

Protecting the environment through public procurement: The case of South Africa

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Abstract

This article deals with the use of the procurement or purchasing power of governments to protect the environment. The focus is on South Africa and the aim is to show that South African organs of state can use procurement as an environmental policy tool to contribute to sustainable development as they have commendably done so to address past discriminatory policies and practices. It is argued that such use does not fall outside the current legislative framework governing procurement and suggestions are made as to how environmental considerations could be incorporated throughout the procurement process, namely the preparatory stage; the drawing up of tender or technical specifications; ensuring the capability or responsibility of contractors; the use of criteria to compare different tenders; and ensuring that eventual performance under a contract is environmentally sound.

Keywords: Public procurement; Public purchasing; Policy promotion; Green procurement; Sustainable development; Environmental protection; South Africa.

1. Introduction

The escalating deterioration of the environment has led governments in recent years to make increased use of their procurement powers as an environmental protection tool (Clement, 2007). Such use of procurement is generally referred to as green procurement; green purchasing; environmentally friendly purchasing; eco-procurement; sustainable procurement; or environmentally responsible procurement. All these terms generally refer to the selection of products and services whose environmental impacts are not harmful or the least harmful to the environment and human health when measured against competing products and services. In light of the vast existing literature on the incorporation of environmental considerations into public procurement procedures internationally, this article will not focus on issues which have already received considerable attention, in particular the potential benefits of green procurement; the myths in relation to the procurement of green products or services; and/or the international trends in relation to green procurement (ICLEI, 2007; Carlsson and Waara, 2007; Parikka-Alhola *et al.*, 2007; Kunzlik, 2005, 2003 and 1998; Schneider, 2000, 2005; Mechel,

2005; Losch, 2005; Coggburn and Rahm, 2005; Day, 2005; Commission of the European Communities, 2004; O'Hara, 2004; OECD, 2003 and 2000; RELIEF, 2003; Erdmenger, 2003; Krohn, 2003; New *et al.*, 2002; Westphal, 1999; McCadney, 1999; Russel, 1998; Marron, 1997). The focus will instead be on South Africa, a country where the use of procurement as an environmental tool is not expressly legislated. South Africa will serve as an example of a general problem that is widespread, namely that of justifying and operationalizing environmental procurement within an existing framework of legislation and regulation. There are many advantages to working within existing legislation; the most important being that it will usually be quicker and easier (and more appropriately within the professional remit of procurement officials) than bringing about wholesale legal change. It will be shown that although at present South African procurement legislation makes no express provision as to environmental protection there is significant scope within the existing legislation for such use.

The paper begins with a brief overview of the legislative framework governing procurement in South Africa. Specific attention is given to South Africa's current use of procurement as a policy tool and how legislation leaves room for the use of procurement as an environmental tool. Thereafter, suggestions are made as to how environmental considerations could be incorporated throughout the

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procurement process. Some of the approaches proposed for South Africa are informed by experience of incorporating environmental criteria in procurement procedures elsewhere, in particular the European Union.

2. The South African legislative framework and the scope for green procurement

2.1. Legislative framework

The legal regulation of government procurement in South Africa is unique in that government procurement is afforded constitutional status. Section 217 of the Constitution of the Republic of South Africa 108 of 1996 provides that —

- (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.

Section 217 thus provides for the use of procurement as a policy tool (McCrudden, 2007; Scharpenack, 2004; Arrowsmith, 1995; Geroski, 1990). Provision is made for the implementation of a policy of preferential procurement or what has also been referred to as “affirmative procurement” or “targeted procurement” (Watermeyer, 2000; www.targetedprocurement.com). For historical reasons, where contracts were generally awarded to large and white-owned businesses, the use of the terms “affirmative procurement” and “targeted procurement” has thus far led to a restricted understanding of the policy goals for which procurement can be used in South Africa. Targeted procurement is typically understood as a system of procurement aimed at providing employment and business opportunities for marginalized individuals and communities — referred to as “target groups”. The aim is to provide opportunities to such groups to participate in public procurement even though they may not have all the necessary expertise, capacity or resources to perform contracts in their own right. The system has been described as a means to achieve a number of social objectives including economic

empowerment, job creation, poverty alleviation, increasing the use of local resources, and reducing disparities in employment and business ownership patterns in society (Watermeyer, 2000). The use of procurement for these goals is important and can in principle be supported (Bolton, 2007).

2.2. Scope for green procurement

The Preferential Procurement Policy Framework Act 5 of 2000 (Procurement Act) gives effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution. In brief, the Procurement Act allows for the preferential treatment of certain contractors during the award stage. Section 2(1)(d), in particular, stipulates that organs of state must have a preferential procurement policy in place. The specific goals of their procurement policies “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 *Government Gazette* No. 16085 dated 23 November 1994”. Of current importance is whether these goals are the only goals that may be pursued by an organ of state through its procurement policy or whether there is scope also for the pursuit of other goals. In this regard, the language of section 217(2) of the Constitution is important. This subsection does not confine the use of procurement for the purposes explicitly provided in the Procurement Act. Section 217(2)(a) broadly refers to the implementation of a procurement policy providing for “categories of preference in the allocation of contracts”. This is also how those who drafted the Green Paper on Public Sector Procurement Reform in South Africa understood and interpreted section 217(2). It was proposed in clause 4.27 that organs of state should:

buy only from vendors who are in compliance with all environmentally-related legislation; promote environmental awareness amongst suppliers, service providers and contractors; favour procurement of less environmentally damaging products; discriminate in favour of products made from recycled materials; require that suppliers limit packaging to the minimum necessary to protect the items supplied; favour products which provide information about their effect on the environment; develop the environmental awareness of government officials; develop and maintain a database of vendors in which information relating to their environmental conduct is retained; develop and promote a code of conduct for vendors; develop a policy with respect to the use of products containing asbestos.

The above reading of section 217(2) of the Constitution creates a link between procurement and the environment

and is a sound approach.¹ In terms of a contextual or systematic approach to interpretation, the meaning of specific provisions in the Constitution should be understood in relation to the Constitution as a whole (Currie and De Waal, 2005). Sound interpretation practice requires that section 217 of the Constitution should be interpreted with reference to other provisions in the Constitution to provide a context for its interpretation. While other provisions in the Constitution may also be significant in a contextual interpretation of section 217, a provision which, for present purposes, is of specific importance is section 24. It provides that everyone has the right “(a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”.²

In light of the high volume of government procurement contracts,³ procurement is one of the best tools to give effect to section 24 of the Constitution. Section 24 can be interpreted to require organs of state to use their procurement powers to protect the environment. Thus far, however, the link between sections 217 and 24 of the Constitution has not been adequately explored. At present, organs of state are not legislatively authorised to take account of environmental factors when awarding contracts. No express provision is made for the use of procurement as an environmental tool. As noted, the current focus of the Procurement Act is persons who were disadvantaged by previous discriminatory policies and practices.

The Procurement Act fortunately opens itself up to a reading which requires compliance with section 24 of the Constitution. Section 39(2) of the Constitution provides that “[w]hen interpreting any legislation ... every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”. When reading section 2(1)(d) of the Procurement Act quoted above (“the specific goals [of a preferential procurement policy] *may* include” (emphasis added)), the legislature can be said to have opened the door to the use of procurement as an environmental tool. The goals for which preferential procurement may be used are clearly not restricted to the goals explicitly mentioned. When section 5(1) of the Procurement Act further provides that “[t]he Minister [of Finance] may make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this

Act”, it clearly authorises the Minister to promote environmentally sound practices. At present, the Procurement Regulations make no express reference to green procurement policies.⁴ Regulation 17 nevertheless does not lay down a closed list of activities which may be recognised for the purposes of preference points in the award of contracts. It simply lists a number of activities that “may” be regarded as a contribution towards achieving the goals of the Reconstruction and Development Programme, for example, the promotion of South African owned enterprises; the promotion of export orientated production to create jobs; and the promotion of small, medium and micro enterprises etc.

Aside from the argument presented above, section 7(2) of the Constitution should be considered. This provision requires that the state “must respect, protect, promote and fulfil the rights in the Bill of Rights”. “To respect rights” means that they should not be infringed (they may be limited only in keeping with the provisions of limitation clauses); “[t]o protect rights” means to ensure that they are infringed by neither the state nor private individuals; and “[t]o promote and fulfil rights” means to facilitate the exercise of rights by providing the means for their exercise (Rautenbach, 2006). There is thus a duty on the state and its organs not only to refrain from infringing rights, but also in some instances, like the present, a positive duty on the state and its organs to enact legislation for the protection of rights (*Carmichele v Minister of Safety and Security; Rail Commuters Action Group v Transnet Ltd t/a Metrorail*).

3. Possibilities for environmental protection throughout the procurement process

As argued, there is scope within the existing legislation (with reference to section 217(2)(a) of the Constitution, section 2(1)(d) of the Procurement Act, and Regulation 17) for the use of procurement as an environmental tool. In what follows, suggestions will be made as to how environmental considerations could be incorporated throughout the procurement process. The focus will be on the preparatory stage; technical specifications; contractor capability

¹ The proposal was not subsequently included in the framework of the Procurement Act or the Regulations thereto.

² Detailed attention has been given to s.24 in Glazewski, 2005; Currie and De Waal, 2005; Van der Linda and Basson, 2003.

³ In 2004 government procurement in South Africa was estimated to amount to roughly 14% of gross domestic product (Mkhize, 2004).

⁴ Preferential Procurement Regulations, *Government Gazette* 22549, 10 August 2001. The Regulations (and also the Procurement Act) are in the process of being repealed with the aim to bring them more in line with the Broad-Based Black Economic Empowerment Act 53 of 2003. The aim of the latter is to establish a legislative framework for the promotion of black economic empowerment in South Africa. At 19 February 2008, a new draft Act and Regulations were not available for public comment. It is nevertheless noteworthy that new draft Regulations were available for comment in 2004 (Preferential Procurement Policy Framework Act, 2000 (Act 5 of 2000): Draft Preferential Procurement Regulations, *Government Gazette* 26863, 4 October 2004) and they did not expressly refer to green procurement.

or responsibility; award criteria; and special performance or environmental clauses.

3.1. Preparatory stage

Of all the stages in the procurement process, the preparatory stage (also referred to as the planning, pre-competition or pre-tender stage) is an ideal time to take account of environmental factors. Compared to the other stages, this stage is not as heavily regulated (government procurement law is more concerned with the way in which organs of state procure than with what they procure) and it is thus easier for organs of state to take account of the environment in procurement decisions. The preparatory stage usually involves taking account of a number of considerations: determining whether there is a need for the products or services in question; ensuring that the government has the legal powers to acquire such products or services; obtaining the necessary authorisation for the transaction; and arranging financial support. For present purposes, the determination of the need for a product or service is important. Determining need will involve: an understanding of future needs; the identification of critical delivery dates; the frequency of need; linking the requirement to the budget; doing an expenditure analysis (based on past expenditures); determining the specifications; doing a commodity analysis, that is checking for alternatives; and doing an industry analysis (National Treasury, 2003).

Environmentally speaking, it is important for organs of state to verify the need for products or services and to avoid procurement that is unnecessary. If an organ of state for example needs to share information with the public and identifies the “need” for the procurement of posters, printed flyers, newspaper ads and brochures, it may, after considering the environmental impact of procuring these, opt to broadcast information via other means like websites, electronic means or e-mails (Commission of the European Communities, 2004). This method is more environmentally friendly although general shortage of internet access by the public in South Africa may warrant the use of printed flyers etc. Green procurement is, furthermore, not necessarily about procuring only or as far as possible environmentally friendly products or services. Effect can be given to the protection of the environment also by cutting down on procurement. If, for example, an organ of state needs office furniture, it could obtain these from other departments who have an oversupply (Commission of the European Communities, 2004). Instead of purchasing new fax machines, officials could be provided with IT facilities to fax from their computers; and instead of purchasing printers for every official’s desk, use could be made of shared printing facilities with up-to-date energy and paper saving features (Office of Government Commerce, 2003). Where, on the other hand, procurement is necessary, an organ of state can decide upfront that it will only procure green products or services, like recycled-content paper and not virgin

paper. An organ of state may also decide that it will consider “green variants”; it can allow itself an option between traditional products or services and possible green variations.

3.2. Technical specifications

Technical specifications serve to notify potential bidders of an organ of state’s needs and facilitate the preparation and submission of responsive tenders. An organ of state will typically describe the product or service that is required; the number of units needed; and the purpose that is to be served by the product or service. An organ of state will usually also stipulate any standards or requirements that must be met by the product or service, for example, performance characteristics; materials composition; and appearances and finishes etc. During this stage, organs of state could stipulate that an environmentally sound product or service is required. This would be the most transparent way to incorporate environmental considerations into the procurement process, that is by adding an environmental dimension to the object or subject-matter of the contract. An organ of state could stipulate that the electricity to be supplied under the contract must come, in part or in full, from renewable energy sources; or that the food to be provided under a catering contract must be organically grown (Day, 2005). An organ of state could also call for tenders for 50% recycled-content paper with the effect that contractors who offer virgin paper are automatically excluded regardless of the performance or cost of their paper. This is because, as noted, the function of technical specifications is to inform potential bidders of an organ of state’s needs so as to enable them to prepare and submit responsive tenders. They (bidders), in turn, are entitled to expect and require organs of state to abide by the specifications provided. Organs of state may not conclude contracts that are significantly different from the specifications provided since doing so would defeat the notions of fairness and transparency (Bolton, 2007).

When drafting specifications, it is further important for organs of state to take account of the environmental impact of a product or service throughout its life cycle. This is because while the manufacturing side of particular products may be environmentally sound, the use and disposal side thereof may pose environmental difficulties. It is also important to ensure that environmentally sound products or services are not automatically excluded from consideration. If an organ of state lays down in the technical specifications that it is calling for “virgin paper” (paper containing no recycled content), doing so will by definition exclude recycled-content paper. It is important, therefore, for organs of state to eliminate impediments to the procurement of green products and services; careful attention should be paid to the language that is used in the drafting of specifications (Cogburn and Rahm, 2005). Organs of state should further not lay down detailed and complex specifications but aim to identify technical specifications in

terms of performance or functional requirements (Commission of the European Communities, 2004). Thus, if the contract advertised is for an environmentally friendly heating system for a government building, it would make more sense to specify that offices must have a constant daytime temperature of 20° Celsius (as opposed to laying down detailed and complex specifications).⁵

Legislation in South Africa further emphasizes that there must be no bias in the drawing up of specifications.⁶ Technical specifications must not, in other words, be custom-made or tailor-made for a specific supplier; doing so will defeat competition and compliance with the notion of fairness. For present purposes, this would mean that green technical specifications should not be drawn up in such a way that a specific supplier will inevitably be awarded the contract. It would appear, however, that in taking into account environmental considerations during the award stage amongst other non-green criteria, the mere fact that only one or a few suppliers is able to comply with the green award criteria does not amount to a breach of the notion of fairness as other contractors will still be able to score points on the basis of the non-green criteria.⁷ It is further important for green technical specifications to relate to the subject-matter of the contract; an organ of state may not impose environmental criteria on issues which are unrelated to the products or service in question. Thus, if an organ of state is procuring furniture or vehicles, technical specifications cannot be drawn up to the effect that bidders must use recycled paper products in their workplaces (Commission of the European Communities, 2004).

3.3. Contractor capability or responsibility

It is important for contractors to have the necessary capability or ability to render performance under a contract. They should have at least the minimum qualifications to perform, meaning they must be responsible — they must be able to complete the work on time and in a

satisfactory manner. The determination of responsibility will generally include a consideration of: the experience and track record of a contractor; the technical knowledge and capacity of a contractor; the possession of appropriate licenses and permits; the nature, quality and reliability of the product or service to be rendered; the availability of tools or equipment for the contractor's use; the financial and economic standing of a contractor; the ability of a contractor to comply with the delivery schedule; and the contractor's record of business ethics and integrity (Schooner, 2004; Bright, 1994; Trepte, 1993; Cirell and Bennett, 1991). If upon balancing these factors a contractor does not comply with the minimum qualifications necessary to perform under the contract such a contractor could be excluded from further consideration. In South African law, contractors can also be excluded on the grounds of fraud or corruption in the procurement process; the non-payment of municipal rates and taxes and municipal service charges; unsatisfactory contractual performance under a previous government contract; failure to comply with labour laws; failure to comply with conditions of contract relating to subcontractors and joint ventures; and/or for currently or previously being in the service of the state (Bolton, 2007; Williams, 2007).

In addition to the factors mentioned above to determine minimum qualifications necessary to render performance under a contract, and hence to qualify for further consideration, it is submitted that the environment could also play a role. An organ of state could exclude contractors from government contract awards if they have been found guilty of contravening environmental laws within a specified period prior to the tender call (for example, five years).⁸ It would appear, however, that it would be necessary for express provision to be made in legislation to allow for this.⁹ Contractors could, furthermore, be excluded if they simply do not have the necessary environmental competence to render performance under a contract that requires this, for example a construction, building, maintenance or renovation contract; a transport contract; or a waste management contract. For such exclusions, there would be no need for the amendment of existing legislation since environmental competence would be an inherent and necessary requirement for the proper performance of the contract. Environmental competence could include: reducing fuel costs; preventing spillage of polluting products; minimising the disturbance of natural habitats; and/or competence in minimising waste formation. Relevant questions that an organ of state could pose may include whether (1) a

⁵ In South Africa, the Local Government: Municipal Finance Management Act, 2003: Municipal Supply Chain Management Regulations, *Government Gazette* 27636, 30 May 2005 (MFMA SCM Regulations) provide that where possible, specifications should be described in terms of performance required rather than in terms of descriptive characteristics for design. There is also a prohibition against the use of particular trademarks, names, patents, designs, types, specific origins or producers unless there is no other sufficiently precise or intelligible way of describing the characteristics of the work, in which case such reference must be accompanied by the word "equivalent". Specifications may also not create trade barriers in contract requirements in the forms of specifications, plans, drawings, designs, testing and test methods, packaging, marking or labelling of conformity certification.

⁶ National Treasury: Supply Chain Management Office "Implementation of Supply Chain Management" 28 October 2004 (<http://www.treasury.gov.za/showpfma.htm> — go to "Treasury Practice Notes" and then to "Supply Chain Management Practice Notes". Last accessed 19 February 2008); MFMA SCM Regulations.

⁷ See further para 3.4 below.

⁸ It is important for a time period to be attached to the exclusion of contractors. As argued elsewhere (Bolton, 2007), the exclusion of contractors should not be aimed at punishing them but rather to ensure that the government deals with responsible contractors.

⁹ Such provision has been made in the labour law context (Employment Equity Act 55 of 1998; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000).

contractor owns or has access to the essential technical equipment for environmental protection; (2) a contractor has appropriate research and technical facilities available to cover the environmental aspects of the contract; and (3) a contractor employs or has access to technicians with the requisite knowledge and experience to deal with the environmental issues of the contract (Commission of the European Communities, 2004).

In light of the above, an organ of state advertising a waste management contract would be able to exclude a contractor who lacks the necessary environmental competence to render performance under the contract. This will be warranted particularly where all contractors were asked to include proof (in their tender submissions) of satisfactory performance under similar contracts in the past and such proof is lacking. Exclusion from further consideration will also be warranted if contractors were asked to provide proof of educational or professional qualifications that confirm their ability to achieve the environmental objectives of the contract in question and such documentation is lacking.¹⁰ It is important, however, for contractors to know beforehand that their tenders will be excluded if they have been found guilty of contravening environmental laws, or if they lack the necessary environmental competence to perform under the contract. The latter is, of course, in accordance with the notion of fairness; only contractors who submit responsive tenders should qualify for the award of a contract.

3.4. Award criteria

As noted, contractors must possess at least the minimum qualifications necessary to perform under a contract in order to qualify for further consideration. It is further important for a contractor, in relation to the merits of other competing contractors, to be able to render satisfactory performance under a contract. “Capability” or “responsibility” thus relates to both the qualification/responsibility of a contractor *and* award criteria, that is the criteria used to compare the merits of competing tenders. In the case of the latter (award criteria), the following will usually play a role when comparing different tenders: costs of use or running costs (also referred to as whole-life costs); aesthetic and functional characteristics; technical merit; commitments with regard to spare parts and after-sales service; technical assistance; price; the number of staff employed by a contractor; delivery period; quality; and the qualifications and competence of the personnel of a contractor (Trepte, 1993). It is submitted that in addition to these factors that can be said to make up the overall economic advantage of a product or service, organs of state may take account also of the environmental effects of a

product or service (without the need for an amendment of the existing legislation).¹¹ Examples of criteria that may play a role in doing so include: the material used for the packaging of products; the possession of environmental certificates; energy usage by the contractor; whether or not a contractor has an environmental policy or environmental management system in place; the general impact of the products or services on the environment; the chemical content of the products to be delivered; the level of noise involved; environmental training and knowledge on the part of the contractor; whether or not the product has certain eco-labels attached to it;¹² and whether or not the product to be delivered is recyclable or reusable (Parikka-Alhola *et al.*, 2007). Contractors should further be asked about their knowledge of the supply chain of component elements or materials in their product. This is important because a contractor may, for example, display exemplary environmental competence, but keep costs down by using environmentally unfriendly components which are sourced elsewhere.

The extent to which environmental criteria may be taken into account during the award stage will depend on the type of products or services procured. The following products and services are likely to attract environmental criteria: plastic and paper products; food products and services; transportation services; construction work; chemicals and chemical products; textile products; cleaning services; optical and/or medical devices; motor vehicles; repair and maintenance services; industrial machinery; and manufactured products, for example, furniture, office machinery, toys, lighting and other consumables (Parikka-Alhola *et al.*, 2007).

In South Africa, the environment is generally not a factor that is taken into account during the award stage (or during any of the other stages of the procurement process). Organs of state, on a superficial reading of the procurement legislation, also do not appear to be legally authorised to do so. As argued, however, the current legislative framework provides scope for the inclusion of environmental considerations into the procurement process. Organs of state are, in other words, allowed to take into account environmental factors when comparing the merits of competing tenders. It is submitted that the environment could be fitted into the points system created in terms of the Procurement Act and Regulations. In terms of the current points system, points are awarded to contractors on the basis of price and

¹⁰ See Commission of the European Communities (2004) that uses as an example a contract that involves the removal of asbestos.

¹¹ For further explanation, see below.

¹² Eco-labels endorse products that are considered to be more environmentally sound than like products in the same product group. They are awarded on a voluntary basis to products that meet specific criteria and they aim at enlightening customers about environmentally sound products. Examples include the European Eco-label (http://ec.europa.eu/environment/ecolabel/index_en.htm (19 February 2008)) and the German Blue Angel (http://www.blauer-engel.de/englisch/navigation/body_blauer_engel.htm (19 February 2008)).

preference. At present, the protection of the environment is not expressly stipulated as something that contractors could be awarded preference points for, but in light of the arguments already made, organs of state should be able to award preference points also on the basis of environmental considerations without the need for legislative change. In this way, the environment would be one of many other factors that a contractor could score points on, for example, contracting with historically disadvantaged individuals and implementing the programmes of the Reconstruction and Development Programme (section 2(1)(d) of the Procurement Act). The award of environmental points would not displace or conflict with South Africa's current use of procurement to address past discriminatory policies and practices. The environment would merely be added to the many other factors that are already taken into account, all of which are aimed at the advancement of previously disadvantaged groups in South Africa. At the same time, the current position will remain unchanged: there will still be a balance between price, on the one hand, and preference on the other (Bolton, 2007).

It remains important for award criteria to be sufficiently precise and objectively verifiable to enable contractors to submit responsive tenders, and to enable organs of state to verify and compare tenders in an objective way. In this sense, it would not be sufficient for an organ of state to simply state in the tender documents that during the award stage it will favour tenders which are "environmentally friendly" or "most consistent with sustainable development". Such criteria would amount to indeterminate criteria and allow organs of state an unfettered discretion at the award stage which defeats the notions of fairness and transparency (Kunzlik, 2003; Arnould, 2003). On the other hand, it would be possible for an organ of state procuring electricity to award "environment" points to a contractor who can prove that 25% of the electricity supplied will be from renewable energy sources. Doing so would be sufficiently precise and objectively verifiable (Day, 2005).

In many instances, the initial cost of green products or services may be more than non-green products. It is important, however to take into account the whole-life costs of products and services, in particular for present purposes, the purchase price; the cost incurred in maintaining or recycling a product; money spent in order to save (for example investing in higher levels of insulation to save energy and thus money in the future); the cost incurred for the treatment of waste or recycling; and the costs of use or running and maintenance costs (for example energy, water and other resources used during the lifetime of the product) (Commission Interpretative Communication, 2001). The initial construction or refurbishment costs of a building that includes energy saving features may, for example, have a higher upfront cost than more standard buildings. The costs involved will, however, often be offset through lower energy bills over its useful life (HM Treasury, 2007). The same applies in the case of energy-efficient light bulbs —

they have a higher upfront cost but compared to conventional light bulbs their life-cycle costs are much lower; they are approximately four times more energy-efficient and last up to ten times longer (Westphal, 1999). From a practical side, however, the consideration of whole-life costing in procurement decisions would require the necessary skills and knowledge on the part of procurement officials. There would, in other words, be a need for organizational learning in relation to procurement and particularly whole-life costing. Only then can true effect be given to whole-life costing in procurement decisions and particularly in relation to green procurement.

It has been noted that an organ of state may decide to consider "green variants". It can, in other words, first define a standard definition for the product or service that is required and in addition to this it can call for variants, for example, a product with a higher environmental performance or the use of a specific production process (Commission Interpretative Communication, 2001). It can then stipulate that if a "green variant" provides better value for money after having taken into account all other award criteria, the "green variant" will be chosen. This can be done where an organ of state is unsure of the availability of green variants for the particular products or service or what the possible cost might be (O'Hara, 2004).

It seems important to add that although in the South African context, there may be few (especially emerging) contractors who may be able to comply with environmental criteria and therefore qualify for environmental points in terms of the preference point system, this does not mean that organs of state should be barred from taking into account environmental considerations when awarding contracts. Most important is that contractors are informed ahead of time that consideration will be given to environmental factors in contract awards. The environment will, furthermore, not be the only factor for which a (emerging) contractor could score points. As noted, in terms of the current preference point system, contractors would also be able to score points for other factors, such as those already stipulated in section 2(1)(d) of the Procurement Act and Regulations (Kunzlik, 2003; Arnould, 2003).

It has been noted that it is important for green technical specifications and minimum qualification criteria (for example environmental competence) to relate to the subject-matter of the contract. In the South African context, however, it would appear that this need not *necessarily* be the case in the application of green award criteria.¹³ Under the existing legislative framework, contractors are awarded preference points for, for example, contracting with historically disadvantaged individuals, even though this does

¹³ It would also not be important for the exclusion of a contractor for non-compliance with environmental laws.

not relate directly to the subject-matter of the contract.¹⁴ It would seem, therefore, that under the current legislation contractors could qualify for “environment” points in instances when the protection of the environment is directly related to the subject-matter of the contract *and* in instances when it is not. In the South African context, therefore, using procurement as a tool of environmental policy would not only be about procuring green products and services, but also about generally preferring contractors who employ environmentally sound practices. Thus, even if an organ of state is not, for example, acquiring products or services, but is in fact selling or letting an asset, it would be able to give preference to contractors who employ environmentally sound practices. It would be able to do so irrespective of whether the environment is directly related to the subject-matter of the contract.¹⁵ As noted, however, contractors should know beforehand that environmental considerations will play a role during the award stage.

3.5. *Special performance or environmental clauses*

To increase the effective and efficient use of procurement as an environmental tool, the contract itself should also incorporate environmental considerations, in particular, the green criteria expressly stipulated in the call for tenders. Environmental clauses must, however, be objectively verifiable. They must also not amount to undisclosed technical specifications or criteria for comparing different tenders. All contractors, if ultimately awarded the contract, should be able to comply with the environmental clauses. It would, for example, be forbidden to require of the successful bidder to register under an environmental management scheme if this was not specifically provided for in the call for tenders. An organ of state would, however, be allowed to include a contractual clause that restricts the type of vehicles and equipment that a contractor intends to use in the execution of the contract provided such clause is directly related to the subject-matter of the contract, for example, a waste management contract. An organ of state would also be allowed to include general contractual clauses to the effect that (1) goods must be delivered outside peak traffic times to minimise traffic congestion; (2) any packaging used for the delivery of goods must be taken back, recycled or re-used to dissuade suppliers from using avoidable or unnecessary packaging; and/or (3) goods must be delivered in bulk so as to be more environmentally efficient in terms of transport impact (Carisson and Waara, 2007; Commission of the European Communities, 2004).

¹⁴ See generally the Procurement Act and Regulations and, in particular, the preference point system created in the Act and Regulations. No requirement is stipulated for the award of preference points to be directly related to the subject-matter of the contract.

¹⁵ On procurement as a policy tool and the sale and letting of assets, see Bolton (2007).

4. Conclusion

In South Africa, there is scope within the existing legislation for incorporating environmental considerations throughout the government procurement process. This is beneficial because it means that there is no need for the introduction of new legislation which is generally a protracted and arduous process. The incorporation of environmental factors in the procurement process can further be done without undermining or weakening South Africa’s current use of procurement to address past discriminatory policies and practices. The environment will simply be an additional factor that organs of state may take into account in the award of contracts. The majority of factors for the award of preference points during the award stage will still relate to the upliftment of previously disadvantaged groups.

As a rule, the preparatory stage is an ideal time to take into account environmental considerations since this stage is not as heavily regulated as the other stages. The environment can further play a role in the drafting of specifications. Organs of state could stipulate that they will only consider green products or services. The environment can also play a role when determining the capability or responsibility of contractors. Contractors could be excluded from consideration for contravening environmental laws, or if they simply lack the necessary environmental competence to render performance under a contract that requires this. The former ground for exclusion would, however, require a legislative amendment. Environmental criteria can further be applied during the award stage provided that they (1) are specific and objectively quantifiable; (2) are expressly mentioned in the tender documentation; and (3) generally comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. Organs of state can further ensure that contracts contain clauses aimed at protecting the environment. A construction contract could, for example, oblige the contractor to implement an environmental policy or to use certain vehicles or types of equipment.

Acknowledgements

The financial support of DAAD (Deutscher Akademischer Austauschdienst/German Academic Exchange Service) during the completion of this research is gratefully acknowledged. I am also very thankful to Professor Folke Schuppert (Humboldt University, Berlin) for providing me with academic support during my stay in Berlin.

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