

THE PUBLIC PROCUREMENT SYSTEM IN SOUTH AFRICA: MAIN CHARACTERISTICS

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I. INTRODUCTION

After more than a decade of the transformation of South Africa's public procurement system, it is only in recent years that there has been an increase in literature in the field. Even though the amount of literature is increasing, in comparison to other countries like the United Kingdom and the United States (where a vast amount of literature exists on public contracts and public procurement and the subject is taught at the university level), there is a lack of information on South Africa's public procurement system.¹ In light of the increasing economic significance of public procurement in South Africa and its

1. In the United Kingdom, the Public Procurement Research Group at the University of Nottingham offers an undergraduate course in Public Procurement Law and the subject is taught at the post-graduate level. In the United States, The George Washington University Law School has a Government Procurement Law Program and Florida Atlantic University has a Public Procurement Research Center. Further, three academic journals are exclusively devoted to the area of public contracts: the *Public Contract Law Journal*, the *Public Procurement Law Review*, and the *Journal of Public Procurement*.

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effects on different groups and interests,² it is important for information on the subject to be available to interested parties. Reference is made here not only to interested parties in South Africa, but also to those in other countries—in particular, developing countries that can, where feasible, learn from the South African system. In this light, the aim of this article is to familiarize readers with South Africa's public procurement system. The article will not provide a detailed and in-depth analysis of the law governing public procurement. Instead, it will limit itself to highlighting and discussing the main characteristics of the South African procurement system. For more detailed discussion and analysis, readers are referred to the existing literature in the field.³

As background, an overview will be given of the legislative framework governing public procurement in South Africa. Thereafter, the focus will be on the main characteristics of South Africa's public procurement system, in particular: the scope of coverage of procurement laws and exemptions; threshold values currently in place and methods of procurement; rules pertaining to qualification and participation in procurement procedures; award criteria and preferences in the award process; enforcement of procurement rules and remedies available to aggrieved parties; and recent developments.

II. OVERVIEW OF LEGISLATIVE FRAMEWORK

South Africa's public procurement system is unique in that the principles governing procurement are contained in the South African Constitution.⁴ The Procurement Clause in the Constitution is section 217 and it provides that "organs of state"⁵ must comply with five principles when procuring goods or services: fairness, equity, transparency, competitiveness, and cost-effectiveness.⁶ This does not, however, prevent organs of state from implementing procurement policies providing for categories of preference in the allocation of contracts and the protection or advancement of persons

2. In 2004 public procurement was estimated to amount to roughly 14 percent of GDP. Zweli Mkhize, MEC for Fin. and Econ. Dev., Transforming Government Procurement System, Address Before the Supply Chain Management Conference 10 (Nov. 22–23, 2004) (transcript available at <http://www.kznded.gov.za/Portals/0/docs/Bulletin/Media%20Releases/SupplyChainManagementConference.doc>).

3. See, generally, PHOEBE BOLTON, *THE LAW OF GOVERNMENT PROCUREMENT IN SOUTH AFRICA* (2007). See also Glen Penfold & Pippa Reyburn, *Public Procurement*, in *CONSTITUTIONAL LAW OF SOUTH AFRICA* (Stuart Woolman et al. eds., 2d ed. 2003).

4. S. AFR. CONST. 1996 s. 217.

5. Section 239 of the Constitution defines an organ of state as

(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

S. AFR. CONST. 1996 s. 239.

6. S. AFR. CONST. 1996 s. 217.

or categories of persons disadvantaged by unfair discrimination.⁷ National legislation, in the form of the Preferential Procurement Policy Framework Act (Procurement Act),⁸ has been enacted to provide a framework for the implementation of such policies.⁹

Aside from the Constitution, different legislation has been enacted to give effect to the constitutional principles. The Public Finance Management Act (PFMA) regulates financial management in the national and provincial governments and at the local government level.¹⁰ The Municipal Finance Management Act (MFMA) aims to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local government sphere.¹¹ The Municipal Systems Act enables municipalities to provide municipal services by way of service delivery agreements, provided that specified selection and prequalification processes are observed.¹² Further, the National Treasury is empowered to issue guidelines and instructions on various issues relating to procurement to ensure uniform minimum norms and standards within the Government. The Prevention and Combating of Corrupt Activities Act (Corruption Act) also applies to public procurement procedures.¹³ The Corruption Act creates offenses out of corrupt activities relating to contracts and to the procurement and withdrawal of tenders.¹⁴

In addition to the above legislation, the general rules of constitutional and administrative law have application to public procurement in South Africa. The courts have held that the solicitation, evaluation, and award of public tenders amount to “administrative action” within the meaning of the Constitution¹⁵ and the Promotion of Administrative Justice Act (PAJA).¹⁶ Unsuccessful or aggrieved bidders also have *locus standi* to challenge procurement decisions by means of an application for judicial review.¹⁷ Procurement decisions can be challenged on the grounds of lawfulness, reasonableness, and procedural fairness.¹⁸ Unsuccessful or aggrieved bidders also can challenge

7. *Id.*

8. Preferential Procurement Policy Framework Act 5 of 2000.

9. The Act and its Regulations (PREFERENTIAL PROCUREMENT REGULATIONS in CG22549 of 10 August 2001) are in the process of being redrafted. See *infra* Part VIII.

10. Public Finance Management Act 1 of 1999 (as amended by the Public Finance Management Act Amendment Act 29 of 1999).

11. Municipal Finance Management Act 56 of 2003.

12. Municipal Systems Act 32 of 2000 (as amended by Act 44 of 2003).

13. Prevention and Combating of Corrupt Activities Act 12 of 2004.

14. *Id.* ss. 12–13.

15. S. AFR. CONST. 1996 s. 33 (recognizing a right to just administrative action).

16. Promotion of Administrative Justice Act 3 of 2000; see *Claude Neon Ltd. v City Council of Germiston* 1995 (5) BCLR 554 (W) at 563 (S. Afr.); *Aquafund (Pty) Ltd. v Premier of the Province of the W. Cape* 1997 (7) BCLR 907 (C) at 915 (S. Afr.); *Lebowa Granite (Pty) Ltd. v Lebowa Mineral Trust* 1999 (8) BCLR 908 (T) at 915 (S. Afr.); *Transnet Ltd. v Goodman Brothers (Pty) Ltd.* 2001 (1) SA 853 (SCA) at ¶¶ 7–9 (S. Afr.); *Logbro Props. CC v Bedderson NO* 2003 (2) SA 460 (SCA) at ¶¶ 5–11 (S. Afr.).

17. *Nat'l & Overseas Modular Constr. (Pty) Ltd. v Tender Bd., Free State Provincial Gov't* 1999 (1) SA 701 (O) (S. Afr.).

18. S. AFR. CONST. 1996 s. 33(1).

procurement decisions on the basis of the reasons given for such decisions.¹⁹ Along with this goes the right of access to information to determine whether or not rights have been infringed. The right of access to information is a constitutional right²⁰ and is given effect by the Promotion of Access to Information Act (PAIA).²¹

In certain instances, parties aggrieved by public procurement procedures also may have recourse to the common (private) law of contract. Thus, even though public procurement procedures are subject to administrative law rules (that is, public law to take account of the unique needs of Government), South Africa is like most other common law countries,²² where public procurement procedures are also subject to the private law of contract.²³ Aggrieved parties may further, where appropriate, avail themselves of the common (private) law of delict.²⁴

III. SCOPE OF COVERAGE AND EXEMPTIONS

A. Procurement Clause

Even though there have been suggestions to the contrary,²⁵ it is submitted that in South Africa the word “procurement” (which heads the Procurement Clause in the Constitution) should be afforded a broad meaning; it refers to both the acquisition of goods or services *and* the selling and lending of assets.²⁶ Nonapplication of the principles in the Procurement Clause to the selling and lending of public assets would be unwarranted and unfortunate.

19. *Id.* s. 33(2).

20. *Id.* s. 32.

21. Promotion of Access to Information Act 2 of 2000.

22. For example, the United Kingdom, Canada, Australia, and New Zealand.

23. See, e.g., MARINUS WIECHERS, ADMINISTRATIVE LAW 117 (1985); YVONNE BURNS, *Government Contracts and the Public/Private Divide*, 13 S. AFR. PUB. L. 234, 236–37 (1998); NICHOLAS SEDDON, GOVERNMENT CONTRACTS: FEDERAL, STATE AND LOCAL ¶ 1.1 (3d ed. 2004); PETER W. HOGG & PATRICK MONAHAN, LIABILITY OF THE CROWN 210 (3d ed. 2000); SUE ARROWSMITH, CIVIL LIABILITY AND PUBLIC AUTHORITIES 43 (1992). This feature of South Africa and other common law countries is in contrast with civil law countries, most notably France, where a distinct body of law (*contrats administratifs*) regulates many of the contracts made by organs of state. For literature on the French system, see NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW 175–212 (5th ed. 1998); MARK ARONSON & HARRY WHITMORE, PUBLIC TORTS AND CONTRACTS 178–81 (1982); L. HARRY STREET, GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY 81–119 (1975) (comparing the United Kingdom, the United States, and France); Alan W. Mewett, *The Theory of Government Contracts*, 5 MCGILL L.J. 222 (1959); J.D.B. MITCHELL, THE CONTRACTS OF PUBLIC AUTHORITIES: A COMPARATIVE STUDY 164–219 (1954).

24. The term “delict” is used in South Africa and is similar to the common law concept of “tort.”

25. See, e.g., Penfold & Reyburn, *supra* note 3, at 25–7 to –8 (arguing that the word “procurement” as used in the Constitution refers only to the acquisition of goods and services and not the selling and lending of assets).

26. Cf. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL), UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES WITH GUIDE TO ENACTMENT art. 2 (1994) (defining “procurement” as the acquisition of goods, construction, or services).

The whole rationale for prescribing a procurement system that complies with principles such as fairness, equity, transparency, and, in particular, competitiveness and cost-effectiveness would be defeated if the principles were to apply only to instances when organs of state contract for the acquisition of goods or services.

Before the abolishment of apartheid in 1994, the state contracted with large, and usually white-owned, businesses. The aim today is to use the procurement power of the state to remedy past injustices.²⁷ If the word “procurement” were to refer only to instances when the state acquires goods or services, contracts that involve the selling and lending of assets could still primarily be awarded to those large, usually white-owned, businesses. This is precisely what the Procurement Clause and the Procurement Act aim to combat. Section 195 of the Constitution further requires all forms of public administration to be governed by principles such as the “efficient, economic and effective use of resources”²⁸ and accountability and transparency.²⁹

The Procurement Clause applies to organs of state at all three levels of Government (national, provincial, and local) and any other institution identified in national legislation.³⁰ All institutions governed by the PFMA, the MFMA, and the Procurement Act thus fall within the ambit of the Procurement Clause. Sections 38(1)(a)(iii) and 51(1)(a)(iii) of the PFMA reflect the principles laid out in the Procurement Clause.³¹ Section 111 of the MFMA, read with section 112, similarly reiterates the principles in the Procurement Clause.³²

27. The Constitution provides for the use of procurement for this purpose. S. AFR. CONST. 1996 s. 217(2).

28. *Id.* s. 195(1)(b).

29. *Id.* s. 195(1)(f)–(g).

30. *Id.* s. 217(1).

31. PFMA s. 38(1)(a)(iii) provides that the accounting officer for a department, trading entity, or constitutional institution must ensure the use and maintenance of “an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective” and section 51(1)(a)(iii) provides that an accounting authority for a public entity must ensure that that public entity does the same. A distinction is drawn between national and provincial public entities. PFMA section 1 defines a national public entity as

(a) a national government business enterprise; or (b) a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is (i) established in terms of national legislation; (ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy, or other money imposed in terms of national legislation; and (iii) [is] accountable to Parliament.

Id. s. 1. A provincial public entity is defined as

(a) a provincial government business enterprise; or (b) a board, commission, company, corporation, fund or other entity (other than a provincial government business enterprise) which is (i) established in terms of legislation or a provincial constitution; (ii) fully or substantially funded from a Provincial Revenue Fund or by way of a tax, levy or other money imposed in terms of legislation; and (iii) [is] accountable to a provincial legislature.

Id.

32. MFMA 56 ss. 111–12 provide that each municipality and municipal entity must have and implement a supply chain management policy that is “fair, equitable, transparent, competitive and cost-effective” and complies with a prescribed regulatory framework that is “fair, equitable, transparent, competitive and cost-effective.” Section 1 of the Municipal Systems Act defines a

The primary aim of the Procurement Act, on the other hand, is to provide a framework for the implementation of procurement policies as specified in the Procurement Clause.³³

Bodies or entities that perform “public” powers or functions also fall within the scope of the Procurement Clause.³⁴ Further, the actual conclusion or formation of a contract falls within the ambit of the Procurement Clause, including negotiations leading up to the formation of a contract.³⁵ Organs of state must comply with the Procurement Clause when they contract for their own purposes, as for example when they acquire computers for in-house use, and when they contract for goods or services on the public’s behalf, such as the delivery of a municipal service.

Organs of state at the local government level, however, need not comply with the Procurement Clause when they specifically contract with other organs of state for the delivery of municipal services. The reason for this is that all organs of state are entities exercising powers on behalf of the state. When a municipality contracts with another organ of state for the delivery of a municipal service, the service will still be provided by the state and there is, accordingly, no need for there to be compliance with the Procurement Clause. The principle of transparency, however, should as a general rule always be complied with. The public has a right to public contracting procedures that are open and transparent irrespective of whether a municipality contracts with a private party or another organ of state.³⁶ Where an organ of state in the local government sphere does not specifically contract with another organ of state for the delivery of a municipal service, or contracts for goods or services in general, the Procurement Clause must be complied with.

B. *Procurement Act*

The Procurement Act was enacted to provide a framework for the implementation of procurement policies contemplated in the Procurement Clause of the Constitution. It applies to all organs of state that are defined therein, namely a national or provincial department as defined in the PFMA; a municipality as contemplated in the Constitution; a constitutional institution as defined in the PFMA; Parliament; a provincial legislature; and any other

municipal entity as (a) a private company established in terms of any applicable national or provincial legislation and that operates under the ownership control of one or more municipalities; (b) a service utility; or (c) a multijurisdictional service utility. Municipal Services Act 32 of 2000 s. 1 (as amended by Act 44 of 2003). A service utility refers to a body established under section 86H of the Act, and a multijurisdictional service utility refers to a body established under section 87 of the Act. The notion of ownership control by the state therefore appears to be the overriding criterion.

33. Procurement Act 5 of 2000.

34. S. AFR. CONST. 1996 s. 239.

35. In *Transnet Ltd. v Goodman Brothers (Pty) Ltd.*, Olivier JA noted that “[i]t may well be that the words ‘contracts for goods and services’ [in section 217(1) of the Constitution] must be given a wide meaning, similar to ‘negotiates for’ etc.” 2001 (1) SA 853 (SCA) at 862A–B (S. Afr.).

36. S. AFR. CONST. 1996 s. 195.

institution or category of institution included in the definition of “organ of state” in the Constitution and recognized by the Minister of Finance through notice in the *Government Gazette* as an institution to which the Procurement Act applies.³⁷ One difficulty with this definition is that even though the Minister has the power to recognize “other” institutions included in the Constitution by means of a notice in the *Government Gazette*, this has not yet been done.³⁸ An “organ of state” as defined in the Procurement Act therefore does not appear to include all those institutions that are bound by the principles in the Procurement Clause.³⁹ Institutions like municipal entities and public entities are therefore, strictly speaking, excluded from the operation of the Act.

Of further note is that parastatals (institutions directly or indirectly controlled by the state, such as Transnet, Eskom, and Telkom) do not fall within the ambit of the Procurement Act even though they are organs of state in terms of the Constitution.⁴⁰ The reasoning behind this is that parastatals are involved with strategic developmental delivery and thus should not be impeded; parastatals need flexibility with regard to the implementation of their preferential procurement programs.⁴¹ In the case of *Fidelity Springbok Security Services (Pty) Ltd. v South African Post Office Ltd.*, the court appears to have been of the view that a parastatal (the South African Post Office) could be regarded as an organ of state for the purposes of the Procurement Act.⁴² This decision should not be followed. As noted, parastatals are organs of state for the purposes of the Constitution, but not the Procurement Act, because parastatals need flexibility in the implementation of their preferential procurement programs.

Those institutions that are organs of state for the purposes of the Procurement Act may request that the Minister of Finance exempt them from the application of the Act.⁴³ This may, however, only be done if it is in the interests of national security, if the likely bidders are international suppliers, or if it is in the public interest.⁴⁴ Organs of state can, therefore, only request exemption in certain circumstances, and only in respect of certain provisions of the Procurement Act. For example, contractors cannot, for example, request a permanent or lasting exemption because this would clearly defeat the purpose of having a national framework for the implementation of procurement policies. The prescribed framework created by the Procurement Act would be undermined if the Minister had unrestricted powers to free organs of state from the Act’s provisions.

37. Procurement Act 5 of 2000 s. 1(iii).

38. Penfold & Reyburn, *supra* note 3, at 25-14.

39. See S. AFR. CONST. 1996 s. 239.

40. *Id.*

41. Parliamentary Monitoring Group, Minutes of the J. Meeting of the Finance Portfolio Comm. and the Finance Select Comm. (Jan. 12, 2000), available at <http://www.pmg.org.za>.

42. [2004] JOL 13215 (T) at 7 (S. Afr.).

43. See Procurement Act 5 of 2000 s. 3.

44. *Id.*

IV. THRESHOLD VALUES AND PROCUREMENT METHODS

Unlike the Procurement Clause in the 1993 Constitution that made specific reference to “tendering” as a procurement method,⁴⁵ the Procurement Clause in the 1996 Constitution makes no such reference.⁴⁶ On a plain reading of the Procurement Clause in the 1996 Constitution, organs of state thus appear to have broad discretion regarding the choice of procurement method. This discretion is, however, significantly structured by legislation and policy documents. Different methods of procurement are prescribed in the legislation and policy documents depending on the value of contracts.⁴⁷ At all three levels of Government, similar rules apply, though there are some differences.

A distinction is generally drawn between four types of procurement: petty cash purchases, verbal or written quotations, written price quotations, and competitive bidding.⁴⁸ At the national and provincial government levels, petty cash purchases are prescribed for contracts up to R2,000 and written or verbal quotations for contracts over R2,000 but under R10,000.⁴⁹ Written price quotations should be obtained for contracts over R10,000 but under R500,000, and competitive bidding (tendering) should be used for contracts over R500,000.⁵⁰ At the local government level, the procurement methods are the same except that written price quotations should be obtained for contracts over R10,000 but under R200,000, and tendering should be used for contracts over R200,000.⁵¹ At the national and provincial government levels, contractors can also apply to be listed as prospective suppliers for contracts under R500,000,⁵² and at the local government level, they can apply to be listed for contracts under R200,000.⁵³

At the local government level, provision is further made for a two-stage bidding process for large complex projects, projects where it may be undesirable to prepare complete detailed technical specifications, or projects with a duration period exceeding three years.⁵⁴ In terms of this two-stage bidding process, a public call for proposals to tender (expressions of interest or requests to tender) is advertised and contractors are invited to submit detailed

45. S. AFR. (Interim) CONST. 1993 s. 187.

46. S. AFR. CONST. 1996 s. 217.

47. NAT'L TREASURY OF THE REPUBLIC OF SOUTH AFRICA, NATIONAL TREASURY PRACTICE NOTE No. 8 OF 2007/2008: SUPPLY CHAIN MANAGEMENT, THRESHOLD VALUES FOR THE PROCUREMENT OF GOODS, WORKS AND SERVICES BY MEANS OF PETTY CASH, available at http://www.treasury.gov.za/divisions/sf/sc/practicenotes/Practice%20note%20SCM%208%20of%202007_8.pdf [hereinafter PRACTICE NOTE No. 8 OF 2007/2008].

48. *Id.*; General Notice 868 of 30 May 2005.

49. PRACTICE NOTE No. 8 of 2007/2008, *supra* note 47, at 3.

50. *Id.*

51. General Notice 868 of 30 May 2005 s. 12(2)(1). Also, provision is made for the lowering, but not the increasing, of threshold values. See *id.* s. 12(2)(a); PRACTICE NOTE No. 8 OF 2007/2008, *supra* note 47, at 4.

52. PRACTICE NOTE No. 8 OF 2007/2008, *supra* note 47, at 5.

53. General Notice 868 of 30 May 2005 s. 14.

54. *Id.* s. 25(1).

technical and cost proposals by a specified date.⁵⁵ The number of proposals received is then reduced, and only those contractors identified as most likely to provide responsive and cost-effective tenders, and most likely to perform in terms of their contractual obligations, are invited to tender.⁵⁶ The actual process of tendering is thus limited to a reasonable number of contractors so that an organ of state's resources for tender evaluation are not unnecessarily strained by the need to review tenders submitted by unqualified contractors.

Strict rules on competition apply in the context of municipal service delivery by an external provider or through a public-private partnership.⁵⁷ If a municipality decides to make use of an external provider for the delivery of a municipal service, a competitive procurement process must take place.⁵⁸ The Municipal Systems Act proceeds on the basis that procurement takes place by way of tendering.⁵⁹

In some instances such as emergencies, the circumstances of a particular case may make the use of tender procedures impractical, regardless of the high value of the contract. Legislation thus provides for exceptions to the prescribed use of tendering.⁶⁰ Organs of state may do away with tender procedures if calling for tenders is impractical, if they are faced with emergencies, or if the goods or services in question are only available from a sole supplier.⁶¹

At the local government level, a municipality does not need to make use of competition or tender procedures where it contracts with another organ of state for the delivery of a municipal service. As already noted in Part III.A, *supra*, the service in this instance will still be provided by the state, so competition or tender procedures are not used.

The national treasury further facilitates the arrangement of contracts, referred to as "transversal term contracts," for the procurement of goods and services required by more than one government department, provided that the arrangement of such contracts is cost-effective and in the national interest.⁶² If an organ of state participates in a transversal term contract facilitated by the

55. *Id.* s. 25(2).

56. *See id.* s. 25(2)–(3).

57. *See, e.g.*, Municipal Systems Act 32 of 2000 ss. 73–94; Municipal Finance Management Act 56 of 2003 s. 120.

58. *See* Municipal Finance Management Act 56 ss. 111–12.

59. *See*, for example, the headings for part 3 of chapter 8, "Service delivery agreements involving competitive bidding," and section 83, "Competitive bidding" of the Municipal Services Act 32 of 2000. For more detailed discussion and analysis of the different procurement methods, see Bolton, *supra* note 3, at 149–59.

60. *See, e.g.*, General Notice 868 of 30 May 2005 s. 36(1)(a); PRACTICE NOTE No. 8 of 2007/2008, *supra* note 47, at 3.4.3.

61. For detailed discussion and analysis of these exceptions, *see* Bolton, *supra* note 3, at 162; Phoebe Bolton, *Grounds for Dispensing with Public Tender Procedures in Government Contracting*, 2 POTCHEFSTROOM ELECTRONIC L.J. (2006).

62. SUPPLY CHAIN MANAGEMENT OFFICE OF THE NAT'L TREASURY OF THE REPUBLIC OF SOUTH AFRICA, OVERVIEW: PROMULGATION OF A FRAMEWORK FOR SUPPLY CHAIN MANAGEMENT 2.7, *available at* <http://www.treasury.gov.za/divisions/sf/sc/overview.pdf>.

relevant treasury, it may not call for tenders for the same or similar product or service during the existence of the transversal term contract.⁶³ An organ of state also may partake in any contract arranged by means of a tender process conducted by another organ of state, subject to the written approval of such organ of state and the relevant contractors.⁶⁴ There is thus no need for every organ of state to conduct its own tender procedures. If the needs of organ of state A are similar to the needs of organ of state B, and state B has already arranged to meet its needs by means of tender procedures, then state A can arrange to make use of state B's contractor.

V. QUALIFICATION AND PARTICIPATION

Legislation in South Africa generally provides little guidance on the different factors that organs of state should take account of to determine whether contractors "qualify" for participation in procurement procedures or whether they are "responsible." At the national and provincial government levels, the national treasury guidelines provide that accounting officers or authorities should appoint bid evaluation committees that must, *inter alia*, verify the "capability/ability of the bidder to execute the contract."⁶⁵ However, no guidance is given for what is meant by the capability or ability of a contractor.

At the local government level, limited meaning is afforded to the ability of contractors to perform, and even then only with respect to contracts that exceed R10 million.⁶⁶ Relevant factors include financial and economic standing; experience and track record; and the nature, quality, and reliability of products or services to be rendered.⁶⁷ Bidders who are required by law to prepare annual financial statements must furnish audited annual financial statements for the past three years or since their establishment if established during the past three years.⁶⁸ They also must furnish particulars of contracts awarded to them by any organ of state during the past five years together with particulars of any material noncompliance or dispute concerning the execution of such contracts.⁶⁹

It is, of course, necessary for a contractor to have at least the minimum qualifications to perform, meaning it must be responsible. It should be able

63. Treasury Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities, in GG27388 of 15 March 2005 s. 16A6.5 [hereinafter Trading Entities].

64. *Id.* s. 16A6.6.

65. SUPPLY CHAIN MANAGEMENT OFFICE OF THE NAT'L TREASURY OF THE REPUBLIC OF SOUTH AFRICA, IMPLEMENTATION OF SUPPLY CHAIN MANAGEMENT (Oct. 28, 2004) s. 4.1(b), available at <http://www.treasury.gov.za/divisions/sf/sc/>.

66. See General Notice 868 of 30 May 2005 s. 21(d) (requiring only certain information and certifications).

67. *Id.*

68. *Id.* s. 21(d)(i).

69. *Id.* s. 21(d)(iii).

to complete the work on time and in a satisfactory manner to be considered “capable.” Likewise, a contractor should, in relation to the merits of other competing bidders, be able to render satisfactory performance. The “capability or ability” of a contractor thus relates to both the qualification or responsibility of a contractor and award criteria that are used to compare the merits of tenders submitted by different contractors.

For present purposes, the first element, qualification or responsibility, is particularly important. Factors that would generally play a role in the determination of qualification or responsibility, but that are insufficiently provided for in legislation or policy documents in South Africa, include the nature, quality, and reliability of the product or service to be rendered; the experience and track record of a contractor; the possession of appropriate licenses and permits; the ability of a contractor to comply with the delivery schedule; the contractor’s record of business ethics and integrity; the technical knowledge and capacity of a contractor; the availability of tools or equipment for the contractor’s use; and the financial and economic standing of a contractor.⁷⁰

Aside from the above factors relating to qualification or responsibility, legislation in South Africa allows for the exclusion or debarment of certain contractors from public contract awards.⁷¹ Access to public procurement is, in other words, strictly regulated. Most importantly, contractors are not “qualified” to participate in public procurement procedures if they have failed to pay their taxes and municipal service charges.⁷² They may be excluded from consideration if they performed unsatisfactorily under a previous contract,⁷³ failed to comply with labor laws,⁷⁴ or failed to comply with conditions of contract relating to subcontractors and joint ventures.⁷⁵ Contractors also may be excluded from consideration if they committed fraud or corruption in the procurement process.⁷⁶

70. Steven L. Schooner, *The Paper Tiger Stirs: Rethinking Suspension and Debarment*, 5 PUB. PROCUREMENT L. REV. 211, 213 (2004); CHRISTOPHER BRIGHT, PUBLIC PROCUREMENT HANDBOOK 27 (1994).

71. Trading Entities, *supra* note 63, s. 16A9.2(a); General Notice 868 of 30 May 2005 s. 38(1).

72. Trading Entities, *supra* note 63, s. 16A9.1(d); General Notice 868 of 30 May 2005 s. 38(1)(d)(i).

73. Trading Entities, *supra* note 63, s. 16A9.2(a)(iii); General Notice 868 of 30 May 2005 s. 38(1)(d)(ii).

74. Employment Equity Act 55 of 1998 s. 52(1). *See also* Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 s. 26.

75. *See* SUPPLY CHAIN MANAGEMENT OFFICE OF THE NAT’L TREASURY OF THE REPUBLIC OF SOUTH AFRICA, POLICY STRATEGY TO GUIDE UNIFORMITY IN PROCUREMENT REFORM PROCESSES IN GOVERNMENT 3.6.3.2, *available at* <http://www.treasury.gov.za/divisions/sf/sc/policy.pdf>, providing that accounting officers must ensure that subcontractors and partners in joint venture arrangements are engaged in fair and reasonable conditions of contract. Contractors who contravene the conditions of contract relating to subcontractors and joint ventures must be designated as nonpreferred suppliers.

76. *See* Corruption Act 12 of 2004 ss. 12, 13, 28; General Notice R194 of 11 March 2005; Trading Entities, *supra* note 63, ss. 16A9.1(c), 9.1(e), 9.2; General Notice 868 of 30 May 2005 ss. 14(1)(c), 38(1)(e), 38(1)(g).

From a cost-effectiveness point of view, it can reasonably be assumed that a contractor who is unable or unwilling to pay its taxes is unlikely to render satisfactory performance under a contract and is likely to cost an organ of state more in the long run. Failure on the part of a contractor to render satisfactory performance under a previous contract also leads to the logical assumption that it is unlikely to render satisfactory contractual performance in the future. Debarment on the ground of unsatisfactory contractual performance thus ensures that organs of state only do business with responsible and reliable contractors, which ensures the efficient use of taxpayers' money. Corruption is harmful to the procurement process because it lessens the confidence that honest contractors and the public at large have in the Government. It leads to the slackening of competition for public contracts and lessens the Government's ability to obtain the best value for its money. Corruption also impedes the attainment of other objectives in the procurement process, including, for example, policy promotion and the fair treatment of contractors. It is therefore not odd for legislation in South Africa to make provision for the debarment of contractors on the ground of fraud or corruption.⁷⁷

At this stage, no express provision is made in South Africa for the exclusion of contractors on the ground of bankruptcy, insolvency, or winding-up. This is unfortunate, as these are obvious threats to the continued ability of a contractor to render satisfactory performance under a contract. In view of the increasing importance of the notion of sustainable development,⁷⁸ and particularly the importance attached to public procurement as a tool of environmental policy, it is also important for contractors who have failed to comply with environmental laws to be excluded from procurement procedures.⁷⁹

77. For a detailed discussion and analysis of the different grounds of exclusion, see BOLTON, *supra* note 3, at 388–400; Phoebe Bolton, *The Exclusion of Contractors from Government Contract Awards*, 10 LAW, DEMOCRACY AND DEV'T 25 (2006); Sope Williams, *The Use of Exclusions for Corruption in Developing Country Procurement: The Case of South Africa*, 51 J. OF AFR. L. 1 (2007); Sope Williams & Geo Quinot, *Public Procurement and Corruption: The South African Response*, 124 S. AFR. L.J. 339 (2007).

78. Sustainable development was defined in 1987 in the Brundtland report as development that “meets the needs of the present without compromising the ability of future generations to meet their own needs.” OUR COMMON FUTURE: WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, ¶ 27, U.N. Doc. A/42/427 (Aug. 4, 1987). Since 1987, the concept has acquired a broader interpretation. Recently it has been described as “a far more embracing and holistic concept than environmental sustainability... [S]ustainable development is a way of looking at all the sources and resources that can lead to a higher quality of life for the current generation, without compromising future generations.” Ron Watermeyer, *Facilitating Sustainable Development Through Public and Donor Procurement Regimes: Tools and Techniques*, 1 PUB. PROCUREMENT L. REV. 30, 35 (2004).

79. For detailed discussion and analysis of the possible use of procurement as an environmental tool in South Africa, see Phoebe Bolton, *Incorporating Environmental Considerations into Government Procurement in South Africa*, 1 J. OF S. AFR. L. 31 (2008). Additional literature on procurement and the environment is cited therein.

VI. AWARD CRITERIA AND PREFERENCES

It was noted above that the capability or ability of a contractor refers both to the qualification or responsibility of a contractor and to award criteria. With regard to award criteria, it is submitted that capability or ability should, in addition to the factors relevant to determine qualification or responsibility, be determined with reference to at least the following: overall price of goods or services, such as running costs and maintenance costs, as well as rates charged per unit (also referred to as life cycle or whole-life costs); commitments with regard to spare parts and after-sales service; the qualifications and competence of the personnel of a contractor; and the number of staff employed by a contractor. In addition to these factors, provision is made in South Africa for the preferential treatment of certain contractors during the award stage.⁸⁰

The Procurement Act and its regulations proceed on the assumption that contracts are awarded by way of tender procedures, and a points system is created for the award of contracts.⁸¹ Contractors are awarded points out of 100 based on price and preference.⁸² The points system is dual-scale in that more preference points are awarded for lower-value contracts and less preference points for higher-value contracts.⁸³ For contracts between R30,000 and R500,000, the 80/20 point system applies.⁸⁴ In terms of the 80/20 point system, 80 points are awarded for price and a contractor may be awarded a maximum of 20 points for being a historically disadvantaged individual (HDI), subcontracting with an HDI, or attaining certain specific goals.⁸⁵ For contracts above R500,000, the 90/10 point system applies.⁸⁶ In terms of the 90/10 point system, 90 points are awarded for price and a contractor may be awarded a maximum of 10 points for being an HDI, subcontracting with an

80. For detailed discussion and analysis, see BOLTON, *supra* note 3, at 269–74. See generally Phoebe Bolton, *An Analysis of the Preferential Procurement Legislation in South Africa*, 16 PUB. PROCUREMENT L. REV. 36 (2007); Phoebe Bolton, *Government Procurement as a Policy Tool in South Africa*, 6 J. OF PUB. PROCUREMENT 193 (2006); Phoebe Bolton, *The Use of Government Procurement as an Instrument of Policy*, 121 S. AFR. L.J. 619 (2004); Deen Letchmiah, *The Process of Public Sector Procurement Reform in South Africa*, 8 PUB. PROCUREMENT L. REV. 15 (1999); Christian M. Rogerson, *Pro-Poor Local Economic Development in South Africa*, 15 URBAN FORUM 180 (2004); Sivi Gounden, *The Impact of the National Department of Public Works's Affirmative Procurement Policy on the Participation and Growth of Affirmable Business Enterprises in the Construction Sector* (2000) (unpublished Ph.D. thesis, University of Natal, South Africa), available at <http://www.targetedprocurement.co.za/>; Ron Watermeyer, *The Use of Targeted Procurement as an Instrument of Poverty Alleviation and Job Creation in Infrastructure Projects*, 9 PUB. PROCUREMENT L. REV. 226 (2000).

81. Procurement Act 5 of 2000; GN R725 of 10 August 2001.

82. The word “price” should be understood here in a broad sense as encompassing, for example, commitments with regard to spare parts and after-sales service, the qualifications and competence of the personnel of a contractor, and the number of staff employed by a contractor.

83. GN R725 of 10 August 2001 s. 3(1).

84. *Id.*

85. *Id.* s. 3(2).

86. *Id.* s. 4(1).

HDI, or attaining certain specific goals.⁸⁷ An HDI, in turn, is defined as a South African citizen who before 1994 had no franchise in national elections; or is female; or has a disability.⁸⁸ Specific goals, on the other hand, include, *inter alia*, the promotion of South African-owned enterprises; the promotion of small, medium, and micro enterprises; the creation of new jobs; the promotion of enterprises in a specific region, municipality, or rural area; and the improvement of communities.⁸⁹

It should be clear from the above that even though preference is afforded to certain contractors during the award stage, the attainment of value for money remains the most important criterion when evaluating tenders. A maximum number of 20 and 10 preference points are specified and organs of state have no discretion to award more than that.

Furthermore, contractors that belong to designated or target groups do not have a right to preferential treatment. The court in *Cash Paymaster Services (Pty) Ltd. v The Province of the Eastern Cape* stressed the importance of the attainment of value for money.⁹⁰ In that case a contract was awarded for the payment of social pensions and other welfare grants to a bidder who quoted roughly R200 million more than other bidders.⁹¹ The tender board justified the award on the ground of factors related to the Reconstruction and Development Program (RDP) and argued that the award to the successful bidder would benefit previously disadvantaged members in the province.⁹² The court held that using procurement as a tool for improvement is important but does not override other considerations such as fairness and competitiveness:

[I]mportant as the RDP factors are, they are not to be regarded as the sole consideration or to be given such importance that at the end of the day they destroy the economy and become counterproductive to that very noble purpose for which they were instituted.

If tenders are to be awarded indiscriminately on the basis of RDP factors without due consideration for the cost to the country, the inevitable result will be an impoverishment of the economy to such an extent that the very people that the RDP factor is intended to develop and empower will suffer the most and be impoverished even more at the end of the day.⁹³

The court accordingly found that the additional cost of R200 million incurred in awarding the tender to the successful bidder was totally disproportionate to the likely benefits that would be achieved, and it set aside the award and ordered that new tenders be called for.⁹⁴ Further, the Procurement Act

87. *Id.* s. 4(2).

88. *Id.* s. 1(h).

89. *Id.* s. 17(3).

90. *Cash Paymaster Servs. (Pty) Ltd. v The Province of the E. Cape* [1997] 4 All SA 363 (Clk) at 386 (S. Afr.).

91. *Id.* at 386.

92. *Id.* at 370–76.

93. *Id.* at 384.

94. *Id.* at 386, 389.

and its regulations provide for penalties. The use of false information by a contractor to obtain preference points may result in the termination of the contract awarded; the recovery of all costs, losses, and damages incurred by the organ of state; and debarment from future contract awards.⁹⁵

It is important to add that South Africa is not yet a party to the World Trade Organization Government Procurement Agreement (GPA), whose overall aim is the promotion of world trade by providing access to government business.⁹⁶ The GPA restricts discriminatory policies that favor domestic suppliers and aims to ensure transparency in government procurement processes.⁹⁷ It lays down detailed and elaborate procedures for the conduct of tenders and requires signatories to implement the agreement by means of national legislation. Article XVI specifically provides that “[e]ntities shall not, in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets.”⁹⁸ Based on this broad overview of the GPA, it is evident that, strictly speaking, South Africa’s current use of procurement as a policy tool is in conflict with the rules of the Agreement.

In the 1990s South Africa was progressively subjected to pressure from its main trading partners to accede to the GPA.⁹⁹ This raised considerable debate and it was cautioned that should South Africa give in to the pressure, there would be significant implications for government procurement in South Africa.¹⁰⁰ Acceding to the GPA would mean that South African firms would be able to compete for valuable contracts issued by other member countries, but accession might preclude the Government from applying preferences in awarding contracts on the basis of national policies,¹⁰¹ namely to promote local business and encourage black economic empowerment (BEE).

The restrictions imposed by the GPA are, of course, not absolute; considerable scope is provided for the negotiation of exemptions and exclusions.¹⁰²

95. Procurement Act 5 of 2000 s. 2(1)(g); GN R725 of 10 August 2001 s. 15.

96. For detailed discussion of the GPA, see SUE ARROWSMITH, *GOVERNMENT PROCUREMENT IN THE WTO* (2003); SUE ARROWSMITH ET AL., *REGULATING PUBLIC PROCUREMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES* 301–22 (2000); SIMON J. EVENETT & BERNARD HOEKMAN (eds.), *THE WTO AND GOVERNMENT PROCUREMENT* (2006); BERNARD M. HOEKMAN & PETROS C. MAVROIDIS (eds.), *POLICY IN PUBLIC PURCHASING: THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT* (1997); ARIE REICH, *INTERNATIONAL PUBLIC PROCUREMENT LAW* 103–40, 279–318 (1999); Christopher McCrudden, *International Economic Law and the Pursuit of Human Rights*, 2 J. INT’L ECON. L. 3 (1999); Arie Reich, *The New GATT Agreement on Government Procurement: The Pitfalls of Plurilateralism and Strict Reciprocity*, 31 J. WORLD TRADE 125 (1997).

97. WORLD TRADE ORGANIZATION, *AGREEMENT ON GOVERNMENT PROCUREMENT*, arts. III, XVII [hereinafter WTO AGREEMENT ON GOVERNMENT PROCUREMENT].

98. *Id.* art. XVI(1). “Offsets in government procurement are measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements.” *Id.* art. XVI(1) n.7.

99. See MINISTRY OF FINANCE AND PUBLIC WORKS, *GREEN PAPER ON PUBLIC SECTOR PROCUREMENT REFORM IN SOUTH AFRICA*, IN GG17928 OF 14 APRIL 1997 s. 4.4 [hereinafter GREEN PAPER].

100. *Id.*

101. *Id.*

102. See, e.g., WTO AGREEMENT ON GOVERNMENT PROCUREMENT, *supra* note 97, art. V.

Governments may, for example, list or specify which entities will be covered by the Agreement and Governments also may maintain their own specific lists of permanent suppliers.¹⁰³ It has therefore been suggested that if, or rather when, South Africa accedes to the GPA, it should adopt a balanced approach that recognizes both the potential costs and the potential benefits that accession to the GPA may provide.¹⁰⁴ Doing so would ensure that accession is not done in a way that is inconsistent with national priorities.¹⁰⁵ Consideration should perhaps also be given to securing developing country status in acceding to the GPA.¹⁰⁶ South Africa would then qualify for “Special and Differential Treatment,” which would permit it to promote infant industries, revitalize rural and underdeveloped regions, and safeguard balance of payments.¹⁰⁷ South Africa might also open up to foreign competition on a case-by-case basis, weighing the overall (socioeconomic and efficiency) costs and benefits.¹⁰⁸ As pointed out by Professor Arrowsmith, limits on immediate competition from foreign suppliers could be regarded as appropriate if they are used as a means to facilitate objectives such as regional development, restructuring, and the assistance of new and viable enterprises.¹⁰⁹

VII. ENFORCEMENT AND REMEDIES

Public procurement in South Africa is, as noted, regulated by the Constitution; the PFMA, MFMA, and Municipal Systems Act; the Procurement Act; the Corruption Act; and PAJA and PAIA. The common (private) laws of contract and delict also apply. The mere existence of rules or laws regulating procurement, however, is not enough. To ensure compliance with

103. Nico Steytler, *Global Governance and National Sovereignty*, 1 *LAW, DEMOCRACY AND DEV'T* 89, 101 (1999), makes reference to the United States and the way in which it has used reservations to protect its affirmative procurement regime. According to Steytler,

[i]n the [U.S.] schedule of commitments, it is explicitly stated that “this Agreement [the GPA] will not apply to set asides on behalf of small and minority businesses.” The [U.S.] states were equally explicit and stipulated that programmes “promoting the development of distressed areas and businesses owned by minorities, disabled veterans and women are reserved from coverage.”

(footnotes omitted).

104. GREEN PAPER, *supra* note 99, s. 4.4.

105. *Id.*

106. For the special rules that apply to developing countries, see WTO AGREEMENT ON GOVERNMENT PROCUREMENT, *supra* note 97, art. V.

107. GREEN PAPER, *supra* note 99, s. 4.4.

108. See Federico Trionfetti, *Discriminatory Public Procurement and International Trade*, 23 *WORLD ECONOMY* 57, 72 (2000) (suggesting gradual accession to the GPA in the case of developing countries).

109. Sue Arrowsmith, *Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation*, 111 *LAW Q. REV.* 235, 245–46 (1995). For the effect of South Africa’s use of procurement as a policy tool on other free trade agreements, see BOLTON, *supra* note 3, at 296–303. Overall, it does not appear as though South Africa’s use of procurement as an empowerment tool has hindered the execution of such agreements.

the different rules, and, most importantly, the constitutional principles, it is important for measures to be in place to ensure application and enforcement of those rules and principles. It is important for aggrieved parties to have recourse to practical and effective dispute resolution mechanisms to enable them to enforce compliance with their rights. It is also important for aggrieved parties to be afforded adequate remedies where their rights are found to have been unjustifiably infringed. Public procurement in South Africa is regulated by both public law and private law rules such that a distinction is drawn between public law remedies and private law remedies.

A. Public Law Remedies

Public law remedies find application mainly during the precontractual stage. During this stage there is, in South African law, no contract and contractual remedies are not available. Remedies are instead available under the Promotion of Administrative Justice Act (PAJA) and other legislation.¹¹⁰ In exceptional circumstances, public law remedies are also available during the contractual and post-contractual stages.¹¹¹

Insofar as dispute resolution is concerned, the PFMA and MFMA generally encourage aggrieved parties to use internal remedies for the resolution of disputes and to use court proceedings as a last resort.¹¹² Considering the time and costs that generally accompany litigation in a court of law, this should be commended. Aggrieved parties also have recourse to nonjudicial bodies to enforce compliance with their rights, namely the Public Protector, the Auditor-General, and the National Prosecuting Authority. Legislation further provides¹¹³ for the exclusion of contractors from participation for the

110. Promotion of Administrative Justice Act 3 of 2000. This is in contrast with the position in Canada (and also, at times, the United Kingdom, New Zealand, and Australia), where the pre-award period is contractual in nature. See SUE ARROWSMITH, *THE LAW OF PUBLIC AND UTILITIES PROCUREMENT* ¶ 2.88–93 (2d ed. 2005); SEDDON, *supra* note 23, at ¶ 7.5–26; Robert B. Pattison, *Bidding and Tendering: Owner's Obligations Under Canadian Law*, 6 *CONSTR. & ENG'G L.* 15 (2001). A contract, variously referred to as a bid contract, preliminary contract, pre-award contract, process contract, option contract, or implied contract, is created upon the submission of compliant tenders in response to a call for tenders. JOHN R. SINGLETON & STEPHEN BEREZOWSKYJ, *TENDERING LAW* 1 (2005), available at http://www.singleton.com/publications/construction/Construction_Berezowskyj_Paper.pdf. The bid contract requires the body calling for tenders to treat all bidders fairly and to act in good faith, and it generally prohibits bidders from withdrawing their tenders for a stipulated period after the opening of tenders. *Id.* at 1–2.

Controversy, however, surrounds the use of a contract to govern the pre-award period. See, e.g., ARROWSMITH, *supra*, at ¶ 2.93; SEDDON, *supra* note 23, at ¶ 7.12; Peter Devonshire, *Contractual Obligations in the Pre-Award Phase of Public Tendering*, 36 *OSGOODE HALL L.J.* 203 (1998); Peter Devonshire, *An Owner's Liability to Bidders Under the Public Tendering Process: The Queen v. Canamerican Auto Lease and Rental Ltd.*, 23 *U. OF B.C. L. REV.* 335 (1989); G.H.L. Fridman, *Tendering Problems*, 66 *CAN. B. REV.* 582 (1987); Andrew Phang, *Tenders and Uncertainty*, 4 *J. ON CONT. L.* 46 (1991).

111. One such circumstance arises where a contract needs to be terminated in the public interest because it amounts to a fetter of discretion.

112. See *Trading Entities*, *supra* note 63, s. 16A9.3 (establishing a process for administrative review); General Notice 868 of 30 May 2005 s. 49 (same).

113. See *supra* Part V.

nonpayment of taxes and municipal service charges; unsatisfactory performance under a previous contract; noncompliance with labor laws; failure to comply with conditions of contract relating to subcontractors and joint ventures; or fraud or corruption in the procurement process.

When recourse is had to a court of law for the judicial review of procurement decisions, the remedies available under PAJA (for example, setting aside, directions to give reasons, declaratory orders, interdicts, and costs orders) generally ensure the enforcement of procurement rules.¹¹⁴ The requirements to be met for claiming compensation under PAJA are, however, controversial and unclear. It is this author's view that expecting an aggrieved bidder to prove all the elements of a delict (wrongfulness, fault, causation, and loss) to successfully claim compensation under PAJA is excessively onerous. In most instances, it would make more sense for an aggrieved bidder to institute a claim in delict rather than claim compensation under PAJA.¹¹⁵ In some instances, however, a claim for compensation under PAJA may be appropriate. A private contractor, for example, should be entitled to compensation where the "contract" to which it is a party is terminated in the public interest because it amounts to a fetter of discretion, or where the "contract" is declared invalid because it was concluded without the necessary power or authority.¹¹⁶

During the contractual and post-contractual stages, two remedies are available to organs of state in terms of legislation: termination of the contract and financial penalties.¹¹⁷ A contract may be terminated on the ground of corruption, insolvency, or default. Termination on the ground of corruption, in particular, requires an organ of state to take account of a number of factors,¹¹⁸ an examination of which illustrates that value for money is, and remains, a very important consideration. In principle, a contract should not be terminated on the ground of corruption if doing so will result in noncompliance with the principle of cost-effectiveness.¹¹⁹ The prescribed financial penalties, on the

114. Promotion of Administrative Justice Act 3 of 2000 s. 8(1).

115. It is noteworthy, however, that thus far the Supreme Court of Appeal and Constitutional Court have generally been cautious in awarding delictual (or constitutional) damages to bidders for the invalidation of a tender award on administrative law grounds. See *Olitzki Prop. Holdings v State Tender Bd.* 2001 (3) SA 1247 (SCA) at ¶¶ 1, 31, 42 (S. Afr.); *Steenkamp NO v Provincial Tender Bd., E. Cape* 2007 (3) SA 121 (CC) at ¶ 31 (S. Afr.). But see *Transnet Ltd. v Sechaba Photoscan (Pty) Ltd.* 2005 (1) SA 299 (SCA) at ¶ 17 (S. Afr.).

116. For more detailed discussion and analysis, see BOLTON, *supra* note 3, at 333–40.

117. See *Trading Entities*, *supra* note 63, s. 16A9.1(f) (cancellation); General Notice 868 of 30 May 2005 s. 38(f) (cancellation); Corruption Act 12 of 2004 s. 28 (debarment, cancellation, damages); GENERAL CONDITIONS OF CONTRACT FOR NATIONAL AND PROVINCIAL GOVERNMENT s. 26 (termination for insolvency), available at http://196.33.85.14/cgs_inter/content/tenders/CGS-2007-029/CGS-2007-029_General_Conditions_of_Contract.pdf; GENERAL CONDITIONS OF CONTRACT FOR LOCAL GOVERNMENT 26 (termination for insolvency), available at <http://www.treasury.gov.za/legislation/mfma/circulars/circular%2025.aspx> (follow "Municipal Bid Documents and Conditions of Contract" hyperlink and open "General Conditions of Contract 25 May 2007").

118. See Corruption Act 12 of 2004 s. 28(3)(a)(i)(aa).

119. *Id.*

other hand, save organs of state the time and effort of resorting to the often cumbersome rules available under the law of contract for the payment of damages. Effect is therefore also given to the principle of cost-effectiveness.

B. *Private Law Remedies*

Private law remedies find application mainly during the contractual and post-contractual stages. In exceptional circumstances, private law remedies are also available during the pre-contractual stage.¹²⁰ Remedies are available under the law of contract and the law of delict. The Constitution provides that when a court, tribunal, or forum interprets any legislation, common law, or customary law, it must promote the spirit, purpose, and objects of the Bill of Rights.¹²¹ The Constitution also provides that the Constitutional Court, Supreme Court of Appeal, and High Courts have the inherent power to develop the common law, taking into account the interests of justice.¹²² The remedies available under the law of contract and the law of delict must thus be used to give effect to the Constitution, and for present purposes, this means the enforcement of the Procurement Clause.

For dispute resolution during the contractual and post-contractual stages, the PFMA, MFMA, and Municipal Systems Act generally ensure that effect is given to the principle of cost-effectiveness. The contracting parties are encouraged to resolve disputes amicably by means of negotiation, mediation, or, as a last resort, litigation in a court of law.¹²³ This should be commended. Litigation in a court of law is generally time-consuming and costly and defeats the attainment of value for money. The remedies available under the law of contract (interdicts, specific performance, cancellation, and damages) and the law of delict (damages) further enable the contracting parties to enforce their rights under the contract, which, in turn, ensures the enforcement of the Procurement Clause.

Case law also illustrates the judiciary's commitment to enforcing the rights of contracting parties.¹²⁴ In particular, delictual liability may arise on the

120. Liability in delict could probably ensue in the following instances: (1) the overlooking of important information contained in a bidder's tender resulting in the nonaward of the tender; (2) the loss or misplacing of a bidder's tender and thus its nonconsideration; (3) the mistaken belief that a tender was submitted late and thus its nonconsideration; (4) the departure from information provided for, or rules applicable to, the award of a tender (such as application of certain conditions or specified procedures); (5) information not provided or withheld (such as important information being provided to another bidder but not to the bidder concerned); or (6) fraud on the part of public officials.

121. S. Afr. CONST. 1996 s. 39(2).

122. *Id.* s. 173.

123. See, e.g., GENERAL CONDITIONS OF CONTRACT FOR NATIONAL AND PROVINCIAL GOVERNMENT s. 27; GENERAL CONDITIONS OF CONTRACT FOR LOCAL GOVERNMENT s. 27; General Notice 868 of 30 May 2005 s. 49.

124. See, e.g., *Mr. Walsh t/a Wondaland Instant Law v City of Tswane Metro. Municipality* [2006] JOL 16919 (T) (S. Afr.) (damages awarded to a contractor for breach of contract by a municipality).

following grounds: (i) fraud on the part of public officials;¹²⁵ (ii) misleading statements made by an organ of state during the tender process resulting in the conclusion of a more onerous contract than anticipated;¹²⁶ and (iii) the wrongful interference by a third party (an unsuccessful bidder) in the contractual relationship between the successful bidder and the organ of state.¹²⁷ Furthermore, delictual damages could take the form of bid preparation costs and out-of-pocket expenses,¹²⁸ loss of profits,¹²⁹ and the loss of a chance to bid for or win a tender.¹³⁰

VIII. RECENT DEVELOPMENTS

The most important changes in procurement law at present revolve around the redrafting of the Procurement Act and its regulations. The aim is to bring the Act and its regulations more in line with the Broad-Based Black Economic Empowerment Act (BBBEEA),¹³¹ the aim of which is, *inter alia*, to establish a legislative framework for the promotion of black economic empowerment (BEE) in South Africa.¹³² The BBBEEA was introduced by the South African Government because even though much progress had been made since 1994, the extent to which black people (a generic term for “Africans, Coloureds, and Indians”)¹³³ participated meaningfully in the economy remained limited.¹³⁴ It was resolved that what was lacking was a comprehensive BEE strategy that drew together the various elements of the Government’s transformation program in a more coherent and focused way.¹³⁵ Most importantly, it was resolved that there was a need for a common definition and understanding of what is meant by black economic empowerment.¹³⁶

The BBBEEA allows the Minister of Trade and Industry to, *inter alia*, issue guidelines and codes of good practice on BEE and to establish a BEE

125. See *Minister of Fin. v Gore NO* [2006] SC 97 (RSA) at ¶ 1 (S. Afr.).

126. See *Rainbow Constr. (Pty) Ltd. v Gov’t of the Republic of S. Afr.* [2002] JOL 9414 (T) (S. Afr.) (recognizing the principle, but dismissing on other grounds).

127. See *GNH Office Automation CC v Provincial Tender Bd.* 1996 (9) BCLR 1144 (Tk), 1996 SA CLR LEXIS 25, *61 (S. Afr.).

128. But see *Steenkamp NO v Provincial Tender Bd. of the E. Cape*, 2007 (3) SA 121 (CC) at ¶¶ 31, 47 (S. Afr.) (holding that an unsuccessful bidder, even if initially successful, is unable to claim out-of-pocket expenses incurred subsequent to and in reliance on the award of a tender).

129. *Transnet Ltd. v Secbaba Photoscan (Pty) Ltd.* 2005 (1) SA 299 (SCA) at ¶¶ 1, 17 (S. Afr.); *CCII Sys. (Pty) Ltd. v Minister of Def.* [2006] JOL 17448 (T), at *9, *17–18 (S. Afr.).

130. For more detailed discussion and analysis, see BOLTON, *supra* note 3, at 377–83.

131. Broad-Based Black Economic Empowerment Act 53 of 2003.

132. *Id.* at “Preamble.” The BBBEEA defines broad-based black economic empowerment in section 1 as “the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include... preferential procurement.” *Id.* at 1.

133. *Id.*

134. See, e.g., *id.* at “Preamble.”

135. See, e.g., SOUTH AFRICA’S ECONOMIC TRANSFORMATION: A STRATEGY FOR BROAD-BASED BLACK ECONOMIC EMPOWERMENT 2.2.6, available at <http://www.info.gov.za/otherdocs/2003/dtistrat.pdf>.

136. *Id.* at 2.6.6.

Advisory Council to advise the president on the implementation of BEE and related matters.¹³⁷ Section 9, in particular, provides that “the Minister [of Trade and Industry] may by notice in the *Gazette* issue codes of good practice on [BEE] that may include... qualification criteria for preferential purposes for procurement and other economic activities.”¹³⁸ Section 10 then provides that “[e]very organ of state and public entity must take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of this Act in... developing and implementing a preferential procurement policy.”¹³⁹

In February 2007 codes of good practice were issued.¹⁴⁰ A “generic scorecard” measures progress made in achieving BEE by enterprises and entities and the elements of the scorecard include ownership, management control, employment equity, skills development, preferential procurement, enterprise development, and socioeconomic development initiatives.¹⁴¹ Based on the overall performance of an enterprise or entity in terms of the generic scorecard, it is awarded a BBBEE status ranging from a level 1 contributor (the best score available) to a level 8 contributor, with a noncompliant contributor earning the lowest score available.¹⁴² The idea is that organs of state will apply the BEE criteria as set out in the scorecard whenever it, for example, sells an asset of a state-owned enterprise, enters into a public-private partnership, or engages in any economic activity.¹⁴³

It is noteworthy that in October 2004, new draft procurement regulations were issued.¹⁴⁴ After their release, however, it became clear that it would be necessary to redraft the Procurement Act as well. It is reported that the new draft Procurement Act will be available for public comment as soon as Cabinet has approved the draft.¹⁴⁵

The 2004 draft regulations are worth noting because they indicate the kinds of changes that are likely to be reflected in the forthcoming draft regulations. The 2004 draft regulations incorporated the generic or balanced scorecard approach and provided that “[t]he balanced scorecard measuring [BBBEE] prescribed by the National Treasury must form part of the evaluation criteria of all bids.”¹⁴⁶ Certain core components of BBBEE were listed in the scorecards

137. See Broad-Based Black Economic Empowerment Act 53 of 2003 ss. 4–7, 9–10.

138. *Id.* s. 9.

139. *Id.* s. 10.

140. See MINISTER OF TRADE AND INDUSTRY, BROAD-BASED BLACK ECONOMIC EMPOWERMENT CODES OF GOOD PRACTICE, in GG29617 of 9 February 2007.

141. See *id.* ss. 7–8.

142. See *id.* s. 8.2.

143. See, e.g., *id.* s. 11.2.

144. General Notice 2174 of 4 October 2004.

145. Reg Rumney, *BEE's Sharpest Tool*, MAIL & GUARDIAN ONLINE, Aug. 29, 2007, http://www.mg.co.za/articlePage.aspx?articleid=317590&area=/insight/insight_economy_business/. As of April 22, 2008, the new draft Act had not been released for comment.

146. General Notice 2174 of 4 October 2004 ss. 3(2), 4(2), 5(2), 6(2) (applying the same language to various types of procurement); see also *id.* at Annexures SC1, SC2 (BBBEE balanced scorecards).

annexed to the regulations, namely equity ownership, management, employment equity, skills development, preferential procurement, enterprise development, and local content.¹⁴⁷ A weight was attached to each component and the aim was for tender submissions to be evaluated and scored on a compliance basis. The total score was out of 100, which was then converted to a maximum of 10 or 20 preference points, depending on the value of the contract.

IX. CONCLUSION

The public procurement system in South Africa is afforded constitutional status, and organs of state are obliged to comply with five principles when procuring goods or services: fairness, equity, transparency, competitiveness, and cost-effectiveness. Organs of state may also use procurement as a policy tool, in particular for the advancement of persons or categories of persons disadvantaged by unfair discrimination. Different legislation applies to public procurement procedures, all of which aim to ensure that effect is given to the Procurement Clause and the principles therein. Aggrieved parties also have recourse to the private law of contract, delict, or the law of judicial review to challenge procurement procedures. In an application for judicial review, procurement procedures can be challenged on the grounds of lawfulness, reasonableness, or procedural fairness. Aggrieved parties can also challenge procurement decisions on the basis of the reasons given for such decisions.

The procurement methods employed by organs of state are determined by the value of contracts; the higher the value of contracts, the more formal procurement procedures should be. Provision is, however, made for exceptions to the prescribed use of tender procedures. Most importantly, organs of state need not call for tenders if doing so is impractical, if they are faced with emergencies, or if there is only one provider for the particular goods or service. Strict rules apply to qualification and participation, particularly in the context of exclusion for the nonpayment of taxes and municipal service charges, unsatisfactory performance under a previous contract, noncompliance with labor laws, failure to comply with conditions of contract relating to subcontractors and joint ventures, and fraud or corruption in relation to procurement. Little guidance is given on the different factors that organs of state may take account of when evaluating tenders (reference is generally made to the “capability or ability” of a contractor to perform) though extensive rules apply to the award of preferences during the award stage.

The use of preferences in the procurement process is, however, undergoing significant changes. The aim is to bring the current preference system more in line with the BBEEA, the aim of which is, *inter alia*, to establish a legislative framework for the promotion of black economic empowerment in South Africa.

147. See DRAFT REGULATIONS Annexures SC1, SC2.