

**LEGISLATIVE AND ADMINISTRATIVE DIRECTIVES
GOVERNING PROCUREMENT PROCEDURES: A CASE
STUDY FOR SOUTH AFRICA**

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ABSTRACT

To enact a comprehensive body of rules to regulate public procurement is only one element in fostering compliance with the norms and objectives of a sound public procurement programme. The development of a sound legal framework is a core element in the modernisation and improvement of public procurement systems.

The task of government institutions is to achieve the policy objectives which have been set by the government for community life. As public policy-maker, the government strives to establish a generally preferred future for the community. Any deliberations by the policy-maker on the establishment and realisation of such a preferred future should, of necessity, include, inter alia, the setting of standards and respect for the administrative legal framework to guide functionaries in government institutions on how to execute policy.

The essence of public procurement legislation is to define and enforce those procedures that will produce a productive and efficient result, while respecting the public nature of the process and the duty of fairness to the suppliers. Government institutions are not usually established with a view to profit-making, with the consequence, the objectives of their procurement function will differ considerably from the objectives of an establishment in the private sector. The efficiency objectives of the government institutions necessitate an

optimal relationship from input to output, which is the same underlying motive for an efficient procurement system as is the profit motive of the organisation in the private sector. The premise for this is the **raison de etre** (reason for existence) of government institutions, is to pursue the general welfare of society. Furthermore, government departments can demonstrate that they have obtained the best terms available by utilising competition among suppliers who are interested in and qualified to supply the goods and services in question.

In this paper, the legislative and administrative directives which impact and govern the procurement system in South Africa will be discussed.

INTRODUCTION

‘A procurement official who is entirely unsympathetic with the particular needs of the users of the goods and services will fail to grasp what is one of the most essential functions for their department because they deal with papers and accounts instead of groups and individuals’ (Twyford, in Dobler et al, 1996:07).

Government institutions are not usually established with a view to profit-making with the consequence that the objectives of their procurement management function will differ considerably from the objectives of an establishment in the private sector. The efficiency objectives of the government institutions necessitate an optimal relationship from input to output, which is the same underlying motive for an effective and efficient procurement management function as is the profit motive of the organisation in the private sector. The premise for this is the **raison de etre** (reason for existence) of government institutions, which is to achieve, maintain and enhance the spiritual and material welfare of the inhabitants (Raga, 1997:58).

The business functions of government, as controlled by the public procurement systems, affect various elements of society. Firstly, there are departments involved in the procurement functions with the responsibility to execute designated needs for the country as a whole and which require material support, for example: roads, hospitals and equipment for educational institutions. Secondly, there is the business sector of actual or potential suppliers to the government. Furthermore, there are academic, training and public interest groups which have views on how public management institutions should execute the procurement function. The largest interest group is the general public, who will express their satisfaction when they note that expenditures

are being made through the public procurement system which are economical, rational and fair (Wittig, 2000:03).

In South Africa, a statutory body, known as the State Tender Board was established to make responsible decisions regarding the allocation of contracts to private sources for the provision of goods and services (Raga, 2002:17). The significance of such a body is clear when it is considered that government expenditure on public sector procurement alone during the 2010/2011 fiscal year exceeds R400 billion, of the total government revenue (<http://www.sars.gov.za/home.asp?pid=4153>). To control and account for such expenditures of taxpayer's funds, a sophisticated and responsible approach is required by both politicians and public sector officials. Legislation exists in this regard together with concomitant subordinate legislation such as regulations, consolidated instructions, procedural codes, circular letters and administrative directives (Raga, 2002:17-18).

During the Apartheid regime (separatist rule based on the colour of ones skin, prior to 1994), the Nationalist Government procurement system favoured large and established companies, which made it almost impossible for smaller and newly established enterprises from entering the procurement system. Due to the discriminatory, unfair and marginalisation practices, the majority of the South African diverse population (other than the minority whites) were purposefully prevented from accessing government contracts. Price was the decisive factor for the procurement of goods and services and tenders were awarded strictly based on price. The lowest tender in terms of price was overlooked only if there was clear evidence that the contractor did not possess experience or capacity to undertake the task or was financially insecure (Raga, 1997: 35).

Procurement reforms in South Africa commenced in 1995. A joint initiative by the Ministries of Public Works and Finance aimed at transforming public sector procurement in South Africa. The public sector procurement reforms were directed at two broad focus areas, viz.: the promotion of principles of good governance and the introduction of a preference system to address certain socio-economic goals. The procurement reform processes were supported by the introduction of a number of legislative and administrative measures which included, inter alia, the Public Finance Management Act 1 of 1999, as amended by Act 29 of 1999 and the Preferential Procurement Policy Framework Act 5 of 2000.

To utilise government procurement as a tool to achieve specific socio-economic goals has been used by countries with developing economies as well as developed countries. Several governments have over decades identified socio-economic goals , for example, targeting

of specific business sub-sectors (SMMEs in South Africa) as having the potential of impacting positively on structured government public sector procurement requirements (Shezi, 1998).

In this paper, the South African Government's utilisation of legislative and administrative directives of the procurement process to address the political imbalances of the past which denied the absolute majority (Black – Africans, Coloureds and Asians) of its people from participating in the public sector procurement function. For the purpose of this article the following legislative directives will be expounded upon: Ten-Point Plan, Green Paper on Public Sector Procurement Reform, Constitution of the Republic of South Africa of 1996, Preferential Procurement Policy Framework Act 5 of 2000, Preferential Procurement Regulations of 2001, Public Finance Management Amendment Act 1 of 1999 and the Supply Chain Management Policy of September 2003. A brief overview is also provided of the right to access of information as stipulated in the Constitution of 1996 and the proposed Draft Preferential Procurement Regulations to target fronting.

POLICY INITIATIVES: 1995 / 1997

The general review of the procurement policy was to produce directives and procedures to accommodate the Reconstruction and Development Programme (RDP) objectives. There was also an urgent need for interim procurement strategies to be implemented immediately after the 1994 general elections within the ambit of existing legislation. The aim was for these interim interventions to impact positively on the participation of Small Medium Micro Enterprises (SMMEs), with the emphasis on the disadvantaged and marginalised sectors as well as on the creation of employment opportunities. Collectively, these interim strategies, were known as the 10-Point Plan (State Tender Board: User Manual, 1996:03-04) which will be explained briefly in the paragraphs that follow.

The Plan made provision for the targeting of those persons previously disadvantaged by unfair discrimination within the emerging medium, small and micro enterprise sector by means of preference mechanisms. It suggested that this strategy facilitate joint ventures and partnerships with the benefit of skills transfer and human resource development. It is further suggested that this approach could be the beginning of a system to deracialise business ownership in control through a focused policy of black economic empowerment (Raga, 2002:189).

The interim strategies were a compilation of means to accommodate and enhance the historically disadvantaged who had previously been denied access to public sector procurement.

The 10 Point Plan proposed that the procurement of goods and services for any project or other requirement of the Government be obtained in the smallest possible quantities without incurring undue negative impacts on the quality, time and cost parameters of such services and goods. The purpose was to provide opportunities and make it easier for small businesses to participate and increase their share in public sector procurement.

In order to ensure the practical and effective implementation of the Cabinet approved interim measures of the 10-Point Plan, and to affirm the RDP in a practical manner, the Property Development Branch of the Public Works Department began to utilise the above documents on all projects in 1996 (Department of Public Works, 1996:01). Consequently, the commencement of South Africa's reformation of public sector procurement policy was the publication of the 10-Point Plan in November 1996 by the Department of Public Works.

Hereunder, the 10-Point Plan as expounded upon by the Department of Public Works (1996:03-18), outlines the principles which were taken into consideration in awarding tenders to SMMEs is discussed briefly.

1. **Access to tendering information**

The State Tender Board will assist with the compilation and dissemination of tendering and related information in a simplified and uncomplicated format. This information should be easily accessible to any business or organisation in a prescribed manner.

2. **Tender Advice Centres (TAC's)**

The Government has established Tender Advice Centres (TAC's) throughout the country with the primary objective to provide effective communication and assistance to tenderers.

In the Province of the Eastern Cape, these advice centres are located in Umtata, Queenstown and Port Elizabeth which are under the jurisdiction of the Department of Economic Affairs, Environment and Tourism (Raga, 2002:218).

3. **Review procurement procedure for contracts less than R7 500**

The Provincial Tender Board has reviewed the existing database of suppliers with the specific objective to incorporate the emerging SMME sector. It is likely that the SMME sector will be competitive in this market due to their low overhead structure.

4. **Waiver of security / sureties**

When contractors are granted loans for projects, the aspect of providing surety is "built-in" into the terms of the loan. The contractor is therefore not required to advance surety or security up-front.

5. **Break-out procurement (packaging into smaller contracts)**

The procurement of goods and services for any project or other requirement of Government must be obtained in the smallest possible quantities without incurring undue negative impacts on the quality, time and cost parameters of such goods and services. The purpose is to provide opportunities and make it easier for smaller businesses to participate and increase their share in public sector procurement.

6. **Early payment cycles**

A 30-day period must be enforced as the maximum time for payment. Wherever possible, payment to suppliers will be made with minimum delay.

7. **Preferences / Targeting**

A price preference system has been implemented to target a specific group, that is, persons disadvantaged by unfair discrimination within the emerging SMME sector. This policy will be based on a percentage preference and shall apply to all contracts which are less than R2million.

8. **Simplification of tender submission requirements**

Tender submission documentation which were supposed to be rationalised and simplified in order to make it easier for small business to deal with the paperwork involved in tendering, has not materialised. This matter is now being dealt with by the TAC's.

9. **Appointment of a procurement ombudsperson (procurement protector)**

Consideration had not yet been given to the appointment of procurement ombudsperson. The Provincial Tender Board identified a need for an ombudsperson (procurement

protector) who would work in close liaison with the Provincial Tender Board on the one hand and the tender advice centres on the other in the dissemination of information pertinent to tender procedures and give attention to complaints from tenderers.

10. **Classification of building and civil engineering contracts**

To provide interventions to assist in establishing, regulating and promoting an enabling environment and thereby ensuring the meaningful and effective involvement of SMMEs (Department of Public Works, 1996:3-18).

In the Province of the Eastern Cape, the above 10-Point Plan was utilised to encourage partnership between established businesses and SMMEs. The Eastern Cape Provincial Tender Board recommended that serious consideration was to be given to unbundling large tenders into smaller packages suitable to be awarded to emerging SMMEs (Raga, 2002:220).

In the following section, the Green Paper on Public Sector Procurement Reform dated April 1997 is discussed.

Green Paper: Public Sector Procurement in South Africa

The Green Paper on Public Sector Procurement Reform in South Africa (Government Gazette No. 17928, 14 April 1997:32), recognised that public sector procurement could be used as a tool by government to achieve economic ideals, including certain socio-economic objectives. This view formed the foundation of the procurement reform process and the development of policies and procedures.

The above-mentioned Green Paper has not been superseded by a White Paper on public sector procurement. However, several proposals of the Green Paper have been implemented.

Furthermore, the Green Paper on Public Sector Procurement Reform in South Africa (Government Gazette No. 17928, 14 April 1997:32), also recognised that an effective and efficient procurement system would permit organs of State to deliver the quality and quantity of services demanded by its new constituency in accordance with its policies articulated in the RDP and in the Growth, Employment and Redistribution Strategy (GEAR).

To achieve this, the following components, involving institutional and economic reform, were deemed necessary:

- (i) Achieving good governance in procurement.
- (ii) Achieving socio-economic objectives through procurement.

(a) Achieving good governance in procurement.

Certain institutional reform needed to take place in order to promote an effective and efficient procurement system as well as to achieve value for money and world class procurement practices.

A National Procurement Framework was drafted to establish uniformity in tender procedures, policies and control measures. According to the Green Paper on Public Sector Procurement Reform in South Africa (Government Gazette No. 17928, 14 April 1997:33), both the State and Provincial Tender Boards be abolished and replaced with reconstituted Procurement Centres (PC's) and an overseeing Procurement Compliance Office (PCO) having a status accorded to it similar to that of the Auditor General. The Green Paper's proposals for creating PC's meant that individual State departments established their own procurement bodies responsible to their own accounting officers (directors-general). These PC's would devise their own procurement strategies according to a framework set out, and in theory be supervised by the PCO.

The PCO would be responsible for linkages at a provincial, national and local spheres and would audit those engaged in procurement activities. The latter Office regulated and prescribed all procurement related documentation in order to achieve a uniform procurement system with standard tendering procedures and control documentation.

(ii) Achieving socio-economic objectives through procurement

According to the Green Paper on Public Sector Reform in South Africa (Government Gazette No. 17928, 14 April 1997:50), the procurement policy should complement the macro-economic strategy and extend into the area of economic development. Black economic empowerment needed to be a focal point of this policy. Furthermore, there is a need for the development and implementation of a procurement system which enable organs of State to operational policies in a targeted, transparent, visible and measurable manner when engaging in economic activity with the private sector without compromising principles such as fairness, competition, cost efficiency and inclusion. Such a system would comprise the following components, namely: an affirmative, small, medium and micro enterprise participation programme; affirming marginalised

sectors of society in construction projects; awarding of tenders in terms of development objective or price mechanism; access to tendering information and the simplification of tender documentation; promoting employment-intensive practices and breakout procurement (unbundling). The latter concept referred to the breaking down of many tenders into smaller components to afford emerging and historically disadvantaged enterprises an opportunity to participate as service providers or suppliers (Government Gazette No 17928, 14 April 1997:50).

The system which was advocated in the Green Paper on Public Sector Reform in South Africa (Government Gazette No. 17928, 14 April 1997:50) was Affirmative Procurement (AP). An AP Policy was advocated to enact the vision for the Procurement Reform Process and to facilitate purposefully the flow of commerce to and through population segments that had been historically under-utilised and excluded from participation. This had to be done in a manner such that participation in public sector procurement activities was ensured through: making the tendering process available to the target group without guaranteeing work; linking the flow of money into target business enterprises with a concomitant flow of responsibility; increase the volume of work available to the poor and marginalised sectors of society and provide employment and income generation opportunities for marginalised sectors of society in all types of contracts, for example, engineering and construction.

Other recommendations included: consistent and uniform definitions, monitoring and reporting mechanisms, strategies and the realisation of policy objectives. In February 2000, section 217(3) of the Constitution of the Republic of South Africa of 1996 was effected with the promulgation of the Preferential Procurement Policy Framework Act 5 of 2000.

It must also be noted that in South Africa, service providers, contractors as well as suppliers are bound by various labour stipulations, for example: the Basic Conditions of Employment Act 75 of 1997, the Labour Relations Act 66 of 1995, the Employment Equity Act 75 of 1997 and the Occupational Health and Safety Act 85 of 1996. Failure to abide by the above stipulations will result in legal action.

The Constitution of the Republic of South Africa of 1996 which provides the basis for public sector procurement is discussed briefly below.

LEGISLATIVE ENVIRONMENT

Constitutional Provisions

Section 217(1) of the Constitution of the Republic of South Africa of 1996 (Constitution) provides the basis for procurement and determines that:

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

Sub-section (2) of the Constitution goes on to provide, that sub-section (1)

‘does not prevent the organs of State or institutions referred to in that sub-section 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’.

Section 217(3) of the Constitution further confers an obligation for national legislation to prescribe a framework providing for preferential procurement to address the social and economic imbalances of the past.

Section 217(30) of the Constitution has been amended by the Constitution of the Republic of South Africa Second Amendment Act 61 of 2001. The word ‘**must**’ has been substituted for the word ‘**may**’.

It can be inferred that section 217 makes provision for the implementation of a policy for ‘affirmative/targeted procurement’ with the amendment of the word, ‘**must**’.

Constitutional legislation enabling Preferential Procurement of 2000 is now discussed.

ENABLING LEGISLATION FOR A PREFERENTIAL PROCUREMENT SYSTEM

Sections 215-219 of the Constitution of 1996 further require that the National Treasury introduce uniform norms and standards within government to ensure transparency and expenditure control measures, which should include best practices related to procurement and provisioning systems.

The Preferential Procurement Policy Framework Act 5 of 2000 (the Act) and its accompanying Regulations (Preferential Procurement Regulations, August 2001), were promulgated to prescribe a framework for a preferential procurement system. This Act and its Regulations incorporate the 80/20 and 90/10 preference point system.

The ultimate rationale of the Act is to enhance participation of Historically Disadvantaged Individuals (HDIs) and SMMEs in public sector procurement.

HDI is defined in Regulation 1(h) as a South African citizen (1) who, due to the Apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa Act 110 of 1983 or the Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution) and/or (2) who is a female; and/or (3) who has a disability, provided that a person who obtained South African citizenship on or after the coming effect of the Interim Constitution, is deemed not to be an HDI.

Section 2 of the Act stipulates the basis upon which an organ of state may implement a preferential procurement policy. The latter allows an organ of state to aim for specific goals which may include 'contracting with persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability'. It requires that any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender. Furthermore, the Act also requires the contract to be awarded to the tenderer who scores the highest points unless objective criteria to those contemplated in paragraphs (d) and (e) of Section 2(1) justify the award to another tenderer.

Below, a detailed explanation of the preference point system is discussed.

PREFERENCE POINT SYSTEM

80/20 Preference Point System

(1) The following formula must be used to calculate the points for price in respect of tenders/procurement with a Rand value equal to, or above R30 000 and up to a Rand value of R500 000. Organs of state may, however, apply this formula for procurement with a value less than R30 000, if and when appropriate:

Where

Ps = Points scored for price of tender under consideration

Pt = Rand value of offer tender consideration

P min = Rand value of lowest acceptable tender

(2) A maximum of 20 points may be awarded to a tenderer for being an HDI and / or subcontracting with an HDI and / or achieving any of the specified goals stipulated in regulation 17.

(3) The points scored by a tenderer in respect of the goals contemplated in subregulation (2) must be added to the points scored for price.

(4) Only the tender with the highest number of points scored may be selected.

90/10 Preference Point System

(1) The following formula must be used to calculate the points for price in respect of tenders/procurement with a Rand value above R500 000:

Where

Ps = Points scored for price of tender under consideration

Pt = Rand value of tender under consideration

Pmin = Rand value of lowest acceptable tender

(2) A maximum of 10 points may be awarded to a tenderer for being an HDI and / or subcontracting with an HDI and / or achieving any of the specified goals stipulated in regulation 17 of the Preferential Procurement Regulations, 2001.

(3) The points scored by a tenderer in respect of the goals contemplated in subregulation (2) must be added to the points scored for price.

(4) Only the tender with the highest number of points scored may be selected.

80/20 Preference Point System for the Sale and Letting of Assets

(1) The following formula must be used to calculate the points for price in respect of tenders with a Rand value equal to, or above R30 000 and up to a Rand value of R500 000 and which relate to the sale and letting of assets. Organs of

State may, however, apply this formula for sales and letting of assets with a Rand value less than R30 000, if and when appropriate:

Where

Ps = Points scored for price of tender under consideration

Pt = Rand value of tender under consideration

Ph = Rand value of highest acceptable tender

(2) A maximum of 20 points may be awarded to a tenderer for being an HDI and / or subcontracting with an HDI and / or achieving any of the specified goals stipulated in regulation 17 of the Preferential Procurement Regulations, 2001.

(3) The points scored by a tenderer in respect of the goals contemplated in subregulation (2) must be added to the points scored for price.

(4) Only the tender with the highest number of points scored may be selected.

90/10 Preference Point System for the Sale and Letting of Assets

(1) The following formula must be used to calculate the points for price in respect of tenders with a Rand value above R500 000 and which relate to the sale and letting of assets:

Where

P_s = Points scored for price of tender under consideration

P_t = Rand value of tender under consideration

Ph = Rand value of highest acceptable tender

(2) A maximum of 10 points may be awarded to a tenderer for being an HDI and / or subcontracting with an HDI and / or achieving any of the specified goals stipulated in regulation 17 of the Preferential Procurement Regulations, 2001.

(3) The points scored by a tenderer in respect of the goals contemplated in subregulation (2) must be added to the points scored for price.

(4) Only the tender with the highest number of points scored may be selected.

Stipulation of preference point system to be used An organ of state must, in the tender documents, stipulate the preference point system which will be applied in the adjudication of tenders.

Evaluation of Tenders on Functionality and Price

(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.

(2) The total combined points allowed for functionality and price may, in respect of tenders with an estimated Rand value equal to, or below, R500 000, not exceed 80 points.

- (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.
- (4) When evaluating the tenders contemplated in this item, the points for functionality must be-calculated for each individual tenderer.
- (5) The conditions of tender may stipulate that a tenderer must score a specified minimum number of points for functionality to qualify for further adjudication.
- (6) The points for price, in respect of a tender which has scored the specified number of points contemplated in subregulation (5) must, subject to the application of the evaluation system for functionality and price contemplated in this regulation, be established separately and be calculated in accordance with the provisions of regulations 3 and 4 of the Preferential Procurement Regulations, 2001.
- (7) Preferences for being an HDI and / or subcontracting with an HDI and / or achieving specified goals must be calculated separately and must be added to the points scored for functionality and price.
- (8) Only the tender with the highest number of points scored may be selected.

Award of Contract to Tender not Scoring the Highest Number of Points

Despite regulations 3.(4), 4.(4), 5.(4), 6.(4) and 8.(8) of the Preferential Procurement Regulations, 2001, a contract may, on reasonable and justifiable grounds, be awarded to a tender that did not score the highest number of points.

Cancellation and Re-invitation of Tenders

- (1) In the event that, in the application of the 80/20 preference point system as stipulated in the tender documents, all tenders received exceed the estimated Rand value of R500. 000, the tender invitation must be cancelled.
- (2) In the event that, in the application of the 90/10 preference point system as stipulated in the tender documents, all tenders received are equal to, or below R500 000, the tender must be cancelled.
- (3) An organ of state which has cancelled a tender invitation as contemplated in sub regulations (1) and (2) must re-invite tenders and must, in the tender documents, stipulate the preference point to be applied.

(4) An organ of state may, prior to the award of a tender, cancel a tender if-

(a) due to changed circumstances, there is no longer need for the goods or services tendered for; or

(b) funds are no longer available to cover the total envisaged expenditure; or

(c) no acceptable tenders are received.

(Preferential Procurement Regulations, 2001 as published in GN R725 in GG 22549 of 10 August 2001).

The above Regulations were promulgated to give essence to the provisions of the PPPFA 5 of 2000. The new evaluation system contemplates preferences be applicable to all tenders irrespective of the amount. Besides the preference points system in favour of HDIs, points will also be awarded for the promotion of, among others, South African owned enterprises, the promotion of export-oriented production to create job opportunities, the empowerment of the workforce by standardising the level of skill and knowledge of employees and the promotion of SMMEs. The Regulations clearly aim at: the inclusion of informal business into the main-stream industry, enhance and promote the involvement of black businesses in public sector procurement as well as uplift the HD communities.

There are current proposed changes to the PPPFA 5 of 2000. The changes are expected to have an effect on the procurement policies with which organs of state are legally bound to comply under the Black Economic Empowerment (BEE) Act. The biggest proposed change is the adjustment of the weight of BEE status in a tender pitch. Currently, the amount is R500 000. A contract below this amount will allocate 80 of the total 100 points to the price and functionality of the proposal. 20 points will be awarded to reconstruction and development goals. A contract above R500 000 eases the entry with an extra 10 points awarded to the proposal's price and functionality. According to the draft of the Act, R1 million will be the new threshold. Contracts below this number will be judged on the 80/20 principle. Above the R1 million, the 90/10 principle will apply (Sunday Times, p.13, March 21 2010).

The Constitution of 1996 illustrates the significance attached to the utilisation of public sector procurement as a means to attempt the correction discrimination and marginalisation of the majority during the Apartheid regime. A brief exposition of the right to information of the tender process in South Africa follows.

RIGHT OF INFORMATION OF THE TENDER PROCESS IN SOUTH AFRICA

Section 217 of the Constitution of the Republic of South Africa Act of 1996, stipulates that the procurement system for South Africa will be open, fair, transparent, competitive, cost effective and tender boards will be obliged to give reasons for any decisions to any interested parties. The premise for this is the **raison de etre** (reason for existence) of public procurement, which is to achieve, maintain, and enhance the general welfare of society.

According to Van As (1999:257), it is not uncommon for both public and private institutions calling for tenders to include specific standard clauses in the tender documents. An example is a clause, which stipulates that the institution is not bound to accept the lowest tender or to provide reasons for rejecting a tender.

In terms of section 32(1) of the Constitution of the Republic of South Africa Act of 1996, everyone has the right to access any information held by the state and any information that is held by another person and is required for the exercise or protection of any rights. Furthermore, section 32(2) of the Constitution stipulates that national legislation must be enacted to give effect to this right and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

The above is a fundamental right and it is a provision that gives effect to one of the objectives of the Constitution, that is, to:

“lay the foundations for a democratic and open society. . .”

The Constitution is the principle policy document of South Africa. Conduct or law inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled (Section 2). According to section (1) of the Constitution, openness is one of the core values of South Africa as a democratic state. Section 39(1)(a) of the Constitution stipulates:

“When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom”.

According to Van As (1999:258), the right to information is limited in two ways. Firstly, the individual is only entitled to information held by the state and secondly, the information must be required by the individual for the exercise or protection of any of his or her rights. This implies that the information must be relevant and reasonably required.

One of the purposes of the right to information is to cultivate a climate of openness and transparency. The court, for example, in *Aquafund (Pty) limited v The Premier of the Province of the Western Cape* 1997 (7) BCLR 707 (C) and *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1997 (10) BCLR 1429 (W) emphasised this notion. Furthermore, the award of public contracts has always provided a seedbed of corruption. In the light thereof, it is not surprising that with the advent of constitutionalism, frequent resort had been to the Bill of Rights in an attempt to uncover corruption in the adjudication of tenders (Van As, 1999:267).

The furnishing of reasons is of significance to emerging or targeted contractors because it enables them to learn what is required in order to be awarded a successful tender as well as improve on any shortcomings in their applications. It can be inferred that the non-furnishing of reasons for unsuccessful tenders will defeat the objective of the Act to enhance participation of HDIs and SMMEs.

Financial enabling legislation such as the Public Finance Management Amendment Act 1 of 1999 is now discussed.

FINANCIAL ENABLING LEGISLATION

At the central government sphere, it is the Treasury's responsibility to control the whole procurement system, including the procurement of goods and services. Large amounts of public money are spent annually on the purchasing of stock. It is thus necessary to have an effective stock control system. The establishment of strict control measures can result in effective and efficient procurement management (Raga, 2002:256). Furthermore, considerable powers are assigned to accounting officers, accounting authorities and municipal managers to enable them to manage their financial affairs within the parameters laid down by the prescribed National Treasury to monitor the compliance of the prescribed norms and standards.

Parliament sets policy objectives and places measures in place to ensure proper financial management and control over State monies, stores, and equipment. According to the Public Finance Management Amendment Act 1 of 1999, the policy objectives are set as follows:

“ ... regulate financial management in the national government and provincial government; ensure that all revenue, expenditure, assets and liabilities of those governments are managed effectively and efficiently; provide for the responsibilities of persons entrusted with financial management in those governments ...” (Public Finance Management Amendment Act 1 of 1999).

The Municipal Finance Management Bill (MFMA) of 2002 extended the same principles to municipalities.

Treasury influences the financial policy of public institutions regarding stores administration. Control over stores and equipment is also exercised in terms of section 76(1)(2) and (4) of the Public Finance Management Amendment Act 1 of 1999). These measures include the making of regulations or issuing of instructions applicable to public executive institutions (departments) concerning, inter alia:

- (i) The handling of and control over trust money and property such as stores and equipment.
- (ii) The determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective (Public Finance Management Amendment Act 1 of 1999).

The following functions and powers identified below have an impact on the procurement process on the provincial sphere of government.

In terms of section 36 of the Public Finance Management Amendment Act 1 of 1999, each public institution (for example, a state department), should have an Accounting Officer. The responsibilities of such Accounting Officer regarding stores administration and procurement of goods and services include, inter alia:

- (i) The determining and maintaining of an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.
- (ii) Be responsible for the managing, safeguarding and maintenance of assets and for the management of the liabilities of a department.
- (iii) The immediate report in writing of the particulars on the discovery of any unauthorised, irregular or fruitless and wasteful expenditure to the Treasury, and in case of irregular expenditure involving the procurement of goods and services to the relevant tender board (Section 38 of the Public Finance Management Amendment Act 1 of 1999).

The Accounting Officer is a major role player in terms of the Public Finance Management Amendment Act 1 of 1999, to effectuate external control by the legislature. Furthermore, the Accounting Officer is required to provide information to the Treasury, the Auditor-General and the Public Accounts Committee who play a role in external control of public finance.

A brief discussion follows on the cabinet adoption of a Supply Chain Management Policy of September 2003.

APPLICATION OF THE SUPPLY CHAIN MANAGEMENT POLICY

Cabinet adopted a Supply Chain Management (SCM) Policy in September 2003 to replace the outdated procurement and provisioning practices across government with a SCM function to form an integral part of financial management and conform to international best practices. SCM is an integral part of financial management, which intends to introduce international best practice. It seeks to breach the gap between traditional methods of procuring goods and services and simultaneously address procurement related issues. The introduction of the principles of SCM requires accounting officers and accounting authorities to accurately extract relevant information to effectively measure the achievement of government's procurement objectives. The major objectives of the policy are to:

- (i) transform government procurement and provisioning practices into an integrated SCM function;
- (ii) introduce a systematic approach for the appointment of consultants;
- (iii) create a common understanding and interpretation of the PPPFA 5 of 2000; and
- (iv) promote the consistent application of 'best practice' throughout government's supply chain.

(www.gcis.gov.za/resource_centre/guidelines/bestpractice_marketing.pdf accessed on 10 November 2009).

Furthermore, the SCM policy is required to give effect to the Constitution of 1996 as well as the PFMA and MFMA.

The SCM office in National Treasury oversees the implementation of the above policy in conjunction with provincial treasuries and chief financial officers from the different spheres of government. In 2003, parallel to this process, Cabinet approved the Broad-Based Black Economic Empowerment (BEE) Act, 2003 which led to amendments to the Preferential Procurement Regulations during 2005. The main objective of the intended amendments to the regulations was to align them to the Broad-Based BEE Act of 2003. Government's BEE strategy aims to accelerate indirect empowerment through preferential procurement and enterprise development (www.gcis.gov.za/resource_centre/guidelines/bestpractice_marketing.pdf accessed on 10 November 2009).

An overview of draft preferential procurement regulations to target 'fronting' is expounded upon below.

FRONTING IN PUBLIC SECTOR PROCUREMENT IN SOUTH AFRICA

Fronting takes one of two forms, both of which intend to misrepresent or artificially inflate a company's actual BEE status.

The most common form of fronting involves the appointment of black individuals to senior positions without their knowledge, or without the responsibilities and rewards associated with these positions are transferred to them. For example, appointing an unskilled labourer as a Director, only on paper.

The second form of fronting involves the establishment of a new "marketing" operation which operates as a separate legal entity but performs limited or no marketing functions. However, it acts as a sales agent for the original business, selling its products to clients with a stringent Preferential Procurement Policy. The original company does not transform while the client gets to procure from a black supplier, at a higher cost without true additional value. It is also not uncommon for the procuring party to be fully aware of the fronting practice.

Fronting actions stem directly from a drive to at least be seen to comply with BEE requirements, coupled with extreme misconceptions about BEE. Public knowledge of Broad-Based Black Economic Empowerment and the associated scoring systems (Generic Scorecard, Qualifying Small Enterprises Scorecard and Excepted Micro Enterprises) remain limited.

(http://www.smartprocurement.co.za/archives/is_bee_fronting_bad_for_business.php accessed on 13 January 2010).

Fronting can be much more than just Ownership and can be far more damaging to the true cause of transformation. Fronting is a deliberate avoidance or attempt to avoid the requirements of the B-BBEE Act or Codes of Good Practice (<http://www.econobee.co.za/bee-articles-and-information/econobee-newsletters/fronting-is-bad-econobee-newsletter-15-october-2009.html> accessed on 16 November 2009).

According to Consulting Engineers South Africa, the construction industry is seen as having the poorest record of transformation and plagued by fronting. This is the first sector to have its charter become law. The Construction Industry Charter was gazetted on June 5 of 2009. The Charter focuses on sustainable transformation through the elements of ownership management control, employment equity, enterprise and skills development, corporate social development and

procurement (www.engineeringnews.co.za/.../construction-sector-charter-becomes-law-2009-08-21, accessed February 2010).

On 11 October 2009, National Treasury reflected its intention to the introduction of new preferential procurement regulations designed to remove inconsistencies in the current procurement practices and address the high levels of fronting. The proposed regulations intend to align the current preferential procurement legislation and the aims of the Broad-Based Black Economic Empowerment (BBBEE) Act and its code of best practice. Furthermore, Treasury is of the view that the establishment of a single system of procurement within the public sector will address legislative confusion with regard to procurement by organs of state.

According to National Treasury, a number of shortcomings have been identified with the current procurement system; inter alia, prevalence of fronting due to a broad definition of HDI, inconsistency in the application of the procurement policy and a lack of synchronisation between BBBEE and PPPFA. The draft regulations aim to introduce the balanced scorecard methodology into the procurement process. This approach is prescribed in the BBBEE Act and the codes of good practice. Verification certificates will be issued by accredited agencies that indicated compliance with the BBBEE scorecard.

Kaplan and Norton (1996b:66) state that a balanced scorecard enable organisations to monitor and evaluate short-term results in four various perspectives to see whether the strategic objectives are being achieved. The balanced scorecard provides managers with the ability to know at any point during strategy implementation whether the chosen strategy is working. It also shows if the strategy is not working and why it is not working.

Treasury has also outlined some of the key elements it envisages to utilise to determine the contribution towards the objectives of the BBBEE legislation namely: black ownership, management control, employment equity, skills development and preferential procurement from BEE suppliers. National Treasury also intends to repeal the PPPFA 5 of 2000

(<http://www.sabinetlaw.co.za/economic-affairs/articles/draft-preferential-procurement-regulations-target-fronting> accessed 19 December 2009).

RECOMMENDATIONS

Many inroads have been made since the first democratic general elections of 1994 in public sector procurement in South Africa. Despite the existence of a progressive and advanced legislative system to govern public sector procurement since 1994, numerous challenges are still being faced by the government to ensure a cost-effective and efficient procurement system.

Against the above background, the Public Service Commission proposed in January 2010, recommendations to improve public sector procurement with the emphasis on compliance with the legislative policy framework. The recommendations below are, inter alia:

- (1) Adequate supervision of the procurement process.
- (2) An updated list of service providers be maintained.
- (3) Performance ratings of suppliers contracted to departments.
- (4) Declaration of conflict of interest from Members of Parliament and those involved in the procurement process.
- (5) Payment of invoices only on the basis of the original quotation.
- (6) Regular fraud detection reviews as well as ongoing forensic and specialised audits within the procurement system.
- (7) Encourage whistle blowing on maladministration and corruption (<http://www.pmg.org.za/report/20100310-public-service-commission-psc-evaluation-supply-chain-management-prac> accessed on 20 February 2010).

CONCLUSION

South Africa has made much progress in the procurement sector since April 1994. Whereas the previous regime which discriminated, denied and marginalised the majority (black South Africans) from participating in the public sector procurement process, section 217 of the Constitution of the Republic of South Africa of 1996, inter alia, the Preferential Procurement Policy Framework Act 5 of 2000 and the Preferential Procurement Regulations of 2001, demonstrate the new regime's attempt to utilise the public sector procurement process as a means of addressing the imbalances of the past.

Various shortcomings have been experienced especially with regard to the 'loopholes' being exploited in the PPPFA. Consequently, new legislation is being formulated to remove inconsistencies in the current procurement practices and address the high levels of fronting. The proposed regulations intend to align the current preferential

procurement legislation and the aims of the Broad-Based Black Economic Empowerment (BBBEE) Act and its code of best practice.

Treasury is of the view that the establishment of a single system of procurement within the public sector will address legislative confusion with regard to procurement by organs of state.

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