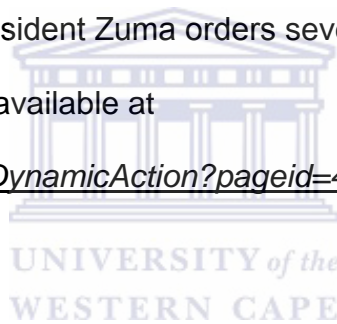
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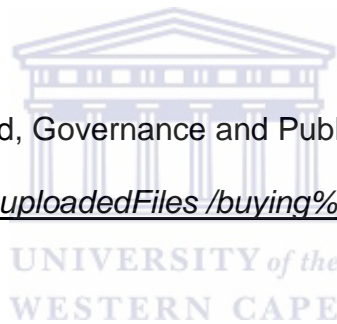
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