


An Analysis of the Preferential Procurement Legislation in South Africa

Phoebe Bolton*

 [keywords to follow]

1. Introduction

Prior to 1994, price was the overriding criterion for the procurement of goods and services by the South African Government. Tenders were awarded strictly based on price and the tenderer who submitted the lowest tender (in terms of price) was only overlooked:

“when there [was] clear evidence that he [did] not have the necessary experience or capacity to undertake the work or [was] financially unsound”.¹

Thus, only if there was a high risk that the lowest tenderer would not complete the contract, was the tender awarded to another tenderer.

With the coming into effect of the 1993 and 1996 Constitutions,² the practice of awarding tenders strictly based on price has to a large extent changed. The 1996 Constitution, in particular, provides that organs of state must procure goods or services in a manner that is “equitable”.³ Organs of state are also not prevented from implementing a procurement policy providing for categories of preference in the allocation of contracts, and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.⁴ National legislation must further prescribe a framework for the implementation of policies.⁵ Even though price, therefore, is still a very important criterion for the procurement of goods and services,⁶ it is no longer the decisive criterion in South Africa. The practice of accepting the lowest tenderer in terms of price only was described in the Green Paper on public sector procurement reform (discussed in greater detail below)⁷ as “inflexible” in the sense that

* University of the Western Cape, South Africa. This paper is based in large part on sections of the author’s unpublished doctoral thesis, *The Legal Regulation of Government Procurement in South Africa* (University of the Western Cape, South Africa, 2005). For a broad overview of the preferential procurement legislation in place in South Africa, and the impact of the notions of equality and cost-effectiveness on the use of procurement as a policy tool, see Bolton, “Government Procurement as a Policy Tool in South Africa” (2006) *Journal of Public Procurement* (forthcoming).

¹ Ministry of Finance and Public Works, Green Paper on Public Sector Procurement Reform in South Africa, *Government Gazette* No.17928, April 14, 1997 (Green Paper on Public Sector Procurement Reform), cl.3.4.1.

² Constitution of the Republic of South Africa 200 of 1993; Constitution of the Republic of South Africa 108 of 1996.

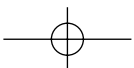
³ s.217(1).

⁴ s.217(2).

⁵ s.217(3).

⁶ *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* [1999] 1 S.A. 324, Ck, p.351G–H; *South African Post Office Ltd v Chairperson, Western Cape Provincial Tender Board* [2001] 2 S.A. 675, C, at [13].

⁷ At section 3.2.



it “restrict[s] the degree to which the smaller enterprises can access the process”.⁸ The specification of unnecessarily high standards in tender advertisements for goods or services is also recognised at local government level (not at national and provincial government level though) as possibly having the effect of discouraging or excluding small firms from tendering.⁹ In South Africa, government procurement has been recognised as a tool to correct South Africa’s history of unfair discriminatory policies and practices. Due to past discriminatory policies and practices, various groups were denied the privilege of being economically active within the government procurement system. Prior to 1994, the majority of state contracts were awarded to large white owned businesses and it was very difficult for newly established businesses to enter the procurement system. When procuring goods and services, organs of state are today required to take account of a number of factors when awarding contracts. It is particularly the notion of “empowerment” that plays an important role in determining whether or not a contract is awarded to a particular contractor. A contractor’s ranking in respect of its achievement of socio-economic objectives plays a significant role in the selection process.

The aim of this article is to analyse the way in which the South African Government has legislated the use of government procurement as a policy tool. First, the way in which the Constitution makes provision for the use of procurement as a policy tool will be examined. Next, policy initiatives prior to the drafting and enactment of the national legislation dealing with procurement as a policy tool will be enquired into. The eventual enactment of the national legislation, i.e. the Preferential Procurement Policy Framework Act (Procurement Act)¹⁰ will then be given a more detailed analysis. The Regulations that were promulgated to give substance to the Act will also be examined.¹¹ These (2001) Regulations are currently in the process of being redrafted. The aim is to bring the Regulations more in line with the Broad-Based Black Economic Empowerment Act (BBBEEA),¹² the aim of which is, inter alia, “[t]o establish a legislative framework for the promotion of black economic empowerment [BEE]” in South Africa.¹³ The BBBEEA was introduced by 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)¹⁴ participated meaningfully in the economy remained limited. It was resolved that what was lacking was a comprehensive BEE strategy that drew together the various elements of the government’s transformation programme in a more coherent and focused way. Most importantly, it was resolved that there was a need for a common definition and understanding of what is meant by BEE.¹⁵

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 Advisory Council to advise the President on the implementation of BEE and related matters. A “balanced scorecard” will be used to measure progress made in achieving BEE by enterprises and sectors and will measure three core elements of

⁸ cl.3.4.4.

⁹ Local Government: Municipal Finance Management Act 2003: Municipal Supply Chain Management Regulations, reg.27(2)(e), *Government Gazette* No.27636, May 30, 2005.

¹⁰ 5 of 2000.

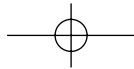
¹¹ Preferential Procurement Regulations, Government Notice R725, *Government Gazette* No.22549, August 10, 2001.

¹² 53 of 2003.

¹³ See the Preamble to the Act.

¹⁴ BBBEEA, s.1.

¹⁵ See “South Africa’s Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment” available at <http://64.233.183.104/search?q=cache:B9B4i2vSBkj:www.info.gov.za/otherdocs/2003/dtistrat.pdf+South+Africa%E2%80%99s+Economic+Transformation:+A+Strategy+for+Broad-Based+Black+Economic+Empowerment&hl=en&gl=za&ct=clnk&cd=1> (accessed: July 8, 2006).



BEE: direct empowerment through ownership and control of enterprises and assets; human resource development and employment equity; and indirect empowerment through preferential procurement and enterprise development. The scorecard will be issued as a code of good practice and is, at present, (July 12, 2006) in draft form.¹⁶ The idea is that the government will apply 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 (PPP), or engages in any economic activity.

The new draft Procurement Regulations¹⁷ incorporate the balanced scorecard approach and provide that “[t]he balanced scorecard measuring [BBBEE] prescribed by the National Treasury must form part of the evaluation criteria of all bids”.¹⁸ Certain core components of BBBEE are listed in the scorecards annexed to the Regulations, i.e. equity ownership, management, employment equity, skills development, preferential procurement, enterprise development and local content.¹⁹ A weighting is attached to each component and the aim is for tender submissions to be evaluated and scored on a compliance/non-compliance basis. The total score is out of 100, which is then reduced to a maximum of 10 or 20 points (depending on the value of the contract) for preference in the award of government contracts. At the completion of this research (July 12, 2006), however, the codes of good practice issued by the Department of Trade and Industry, including the balanced scorecard, were still in draft form.²⁰ The new Procurement Regulations are also still in draft form. The focus of this article is thus on the promulgated Regulations of 2001. At times, however, reference will be made to the new draft Regulations in order to highlight key differences between the draft Regulations and the current (2001) Regulations.

The Public Finance Management Act (PFMA),²¹ the Local Government: Municipal Finance Management Act (MFMA)²² and the Local Government: Municipal Systems Act (Municipal Systems Act)²³ also make provision for the use of procurement as a policy tool in South Africa. The relevant provisions, however, mostly reiterate the constitutionally prescribed use of procurement as a policy tool without going into any further detail. Consistent reference is further made to the relevant

¹⁶ See the BBBEE Guidelines “Codes of Good Practice on B-B BEE” Second Phase—available at www.dti.org.za (accessed: July 8, 2006). According to press coverage, “the codes will be out by August [2006]” (D. Mametse “BEE codes out in August” July 12, 2006—available at www.moneyweb.co.za (accessed: July 13, 2006)). There does, however, appear to be much controversy still regarding the finalisation of the codes. It is reported that private sector stakeholders are becoming increasingly concerned about the complexity of the codes and their implications for the economy. It is thought that the scorecard targets are “unrealistically high” and may not be attainable within the required time-frames. There is also concern that the administrative burden on enterprises is likely to be enormous, and would require the dedicated services of professionals with legal and technical background (M. le Roux “Mpahlwa, business to clarify BEE codes” July 11, 2006—available at www.businessday.co.za (accessed: July 11, 2006)).

¹⁷ Preferential Procurement Policy Framework Act 2000 (Act No.5 of 2000): Draft Preferential Procurement Regulations, *Government Gazette* No.26863, October 4, 2004.

¹⁸ Draft Regulations 3(2), 4(2), 5(2) and 6(2). See also Annexures SC1 and SC2.

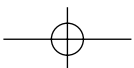
¹⁹ See Annexures SC1 and SC2 of the draft Regulations.

²⁰ For more information on the codes of good practice, visit www.thedti.gov.za.

²¹ 1 of 1999 (as amended by Act 29 of 1999). See, in particular, regs 16A3.2a-c and 16A8.3(b) of the National Treasury: Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities: Issued in terms of the Public Finance Management Act 1999, *Government Gazette* No.27388, March 15, 2005; and para.5.1 of the National Treasury: Supply Chain Management Office, Practice Note Number SCM 2 of 2005 “Threshold Values for the Procurement of Goods and Services by Means of Petty Cash, Verbal/Written Price Quotations and Competitive Bids”—available at www.treasury.gov.za/showpfma.htm—click on “Treasury Practice Notes” and then on “Supply Chain Management Practice Notes” (confirmed access: April 14, 2006).

²² 56 of 2003. See Ch.11 of the Act and reg.46(2)(a) of the Local Government: Municipal Finance Management Act 2003: Municipal Supply Chain Management Regulations, *Government Gazette* No.27636, May 30, 2005.

²³ 32 of 2000 (as amended by Act 44 of 2003). See ss.83(1)(e), 83(2) and 83(3).



provisions in the Procurement Act and Regulations. The primary legislation dealing with government procurement as a policy tool in South Africa is thus the Procurement Act and Regulations. The focus of this article is, accordingly, on the Procurement Act and Regulations.

2. Constitutional framework

2.1 Overview

Even though both the 1993 Constitution (in s.187) and the 1996 Constitution (in s.217) recognise government procurement as a constitutional principle, it is only the 1996 Constitution that makes express provision for the use of procurement as a policy tool. This (making express provision for the use of procurement as a policy tool in a country's constitution) is not common practice. The fact that it has been done in South Africa's Constitution serves to illustrate the importance attached to the use of procurement as a tool to correct past imbalances and to uplift vulnerable groups in society.

The most important provision in the Constitution that deals with government procurement and specifically its use as a policy tool is s.217. Subsection (1) provides that when organs of state contract for goods or services, they must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Subsection (2) provides that:

“[s]ubsection (1) does not prevent [organs of state] 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”.

Subsection (3) then provides that “[n]ational legislation must prescribe a framework within which the policy referred to in subsection (2) *must* be implemented”.²⁴

Broadly speaking therefore, s.217 makes provision for the use of procurement as a policy tool. It allows organs of state to make use of “affirmative procurement”, “preferential procurement” or “targeted procurement” during the award stage of the government procurement process.²⁵ Section 217 reflects the broader notion of equality in South Africa, i.e. a substantive conception of equality. The Constitutional Court has held that the right to equality in the 1993 and 1996 Constitutions refers to a “substantive” conception of equality as opposed to a “formal” conception of equality.²⁶ The actual economic and social circumstances of individuals should be taken into account when

²⁴ Emphasis added.

²⁵ On “targeted procurement”, see Watermeyer “The Use of Targeted Procurement as an Instrument of Poverty Alleviation and Job Creation in Infrastructure Projects” (2000) 9 P.P.L.R. 226; www.targetedprocurement.com/. There are also other mechanisms that may be employed for the use of procurement as a policy tool, for example, set-asides; offer-back; contract conditions; and preferences in choosing providers to participate. In the South African context however, and as will be evident from the rest of the article, preference may only be afforded to contractors during the award stage of the government procurement process. Most importantly, organs of state are not allowed to make use of “set-asides” in the award of contracts. On the different mechanisms that may be employed for the use of procurement as a policy tool, see Arrowsmith, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2nd edn., 2005), Ch.19; Arrowsmith, Linarelli and Wallace, *Regulating Public Procurement: National and International Perspectives* (2000), Ch.5.

²⁶ *President of the Republic of South Africa v Hugo* [1997] 6 B.C.L.R. 708, CC; *Harksen v Lane NO* [1997] 11 B.C.L.R. 1489, CC; *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] 12 B.C.L.R. 1517, CC; *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs* [2004] 4 S.A. 490, CC.

reading s.9 of the Constitution.²⁷ The section should be interpreted as “[encompassing] the need to remedy inequality as well as to remove discrimination, to give in the present that which was unjustly withheld in the past, and to restore in the present what was wrongly taken in the past”.²⁸ A substantive conception of equality therefore means that affording preferential treatment in the award of government contracts is not unconstitutional because affirmative action, and thus affirmative procurement, has been integrated into the right to equality—it is not a departure therefrom. Section 9(2) of the Constitution also provides that:

“[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken”.

Thus, in terms of a substantive conception of equality, it cannot be presupposed, as is the case in terms of a formal conception of equality, that all persons in South Africa are equal bearers of rights and that the inequalities of the past can be eliminated by simply extending the same rights and entitlements to all in accordance with the same “neutral” norms or standards. The actual social and economic disparities between groups and individuals in South Africa cannot be ignored. Due to South Africa’s history of discrimination, unfair practices and marginalisation of people, various groups in society were denied the privilege of being economically active within the government procurement system. Affording preferences to previously disadvantaged groups in the award of government contracts therefore does not infringe on the right to equality. As pointed out by Albertyn and Kentridge,²⁹

“the right to equality acknowledges and accommodates group differences and encompasses the right to *reparation* for past inequality. Only if it is understood in this way is equality equal to the task of reconstruction and reconciliation”.³⁰

It is further important for the right to equality to be read in light of the underlying values of the Constitution and in light of the task which the Constitution sets out to accomplish, *i.e.* to:

²⁷ s.9 provides that “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair”.

²⁸ Albertyn and Kentridge “Introducing the Right to Equality in the Interim Constitution” (1994) 10 *South African Journal on Human Rights* 149 at 152.

²⁹ *ibid.*, at p.178.

³⁰ Emphasis added. See also the Constitutional Court case of *Brink v Kitshoff NO* [1996] 4 S.A. 197, CC, at [40] where the Court noted that “[o]ur history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all respects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as ‘white’, which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted”.

“Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations”.³¹

The reality, unfortunately, is that even though much progress has been made since 1994, racial inequality and both conscious and unconscious racial discrimination still persist in South Africa. This is evident in places of work, different areas and neighbourhoods, and also the marketplace. Applicants for employment may have similar qualifications but still experience different treatment depending on their race. Black people looking for housing face discriminatory treatment by landlords and real estate agents, and white and black consumers still encounter different deals. This kind of bias, whether conscious or unconscious, reflects conventional and unexamined habits of thinking and serves as obstacles to equal opportunity and non-discrimination. In the South African context, therefore, the use of affirmative procurement is justified.³²

2.2 Obligation to use procurement as a policy tool

Section 217(2) of the Constitution does not place organs of state under an obligation to implement a preferential procurement policy. Section 217(2) simply provides that organs of state are not “prevented” from using procurement as a policy tool. This should not be cause for concern. The Constitution is meant to govern the country in the long term and procurement is not intended to be used as a policy tool indefinitely. The aim, in South Africa, is (simply) to use procurement as a means to address *past* discriminatory policies and practices. The use of procurement is thus an interim measure. There is, accordingly, no need for the Constitution to make the use of procurement as a policy tool obligatory for organs of state. This should, instead, be left to legislation—examined in greater detail below.³³

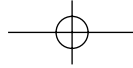
After the recent amendment of s.217(3), organs of state who implement a preferential procurement policy are also obliged to do so *in accordance with* the national legislation referred to in s.217(3), i.e. the Procurement Act. This is because s.217(3) has been amended by the Constitution of the Republic of South Africa Second Amendment Act³⁴ and the word “must” has been substituted for the word “may”. Before proceeding to examine the precise nature and content of the Procurement Act, a brief overview will be given of policy initiatives that preceded the enactment of the Procurement Act.

³¹ Preamble to the 1996 Constitution.

³² See also *Minister of Finance v Van Heerden* [2004] 11 B.C.L.R. 1125, CC. The government implemented a five-year affirmative action plan in terms of which it reduced its contributions to the pensions of Ministers of Parliament who were part of the apartheid era tricameral parliament. This was done in an effort to “distribute available funds in an equal manner”. The question before the Court was whether the plan was unconstitutional. The Constitutional Court held that the plan passed muster as a restitutionary measure under s.9(2) of the Constitution. It was directed at achieving equality between old and new parliamentarians, the overwhelming majority of whom had been disadvantaged by past unfair discrimination and exclusion. The measure was, accordingly, not unfairly discriminatory.

³³ At 4.2.1.

³⁴ 61 of 2001.



3. Policy initiatives prior to the Procurement Act

With the abolishment of apartheid in 1994, the government embarked upon a reform process of the government procurement system.³⁵ In February 1995, a joint initiative was embarked upon by the Ministries of Finance and Public Works with the aim of transforming South Africa's public sector procurement policy and systems. A review of existing procurement policies and systems highlighted the skewed nature of government contract awards to large and established companies. Participation by small and medium businesses, particularly businesses owned by previously disadvantaged individuals, was also negligible. The transformation of the public sector procurement system involved two concurrent approaches. First, it was necessary to develop a new procurement policy that was linked to legislative reform and secondly, a series of interim strategies had to be developed and implemented in the interim period. The first approach resulted in the Green Paper on Public Sector Procurement Reform and the second approach in the Interim 10-Point Plan on Procurement.³⁶

3.1 Interim 10-Point Plan on Procurement

To give effect to the new policy role of government procurement in South Africa, the government embarked upon a reform process of the government procurement system which started with a 10-point plan in November 1995.³⁷ The aim of the plan was to provide interim or temporary procurement strategies until the enactment of national legislation (the Procurement Act) that were in line with existing legislation but at the same time accommodated the objectives of the Reconstruction and Development Programme (RDP). The plan included the following measures:

- the improvement of access to tendering information;
- the development of tender advice centres;
- the broadening of a participation base for small contracts (less than R7,500);
- the waiving of security/sureties on construction contracts with a value less than R100,000;
- the unbundling or unpacking of large projects into smaller projects³⁸;
- the promotion of early payment cycles by government;
- the development of a preference system for Small, Medium and Micro Enterprises (SMMEs) owned by historically disadvantaged individuals (HDI)s³⁹;

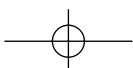
³⁵ The development of contractors from disadvantaged communities commenced in the mid-1980s already. Most programmes were run in the former homelands and originally focused on housing projects. Some of the identifiable programmes included the Soweto Contractor Development Programme and the Department of Public Service and Administration's Contractor Development Programme (Manchidi and Harmond "Targeted Procurement in the Republic of South Africa: Independent Assessment" Report for the Department of Public Works, the Development Bank of Southern Africa and the International Labour Organization, April 2002, p.19). See also Watermeyer, "Soweto's Contractor Development Programme: 1988-1998" 1999—available at www.targetedprocurement.co.za/p (accessed: July 13, 2006).

³⁶ See Letchmiah, "The Process of Public Sector Procurement Reform in South Africa" (1999) 8 P.P.L.R. 15; Rogerson, "Pro-Poor Local Economic Development in South Africa: The Application of Public Procurement" (2004) 15 *Urban Forum* 180.

³⁷ Ministries of Finance and Public Works, The Procurement Task Team: An Initiative of the Ministries of Finance and Public Works, *Interim Strategies: Public Sector Procurement Reform in South Africa: A 10-Point Plan* (November 29, 1995)—available at www.targetedprocurement.com/papers/general/10PointPlan.PDF (confirmed access: April 14, 2006).

³⁸ The unbundling of contracts allows emerging contractors to gain the practical experience that would generally be denied to them when working as a subcontractor under an established contractor.

³⁹ The definition of an HDI is examined below at 4.4.2.



- the simplification of tender submission requirements;
- the appointment of a procurement ombudsman; and
- the classification of building and engineering contracts.

The above measures were thus aimed at increasing the participation of SMMEs with the emphasis on the disadvantaged and marginalised sectors of society and the unemployed.

3.2 Green Paper on public sector procurement reform

In April 1997, the Green Paper on public sector procurement reform was released and contained all the principles of the 10-point plan. Some of its main principles and proposals included easier access to tendering information; the simplification of tender documents; breakout procurement (unbundling or the use of smaller contracts); and the award of tenders in terms of a development objective. A further proposal included the drafting of an affirmative procurement policy with its essential characteristics being the use of targeted procurement to achieve socio-economic objectives and the specific targeting of groups in accordance with national policy objectives. Further suggestions included consistent and uniform definitions, strategies, monitoring and reporting mechanisms to realise policy objectives. It was particularly the emphasis given to monitoring, enforcement and evaluation which distinguished the Green Paper from other countries' procurement policies.⁴⁰ In February 2000, effect was finally given to s.217(3) of the Constitution with the promulgation of the Procurement Act.

4. The Procurement Act and Regulations

The purpose of the Procurement Act is:

“[t]o give 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; and to provide for matters connected therewith”.⁴¹

The aim of the Act is in other words to, inter alia, enhance the participation of HDIs and SMMEs in the public sector procurement system. Section 5(1) of the 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”.

The Regulations to the Procurement Act, as will be evident from the discussion below, are much more detailed than the Procurement Act itself because they lay down the manner in which the preferential procurement framework created by the Act should operate. A number of questions nevertheless arise. They relate to, inter alia, the scope of application of the Procurement Act and Regulations; the implementation of preferential procurement policies; the use of a preference point system; and the specific goals to be achieved by organs of state when awarding contracts. Other questions relate to the award of preference points for “equity ownership” and “RDP” goals; notification to tenderers of the attainment of “specific goals”; exceptions to the award of a tender to a tenderer who scores the highest points; and the imposition of penalties.

⁴⁰ See also Arrowsmith, Linarelli and Wallace, cited above, at Ch.5.

⁴¹ Preamble to the Procurement Act.

4.1 Scope of application

The Procurement Act applies to all “organs of state” that are defined therein. Section 1(iii) defines an organ of state as:

- (a) a national or provincial department as defined in the [PFMA];
- (b) a municipality as contemplated in the Constitution;
- (c) a constitutional institution as defined in the [PFMA];
- (d) Parliament;
- (e) a provincial legislature;
- (f) *any* other institution or category of institution included in the definition of “organ of state” in s.239 of the Constitution and recognised by the Minister [of Finance] by notice in the *Government Gazette* as an institution to which this Act applies.⁴²

One of the difficulties with the application of s.1(iii) of the Procurement Act is that even though, in terms of subsection (f), the Minister has the power to recognise those “other” institutions included in s.239 of the Constitution by means of a notice in the *Government Gazette*, this has, as yet, not been done.⁴³ 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 laid down in s.217(1) of the Constitution. Institutions like municipal entities⁴⁴ and public entities⁴⁵ are, strictly speaking therefore, excluded from the operation of the Act.⁴⁶

Parastatals (institutions which are directly or indirectly controlled by the state, for example, Transnet, Eskom and Telkom) are also, even though they are organs of state in terms of s.239 of the Constitution, not regarded as organs of state for the purposes of the Procurement Act. The reasoning behind this appears to be that parastatals are involved with strategic developmental delivery

⁴² Emphasis original. Section 239 of the Constitution provides that “[i]n the Constitution, unless the context indicates otherwise ‘organ of state’ means (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”.

⁴³ This is based on a search conducted on LexisNexis, Butterworths (available at <http://butterworths.uwc.ac.za>) on April 14, 2006. See also Penfold and Reyburn “Public Procurement” in *Constitutional Law of South Africa* (M. Chaskalson, M. Kentridge, J. Klaaren, J. Marcus, G. Spitz, D. Steyn, and S. Moolman eds, 2nd edn., 2003), p.25-15.

⁴⁴ A municipal entity is defined in s.1 of the Municipal Systems Act (as amended by Act 44 of 2003) as “(a) a private company [established by one or more municipalities or in which one or more municipalities have acquired or hold an interest]; (b) a service utility; or (c) a multi-jurisdictional service utility”. A service utility, in turn, refers to a body established under s.86H of the Act and, a multi-jurisdictional service utility refers to a body established under s.87 of the Act. The notion of ownership control by the state therefore appears to be the overriding criterion.

⁴⁵ The PFMA draws a distinction between “national” and “provincial” public entities. A “national” public entity is defined in s.1 as “(a) a national government business enterprise; or (b) a board, commission, company, corporation, fund or other entity (other than a national government business) 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”. A “provincial” public entity is defined in s.1 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 (c) [is] accountable to a provincial legislature”.

⁴⁶ See, however, reg.2(1) of the new draft Procurement Regulations which provides for the application of the Regulations also to “public entities listed in schedules 3A and 3C to the [PFMA]”. Dekker, “New Procurement Regulations Cause Upset” (2005) 30 I.M.I.E.S.A. 47, argues that public entities listed in Schs 2 and 3B should also fall within the scope of the draft Regulations.

and this should not be impeded; parastatals need flexibility with regard to the implementation of their affirmative procurement programmes.⁴⁷ In the case of *Fidelity Springbok Security Services (Pty) Ltd v South Africa Post Office Ltd*,⁴⁸ however, the court appears to have been of the view that a parastatal (the South African Post Office Ltd) could be regarded as an organ of state for the purposes of the Procurement Act. The plaintiff argued that a valid oral contract had been concluded between itself and the defendant (the South African Post Office Ltd) in terms of which the existing contract between them was renewed—the plaintiff would continue to render security services to the defendant.⁴⁹ The defendant, however, argued that as an organ of state within the meaning of s.239 of the Constitution and the Procurement Act, it was bound to contract in accordance with a “constitutionally compulsory tender process” and “follow a clear precise procedure when it requests services to be rendered on its behalf”.⁵⁰ The defendant thus argued that the agreement in question was invalid.

The plaintiff argued that the defendant is not an organ of state for the purposes of the Procurement Act because, even though the defendant is an organ of state in terms of s.239 of the Constitution, it has not been recognised by the Minister by notice in the *Government Gazette* as an institution or category of institutions to which the Procurement Act applies. The Procurement Act therefore does not apply to the defendant and the court should accordingly find that s.217 of the Constitution similarly does not apply to the defendant.⁵¹ Motata J. disagreed and held as follows:

“Clearly the South African Post Office Ltd is a parastatal wherein the provisions of section 217 of the Constitution read with the [Procurement] Act enjoin and/or prescribe to the defendant to conduct and/or act in a specified manner when it wants services to be rendered for it. This is the domain of the defendant as adumbrated by the statutory provisions (. . .). Section 217 of the Constitution is a constitutional provision and has to be complied with (. . .). The South African Post Office Ltd is an organ of State and as such falls within the provisions of the Constitution read with the [Procurement] Act”.⁵²

The court accordingly held that the agreement in question was invalid. Of importance, is that the court appears to have been of the view that the defendant, as a parastatal, could be regarded as an organ of state for the purposes of the Procurement Act. As noted, parastatals, even though they are organs of state in terms of s.239 of the Constitution, are not bound by the Procurement Act. The decision in *Fidelity Springbok Security Services* should therefore be regarded as wrong. The South African Post Office Ltd is an organ of state in terms of the Constitution but not the Procurement Act.

Those institutions that are regarded as “organs of state” for the purposes of the Procurement Act are, in terms of s.3 of the Act, entitled to request the Minister of Finance to be exempted from the application of the Act. This may, however, only be done if “(a) it is in the interests of national security; (b) the likely tenderers are international suppliers; or (c) it is in the public interest”. Organs of state can, therefore, only request exemption in certain set circumstances and also only in respect of certain provisions of the Procurement Act. Contractors cannot, for example, request a “permanent”

⁴⁷ Parliamentary Monitoring Group, Minutes of the Joint Meeting of the Finance Portfolio Committee and the Finance Select Committee, held on January 12, 2000, to discuss the Preferential Procurement Policy Framework Bill; available at www.pmg.org.za—click on “The PMG Archives: July 1999 to mid-2000”—confirmed access: October 28, 2005.

⁴⁸ [2004] J.O.L. 13215, T.

⁴⁹ *ibid.*, paras 7–8.

⁵⁰ *ibid.*, para.11.

⁵¹ *ibid.*, para.15.

⁵² At paras 15–16, *fn.* omitted, emphasis added.

or “lasting” exemption. This would in any event defeat the purpose of having national legislation that, in terms of s.217(3) of the Constitution, “*must* prescribe a framework” for the implementation of the procurement policy contemplated in s.217(2) of the Constitution.⁵³ Clearly, 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.⁵⁴

Section 2 of the Procurement Act prescribes a framework within which an organ of state must implement a preferential procurement policy. The precise meaning to be given to the whole of s.2, however, gives rise to difficulty.

4.2 Implementation of preferential procurement policies

Section 2(1) of the Procurement Act provides that an organ of state “must” determine its preferential procurement policy and implement it “within” the framework provided for in the Act. Two questions arise in this regard: (1) does an organ of state have discretion to implement a preferential procurement policy? and (2) do contractors from designated or target groups have a right to be afforded preferential treatment? Controversy also surrounds the obligation on organs of state to use the framework provided in the Procurement Act for the implementation of policies.

4.2.1 Obligation or discretion to implement policy

As noted in 2.2 above, s.217(2) of the Constitution does not oblige organs of state to implement a preferential procurement policy. It only provides that organs of state are not “prevented” from implementing a preferential procurement policy. Section 2(1) of the Procurement Act, however, obliges organs of state to implement a preferential procurement policy. It provides that “[a]n organ of state *must* determine its preferential procurement policy and implement it within [the framework provided for in the Act]”.⁵⁵

The compulsory nature of s.2(1) of the Procurement Act can be commended. True reform of the South African Government procurement system can only take place if organs of state have little (if any) discretion on whether or not to implement a preferential procurement policy. Chapter III of the Employment Equity Act (EEA)⁵⁶ also makes it compulsory for organs of state as “designated employers” to implement affirmative action measures in their workplaces; they do not have discretion in this regard.⁵⁷ Recent constitutional jurisprudence dealing with affirmative action measures also serves to illustrate that the implementation of preferential procurement policies should not be left to the discretion of organs of state. In the words of Ngcobo J. in *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs*,⁵⁸

“[t]he achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of

⁵³ Emphasis added.

⁵⁴ Penfold and Reyburn, cited above, p.25-15, fn. omitted.

⁵⁵ Emphasis added.

⁵⁶ 55 of 1998.

⁵⁷ The meaning of a “designated employer” is defined in s.1 of the EEA as including, inter alia, “a municipality” and “an organ of state as defined in s.239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service”.

⁵⁸ Cited above, at [74].

our society to one ‘in which there is equality between men and women and people of all races’. In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without *positive action* being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a *commitment* to end it”.⁵⁹

It is submitted therefore that based on constitutional jurisprudence, the use of the word “must” in s.2(1) of the Procurement Act, and in view of Ch.III of the EEA which obliges organs of state (as employers) to implement affirmative action measures, all organs of state (as contracting entities) should be and are correctly obligated to use procurement as a policy tool.⁶⁰

4.2.2 A right or entitlement to preferential treatment

Do contractors from designated or target groups have a right to be afforded preferential treatment? Can they claim an entitlement to affirmative procurement?

It is only logical that contractors from target groups should not be entitled to be awarded government contracts simply because they fall within a specific target group. Section 217(1) of the Constitution lays down five principles that must be complied with when organs of state contract for goods or services: fairness, equity, transparency, competitiveness and cost-effectiveness. Even though the principle of equity, in particular, cannot be ignored when organs of state contract for goods or services, the principle (of equity) is only one of the five principles. It must be balanced with the other principles and the weight afforded to it will be determined by the facts and circumstances of the particular case. Also, as explained in greater detail below,⁶¹ in so far as selecting a winning contractor is concerned, equity only accounts for a maximum of 10 or 20 points (out of 100) in the actual award of contracts. Whether or not a particular contractor will be awarded a contract is therefore determined by the number of points awarded to it out of 100, the notion of equity only accounting for a maximum of 10 or 20 points depending on the value of the contract. Contractors who fall within a specific target group are thus not entitled to be awarded government contracts simply because they fall within a specific target group.⁶²

An unsuccessful contractor does, however, have the right to ask a court to compel an organ of state to implement or follow its preferential procurement policy when awarding contracts. In a recent Johannesburg Equality Court case, a government department was taken to court to account for whether affirmative procurement policies had been followed in the way it awards contracts. It is reported to be the first time that a government department had been taken to court to account

⁵⁹ Footnote omitted, emphasis added—referring to the Preamble of the 1993 Constitution.

⁶⁰ See also the Parliamentary Monitoring Group Minutes of the Joint Meetings of the Finance Portfolio Committee and the Finance Select Committee on January 12 and 18, 2000 at which the Procurement Bill was considered. The intention appears to have been that “every” organ of state “must” implement a preferential procurement policy. The same intention appears to flow from the opinion provided by the Principal State Law Advisor and the opinion on behalf of the Ministry of Finance (drafted by H. Cheadle, N. Haysom and M. Taylor) at the meeting of January 18, 2000.

⁶¹ At 4.3.

⁶² See also *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province*, cited above (discussed in greater detail below—at 4.2.3) where the court held that even though the use of procurement as a policy tool is important in South African law, such use does not override other considerations such as fairness and competitiveness.

for whether affirmative procurement policies had been followed in the award of contracts. The court found the Gauteng Transport and the Public Works Department (Gautrans) guilty of favouring large white firms at the expense of black owned businesses, despite the Department's affirmative procurement policies. The case was decided in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act.⁶³

4.2.3 Obligation to use framework in Procurement Act

Section 2(1) of the Procurement Act provides that an organ of state must determine its preferential procurement policy and implement it "within" the framework provided for in the Act. A similar provision is contained in reg.2(2).⁶⁴ The fact that organs of state are obliged to use the framework provided in the Procurement Act and Regulations for the implementation of preferential procurement policies may give rise to controversy. As Penfold and Reyburn⁶⁵ point out, an organ of state cannot use a system that is "more generous to HDIs than that established by the [Procurement Act] and Regulations" or that is "different but equivalent" to the framework provided for in the Act and Regulations. The writers therefore argue that reg.8882(2) in particular is "fairly restrictive". They argue that there are organs of state that:

"are eager to promote the implementation of social and economic objectives (through the award of contracts to HDIs) to a greater extent than is permitted by the preference points system provided for in the [Procurement Act]".

It is submitted that s.2(1) of the Procurement Act and reg.2(2) serve to illustrate the importance attached to the attainment of value for money or cost-effectiveness in the government procurement process. Even though price is no longer the sole criterion for the award of government contracts, it remains, and should remain, the most important criteria.⁶⁶ The court in *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province*⁶⁷ emphasised the importance of value for money in the government procurement process. In this case, the tender board awarded a contract to a tenderer who quoted roughly R200 million more than other tenderers and justified the award on the ground of factors related to the RDP. The court held that using procurement as a policy tool is important but its use should not be elevated to such a degree that it goes beyond even that which the government intended

⁶³ 4 of 2000. See F-N. Moya "Gauteng accused of favouring whites" *Mail & Guardian*, June 18-24, 2004, p.6; S. Timm, "Landmark court victory for owner in race case" September 11, 2004—available at www.businessowner.co.za; F-N. Moya, "Gautrans favours white firm" *Mail & Guardian*, October 15-21, 2004, p.7.

⁶⁴ reg.2(2) provides that unless the Minister of Finance has directed otherwise, organs of state are obliged to use a preferential procurement system "only" in accordance with the Procurement Act and Regulations. An exception is, however, contained in reg.2(3)—an organ of state "may deviate from the framework contemplated in section 2 of the [Procurement] Act in respect of (. . .) pre-determined tariff based professional appointments". This exception is omitted from the new draft Procurement Regulations (see draft reg.2). Dekker ("New Procurement Regulations Cause Upset" (2005) 30 I.M.I.E.S.A. 47 at 48) suggests that a Regulation similar to the current reg.2(3) should be retained to enable the appointment of consultants based on approved tariffs.

⁶⁵ Cited above, pp.25-19-25-20.

⁶⁶ The objectives of competition law in South Africa are also, first and foremost, "to promote the efficiency, adaptability and development of the economy" and "to provide consumers with competitive prices and product choices" (ss.2(a) and 2(b) of the Competition Act 89 of 1998). "Secondary" objectives are listed to include the promotion of employment and the advancement of economic welfare; the enhanced participation of small and medium-sized enterprises; and the extension of ownership, particularly in favour of HDIs (ss.2(c), 2(e) and 2(f)).

⁶⁷ [1999] 1 S.A. 324, Ck.

it to be.⁶⁸ It is untenable to award a contract to a tenderer who quotes approximately R200 million more than other tenderers and to justify this on ideological grounds.⁶⁹ The use of procurement as a policy tool does not override other considerations such as fairness and competitiveness.⁷⁰ The court set aside the award of the tender and ordered that new tenders be called for.⁷¹

There may, admittedly, be organs of state that:

“are eager to promote the implementation of social and economic objectives (through the award of contracts to HDIs) to a greater extent than is permitted by the preference points system provided for in the [Procurement Act]”.⁷²

The contrary may, however, also be true. There may be organs of state that would prefer to afford less (if any) preferential treatment than that prescribed by the Procurement Act and Regulations.⁷³ The “restrictive” nature of s.2(1) and reg.2(2), to a large extent, therefore serves to ensure uniformity in the use of procurement as a policy tool in South Africa which, in turn, goes towards the integrity and transparency of the government procurement system. Organs of state should further be under an obligation to implement their preferential procurement policies whether they contract for the acquisition of goods and services or for the sale and letting of assets.⁷⁴

4.3 The preference point system

In order to redress the unfair practices of the past where government contracts were awarded primarily to large white owned businesses, the Procurement Act establishes a preference point system for the award of contracts. The preference point system in the Act has been created on the assumption that contracts are advertised by way of calling for tenders.⁷⁵ Such tenders are then evaluated and the contract is awarded to the winning tenderer. Whereas previously, however, price was the decisive criterion in the evaluation of tenders, the point system created by the Procurement Act changes this.

⁶⁸ *ibid.*, p.351D–E.

⁶⁹ *ibid.*, pp.351I–52B.

⁷⁰ See also s.83(2) of the Municipal Systems Act which provides that “[s]ubject to the provisions of the [Procurement Act], a municipality may determine a preference for categories of service providers in order to advance the interest of persons disadvantaged by unfair discrimination, as long as the manner in which such preference is exercised *does not compromise or limit the quality, coverage, cost and developmental impact of the services*” (emphasis added).

⁷¹ The decision in *Cash Paymaster Services* was cited with approval in *South African Post Office Ltd v Chairperson, Western Cape Provincial Tender Board*, cited above, at p.686A–E. See also *JFE Sapela Electronics (Pty) Ltd v Chairperson: Standing Tender Committee* [2004] 3 All. S.A. 715, C, at p.728i–j.

⁷² Penfold and Reyburn, cited above, p.25–20.

⁷³ See cl.2.2 of the National Treasury: Policy Strategy to Guide Uniformity in Government Procurement Reform Processes in Government (April 7, 2003)—available at www.treasury.gov.za/showp/fin.htm—click on “Supply Chain Management” (confirmed access: April 14, 2006) which states that “certain organs of state apply set-aside practices, instead of the prescribed preference points system”. See, in turn, National Treasury: Supply Chain Management Office, Practice Note Number SCM 2 of 2006 “Prohibition of Set-Asides and the Use of Cost Estimates as Benchmarks, Measures Attached to Specific Goals for which Preference Points are Awarded” January 23, 2006 which expressly prohibits the practice of issuing bid documents that contain conditions that promote set-asides or excludes certain categories of potential bidders from bidding for government contracts.

⁷⁴ See the opinion of the Principal State Law Advisor in the Parliamentary Monitoring Group, Minutes of the Joint Meeting of the Finance Portfolio Committee and the Finance Select Committee, held on January 18, 2000, to discuss the Preferential Procurement Policy Framework Bill. See also 4.3.3 below.

⁷⁵ See, however, the new draft Procurement Regulations which provide for the application of the preference point system also to “price quotations” (regs 3(1) and 5(1)).

Points are awarded to contractors not only on the basis of price but also for the achievement of certain “specific goals” as provided for in s.2(1)(d) of the Act. These “specific goals” are examined below.⁷⁶

Whichever way one looks at it, price is and always will be an important criterion in the selection of contractors. In recognition of this fact, the preference point system created by the Procurement Act is “dual-scale” depending on the value of a specific contract. The total number of points that may be awarded to contractors is 100, and to ensure that organs of state still obtain the best price for goods and services, more preference points are awarded for lower value contracts and less preference points for higher value contracts. For contracts with a Rand value equal to or above R30,000 but below R500,000, a maximum of 20 preference points may be awarded for the achievement of “specific goals”.⁷⁷ Thus, 80 points must be awarded for price and a maximum of 20 points may be awarded for the achievement of “specific goals”.⁷⁸ The 80/20 preference point system is therefore applied.⁷⁹ For contracts with a Rand value above R500,000, only a maximum of 10 preference points may be awarded for the achievement of “specific goals”. Thus, 90 points must be awarded for price and a maximum of 10 points may be awarded for the achievement of “specific goals”.⁸⁰ The 90/10 preference point system therefore applies.⁸¹

Before proceeding to examine the application of the 80/20 and the 90/10 preference point systems in more detail, it is worth noting that the “Rand value” of a particular procurement, as provided for in s.2(1)(b) of the Procurement Act and regs 3 and 4, has to be based on an “estimate”. Thus, the meaning of “Rand value” need not be based on “known quantities”. Many, if not most, procurement contracts entered into by organs of state are for the provision of goods and services on an ongoing basis over a set period. It would therefore be impossible to always know the “Rand value” of a particular procurement if it was based on “known quantities”. Regulation 1(l) further defines “Rand value” as:

“the total *estimated* value of a contract in Rand denomination which is calculated at the time of tender invitations and includes all applicable taxes and excise duties”.⁸²

The fact that a maximum number of 10 and 20 points are specified for the allocation of preference points further means that organs of state have no discretion to award more than the specified maximum. This serves to illustrate that even though price is no longer the only criterion for the award of government contracts in South Africa, and organs of state have to take into account also the “specific goals” laid down in s.2(1)(d) of the Procurement Act, price is still the most important

⁷⁶ At 4.4.

⁷⁷ reg.3(1) does, however, provide that “if and when appropriate”, the 80/20 preference point system may be used for contracts with a Rand value below R30,000.

⁷⁸ reg.5.

⁷⁹ The new draft Procurement Regulations make the 80/20 preference point system applicable to contracts with a Rand value equal to or above R30,000 and up to a Rand value of R1 million (reg.3(1)).

⁸⁰ reg.4 and s.2(1)(a) read with s.2(1)(b) of the Procurement Act.

⁸¹ The new draft Procurement Regulations make the 90/10 preference point system applicable to contracts with a Rand value above R1 million (reg.4(1)).

⁸² Emphasis added. See also *Barry Kotze Inspections CC t/a Bis in Joint Venture with Pugubye Investments (Pty) Ltd v City of Johannesburg* [2004] 3 B.C.L.R. 274, T, pp.282C–283A (the question was whether s.2(1)(d) of the Procurement Act and reg.10 applied to a contract requiring the successful tenderer to do debt collections “as and when required” by the organ of state with the result that it is impossible to calculate the money value of the contract at the time of evaluating tenders; the court held that upon reading reg.10, the meaning of “Rand value” should be based on “an estimate” and not “known quantities”).

though not the only criterion for the award of contracts.⁸³ Even though certain contractors or “target groups” are afforded preference in the selection process, they are still required to submit competitive tenders in order to secure contracts. A successful tenderer is the one who is awarded the most points, subject always to technical factors, prior contractual performance, financial references, unit rates and prices, alternative offers, and qualifications, etc. being acceptable.⁸⁴ The preference point system in the Procurement Act and Regulations:

- Enables tenderers to use their skill, knowledge and creativity in arriving at a favourable mix between economic and development objectives.
- Penalises those persons who fall outside the targeted groups, or who offer to meet certain socio-economic objectives to only a limited degree, but does not preclude them from tendering (i.e. engaging in economic activity) in a meaningful manner.
- Prevents those who fall within a targeted group from presenting grossly uncompetitive tender prices, as the reward for compliance with socio-economic objectives will be outweighed by the loss of points incurred through competitive tender prices.⁸⁵

The preference point system created by the Procurement Act and Regulations is accordingly commended. Very careful consideration has been given to the balancing of costs and benefits in the use of procurement as a policy tool. A recent analysis further confirms that the methods that relate to preferencing at the short listing and award/tender evaluation stage of the procurement process, while not guaranteeing that socio-economic objectives will be met, are the methods that are most likely *not* to compromise the notions of fairness, equity, transparency, competitiveness and cost-effectiveness, if appropriately managed.⁸⁶

4.3.1 The 80/20 point system

Regulation 3(1) of the Procurement Regulations provides a formula that must be used to calculate the points to be awarded for price out of 80. The points awarded for price must then be added to the points awarded out of 20 to a tenderer “for being an HDI and/or subcontracting with an HDI and/or achieving any of the specified goals stipulated in regulation 17”.⁸⁷ The formula for the 80/20 preference point system will first be stated as provided for in the Regulations. The application of the formula will then be explained by means of a hypothetical example.

⁸³ See, however, Penfold and Reyburn, cited above, p.25-17) who argue that the inflexibility of the preference point system in the Procurement Act “may place undesirable constraints on procuring bodies that want to allocate preference points to more than one specific goal”.

⁸⁴ Watermeyer, “The Use of Targeted Procurement as an Instrument of Poverty Alleviation and Job Creation in Infrastructure Projects”, cited above, at 236.

⁸⁵ Watermeyer, Gounden, Letchmiah and Shezi “Targeted Procurement: a Means by which Socio-economic Objectives can be Realized Through Engineering and Construction Works Contracts” 1998, 9—available at www.targetedprocurement.co.za/p (accessed: July 13, 2006).

⁸⁶ Watermeyer “Facilitating Sustainable Development Through Public and Donor Procurement Regimes: Tools and Techniques” (2004) 13 P.P.L.R. 30.

⁸⁷ reg.3(2) read with reg.3(3). No corresponding provision is contained in the new draft Procurement Regulations. Reference is, instead, made to the balanced scorecard measuring BBBEE prescribed by the National Treasury annexed to the draft Regulations (Annexure SC1). Certain core components of BBBEE are listed in the scorecard, i.e. equity ownership, management, employment equity, skills development, preferential procurement and local content. A weighting is attached to each component and the aim is for tender submissions to be evaluated and scored on a compliance/non-compliance basis. The total score is out of 100, which is then reduced to a maximum of 20 points for preference in the award of contracts.

The formula for the 80/20 preference point system is as follows:

$$P_s = 80 (1 - (P_t - P_{\min}) \div P_{\min})$$

In terms of this formula,

P_s = the points scored for price for the tender under consideration,

P_t = the rand value of the tender under consideration, and

P_{\min} = the rand value of the lowest acceptable tender.

The following hypothetical example can be used to illustrate the application of the above formula. The Education Department invites tenders for the provision of computer software. X, an empowerment company, offers the software for R400,000. Y, which has no empowerment component, offers the software for R300,000. Since the contract is worth more than R30,000 but less than R500,000, the 80/20 preference point system applies and the points awarded to X and Y must be calculated as follows:

Y's tender

Price = 80

Preference = 0

Total number of points = 80

X's tender

Price = $80 (1 - (P_t - P_{\min}) \div P_{\min})$
 $80 (1 - (R400,000 - R300,000) \div R300,000)$

$80 (1 - (R100,000 \div R300,000))$

$0 (1 - (0.33))$

$80 (0.67)$

53.6

Preference = 20 (this is on the assumption that 20 points are awarded - it need not necessarily be 20, it could be less)

Total number of points = 73.6

The tender will be awarded to Y because it scored the most points. If the facts and figures provided were different and X and Y ended up with the same total number of points for price, X (and not Y) would be awarded the tender because the award of preference points would be the determining factor—Y has no empowerment component. On the other hand, if both X and Y had empowerment components and both were equal in all respects (the same points for price and preferences) the contract would have to be awarded by the drawing of lots.⁸⁸

⁸⁸ reg.12(8).

4.3.2 The 90/10 point system

Regulation 4(1) provides the formula that must be used for contracts with a Rand value above R500,000. In terms of this formula, 90 points must be awarded for price and a maximum of 10 points may be awarded to a tenderer “for being an HDI and/or subcontracting with an HDI and/or achieving any of the specified goals stipulated in regulation 17”.⁸⁹ Aside from the fact that only a maximum of 10 preference points (as opposed to 20) may be awarded to a tenderer, the application of the 90/10 preference point system is essentially the same as the application of the 80/20 preference point system. Further examination of the 90/10 preference point system is therefore unnecessary.

4.3.3 Sale and letting of assets

Regulations 5 and 6 make provision for the application of an 80/20 and 90/10 preference point system to contracts for the sale and letting of assets. It has, however, been argued that these Regulations may be ultra vires because the Procurement Act purports to regulate contracts for the procurement, in the sense of attainment, of goods and services and not contracts for the sale and letting of assets. This argument is said to be in line with section 217 of the Constitution and section 2 of the Procurement Act which provides that the maximum points for price are to be awarded to the “lowest acceptable tender”.⁹⁰

It is submitted that even though, as a general rule, price should be the sole criterion for the sale and letting of government assets, this cannot be the case in the South African context. Whenever the government enters into contracts with private parties, it is bound by the principle of “substantive equality” as provided for in s.9 of the Constitution.⁹¹ This is particularly so in view of the recent Constitutional Court case of *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs*⁹² where emphasis was placed on the taking of “positive action” and a “commitment” to end systematic racial discrimination. By allowing price to be the sole criterion for the award of contracts for the sale

⁸⁹ reg.4(2). As is the case with the 80/20 point system, no corresponding provision is contained in the new draft Procurement Regulations. Reference is, instead, made to the balanced scorecard measuring BBBEE prescribed by the National Treasury annexed to the draft Regulations (Annexure SC2). Certain core components of BBBEE are listed in the scorecard, i.e. equity ownership, management, employment equity, skills development, preferential procurement, enterprise development and local content. A weighting is attached to each component and the aim is for tender submissions to be evaluated and scored on a compliance/non-compliance basis. The total score is out of 100, which is then reduced to a maximum of 10 points for preference in the award of contracts. A number of issues relating to the preferential point system as contained in the balanced scorecards (Annexure SC1 and SC2 of the draft Regulations) need highlighting. First, in terms of the scorecards, no points are awarded for BEE if the total percentage score is less than a prescribed minimum of 40%. This is unacceptable; bidders should be awarded the points scored without any prescribed minimum. Secondly, the general balanced scorecards as contained in the draft Regulations will apply to all industries in the short term. As specific industries adopt “industry charters”, these will override the general prescribed scorecards. In terms of the draft Regulations, however, specific “industry charters” will only replace the general BEE scorecard in respect of the 90/10 point system and not the 80/20 point system. It would be more appropriate if the specific “industry charters” ultimately replace both the general 90/10 and the 80/20 scorecards. (See draft reg.3(2) compared with draft reg.4(2)). Thirdly, the indicators in the scorecards give too much importance to ownership and management and too little to skills development. As noted by Dekker (“New Procurement Regulations Cause Upset” (2005) 30 I.M.I.E.S.A. 47), “[a]lthough it is easier in the short term to obtain a bigger percentage of BEE ownership and management of tendering firms, the long term requirements of sustainability and growth require more emphasis on skills development and local content. The key to success is to train historically disadvantaged persons to enable them to make a meaningful contribution to the various industries and to the growth of South Africa. The use of locally manufactured components is another targeted area of importance”.

⁹⁰ Penfold and Reyburn, cited above, p.25-21.

⁹¹ See 2.1 above.

⁹² Discussed above, at 4.2.1.

and letting of government assets, assets will once again end up in the hands of primarily large and established white owned businesses. This is precisely what the Constitution and the Procurement Act and Regulations are attempting to combat.

Thus, even though, upon reading s.217 of the Constitution and s.2 of the Procurement Act, the view appears to be that only contracts for the attainment of goods and services are subject to affirmative procurement measures, the principle of “substantive equality” demands that *all* contracts entered into by the state with private parties comply with affirmative procurement procedures.⁹³ Also, the word “contracts” in s.217(1) of the Constitution should be read as referring to instances when the state acquires goods and services *and* when it sells and lets assets. The whole rationale for prescribing a system that complies with principles such as fairness, equity, transparency and in particular, competitiveness and cost-effectiveness⁹⁴ would be defeated if these principles were to apply only to instances when the state contracts for the acquisition of goods and services. The public has a right to procurement procedures that comply with the principles mentioned whenever the state contracts, whether it is acquiring goods and services or selling and letting assets. Regulations 5 and 6 are accordingly not ultra vires. The calculation of the 80/20 and 90/10 preference point systems created in regs 5 and 6 are furthermore essentially the same as that provided for in regs 3 and 4. The difference, however, is that only the tenderer with the highest points may be awarded the tender.

4.3.4 Notification of preference point system

Regulation 7 of the Procurement Regulations provides that an organ of state “must, in the tender documents, stipulate the preference point system which will be applied in the adjudication of tenders”. Notifying potential tenderers of the preference point system (80/20 or 90/10) to be used in the selection process is in compliance with s.217(1) of the Constitution which provides for a procurement system which is “fair”, “competitive” and “transparent”. It has, however, been correctly argued that the practice of notifying potential tenderers of the exact preference point system to be used may lead to prolonged and protracted procurement procedures.⁹⁵ This is particularly in view of the fact that provision is made in the Regulations for the cancellation and re-invitation of tenders where, for example, the 80/20 preference point system is stipulated in a call for tenders but all tenders received exceed R500,000, or where the 90/10 preference point system is stipulated but all tenders received are equal to, or below R500,000. In such instances, the call for tenders must be cancelled and a new

⁹³ This is what the one recent (2004/2005) Big Bay tender saga was about—the tender involved the “sale” of a prime piece of beachfront land. The facts were briefly as follows: the tender was awarded to Jonga Entabeni (a South African consortium) but two unsuccessful tenderers, an Italian company and Earthquake Properties (an Irish group), claimed that “favouritism and bias” formed part of the tender process; Jonga Entabeni offered R115 million, way below the R151 million tender by the Italian company and the R147 million by Earthquake Properties; the award of the tender to Jonga Entabeni was justified in view of the fact that the consortium would be setting aside R50 million which is to be spent on “social housing”. It was also argued that the other two tenderers “come from Europe where they had the world at their disposal” whereas Jonga Entabeni “wants to empower people who were historically disadvantaged” (N. Dreyer “Blacks to share in property development if council accepts tender recommendation” *Cape Times*, August 19, 2004, p.6; N. Dreyer “City decides today whether local bid gets Big Bay land” August 25, 2004—available at www.capetimes.co.za). See also generally: J-A. Smetherham “City policy to allow blacks to pay less for land” *Cape Times*, December 8, 2004, p.3; J-A. Smetherham “Province approves plan to sell land on preferential basis” *Cape Times*, December 16, 2004, p.6; T. “The ANC’s points policy for public land sales will only make the rich richer” *Cape Times*, December 20, 2004, p.11.

⁹⁴ s.217(1) of the Constitution.

⁹⁵ Penfold and Reyburn, cited above, at p.25-21.

call for tenders must go out, again stipulating the preference point system to be used in the selection process.⁹⁶

Instead of requiring organs of state to stipulate the exact preference point system to be used in the selection process, potential tenderers should simply be notified that the dual scale preference point system provided for in the Procurement Act and Regulations will be used, and that the precise system to be used (80/20 or 90/10) will depend on the value of tenders received. Doing so will still be in compliance with the principle of transparency in s.217(1) of the Constitution. Effect will also be given to the principle of cost-effectiveness because it prevents a situation where tenders are called a second time. There would, in other words, be cost-savings.

4.4 Meaning of “specific goals” in section 2(1)(d)

Section 2(1)(d) of the Procurement Act provides that an organ of state may, in its procurement policy, aim for specific goals which “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 (RDP) as published in *Government Gazette* No.16085 dated November 23, 1994.⁹⁷

At least two questions can be raised regarding the interpretation of s.2(1)(d): the use of the word “may”, and the meaning of the phrase “persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability”.

4.4.1 Use of the word “may”

By using the word “may” in s.2(1)(d), the legislature can be said to have afforded the provision a directory (permissive) status rather than a mandatory (peremptory) status.⁹⁸ It would appear therefore that other goals, in addition to those expressly laid down in ss.2(1)(d)(i) and 2(1)(d)(ii), can also be taken account of when awarding preference points (for example, the promotion of environmentally sound practices). This interpretation would be in line with s.217(2)(a) of the Constitution which simply provides for “categories of preference in the allocation of contracts” without specifying what these categories may be. The Regulations, however, do not appear to contemplate the achievement of goals other than those laid down in s.2(1)(d) of the Procurement Act.⁹⁹ It has therefore been argued that:

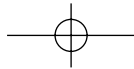
“[t]o the extent that the goals contemplated in the Regulations are narrower than the framework created by the [Procurement Act], the applicable Regulations may be *ultra vires*. However if the Regulations are in this respect legally valid, the implications of this dual scale system are

⁹⁶ regs 10(1), 10(2) and 10(3).

⁹⁷ See the RDP White Paper, Ch.3 entitled “The Economic Policy Framework” which in essence provides that employment creation is a central priority; greater participation in the economy and less concentrated, more racially and gender inclusive ownership patterns are essential; and SMMEs need to play a substantially larger part in economic activity.

⁹⁸ For detailed discussion on mandatory and directory provisions, see De Ville, *Constitutional and Statutory Interpretation* (2000), Ch.5; Du Plessis, *Re-Interpretation of Statutes* (2002), pp.249–254; Botha, *Statutory Interpretation: An Introduction for Students* (4th edn., 2005), Ch.9.

⁹⁹ regs 3(2), 4(2), 5(2) and 6(2).



restrictive, in that they do not permit the allocation of preference points to any category of preference other than the attainment of HDI and RDP goals”.¹

The latter approach is to be preferred. The specific goals to be achieved in the award of government contracts are restrictive—preference points may “primarily” be awarded for the attainment of HDI and RDP goals.² Even though the use of procurement to promote, for example, sound environmental practices has much to commend it, and has at different times been employed by countries, this does not appear to be the primary reason for the inclusion of ss.217(2) and 217(3) in the Constitution and the subsequent enactment of the Procurement Act and Regulations. The primary aim was rather, it appears, to redress South Africa’s history of unfair discriminatory policies and practices by uplifting previously disadvantaged persons in general. Sections 217(2) and 217(3) of the Constitution and the Procurement Act and Regulations appear to be more aimed at the economic upliftment of the *citizens* of South Africa, and thus the economy in general, than the promotion of, for example, sound environmental practices which are not directly linked to past unfair discriminatory policies and practices.

4.4.2 Persons falling within section 2(1)(d)(i)

A “historically disadvantaged individual” (HDI) is defined in reg.1(h) as a South African citizen:

- (1) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983 (Act No.110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act No.200 of 1993) (“the Interim Constitution”); and/or
- (2) who is a female; and/or
- (3) who has a disability³:

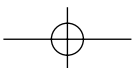
Provided that a person who obtained South African citizenship on or after the coming to effect of the Interim Constitution, is deemed not to be an HDI.⁴

¹ Penfold and Reyburn, cited above, at p.25-17 fn.4.

² See reg.12(1) which allows organs of state to award preference points for “locally manufactured products”. An organ of state’s intention to award preference points for locally manufactured products must, however, be made known to potential tenderers in the call for tenders. This is, of course, in line with the requirement of procedural fairness which finds application to the government procurement process. See also the State Tender Board Act 86 of 1968: Amendment to Regulations of the State Tender Board Act in Terms of Section 13 which provides that “[w]hen considering the award of agreements the [tender] board may accord a preference in respect of goods produced, manufactured or assembled in the Republic, or in respect of goods falling into any other category on the basis determined by the Minister from time to time” (reg.8).

³ reg.1(f) provides that “‘disability’ means, in respect of a person, a permanent impairment of a physical, intellectual or sensory function, which results in restricted, or lack of, ability to perform an activity in the manner, or within the range, considered normal for a human being”.

⁴ The new draft Procurement Regulations do not refer to “historically disadvantaged individuals”. The Regulations simply refer to “black people” which is, in turn, defined as “Africans, Coloureds and Indians who are South African citizens” (reg.1(c)). The redefinition of an HDI as “black” has important consequences. First, white disabled persons are excluded from the operation of the draft Regulations. Section 217 of the Constitution and the Procurement Act (in s.2(1)(d)(i)), however, make reference to “historically disadvantaged persons”, which includes disabled persons of all races. Secondly, white women are excluded from the ambit of the draft Regulations. Historically, women of all races have been disadvantaged. This is evidenced by the lack of female involvement in senior management positions. White women should, accordingly, be eligible for preferential treatment in the award of government contracts. Section 2(1)(d)(i) of the Procurement Act also makes express reference to the attainment of specific goals which may include “contracting with persons or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or



Two potential problems of the above definition have been correctly noted.⁵ The first is that the definition is framed in terms of individuals rather than groups: reg.1(h) specifically refers to “a South African citizen”. A man born prior to 1980 may therefore fall outside the definition because the reason for his exclusion would have been age (he was too young to vote in 1994) and not apartheid. Thus, it was “due to his age” that he had no franchise to vote and not “due to the apartheid policy that had been in place”. The second potential problem is that some of the qualifications contained in the definition may have “unintended consequences”. A black Nigerian woman who has been disabled from birth and became a South African citizen on May 1, 1994 will not, for example, qualify as an HDI whereas a white South African man disabled in 2002 would qualify as such.

As noted above, the use of the word “may” in s.2(1)(d) of the Procurement Act means that the provision is cast in directory rather than mandatory terms—the section provides that “specific goals *may* include”.⁶ The Procurement Act therefore appears to cast the award of preference points for HDI and RDP goals in directory terms rather than mandatory terms. The Regulations, however, differ in this respect. The award of preference points for equity ownership by HDIs is cast in mandatory terms and the award of preference points for RDP goals is cast in directory terms. This requires further examination.

4.5 Preference points for “equity ownership” and “RDP” goals

4.5.1 General

Regulation 13(1) provides for the allocation of preference points for equity ownership by HDIs and states that “[p]reference points stipulated in respect of a tender *must* include preference points for equity ownership by HDIs”.⁷ The provision is thus cast in mandatory terms. It would appear therefore that preference points may not, for example, be allocated only for the attainment of RDP goals. On the other hand, however, it would appear that preference points may be awarded only for equity ownership by HDIs. This is because reg.17(3) is cast in directory terms: it provides that:

“[o]ver and above the awarding of preference points in favour of HDIs, the following activities *may* be regarded as a contribution towards achieving the goals of the RDP”.⁸

It is submitted that the mandatory nature of reg.13(1) once again serves to illustrate that South Africa’s current use of procurement as a policy tool is more directed at *persons* who were disadvantaged by previous discriminatory policies and practices. Even though “RDP” goals are recognised as worthy

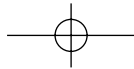
disability” (emphasis added). See, in this regard, the Draft Proposal and Submission by the Businesswomen’s Association on the Preferential Procurement Policy Framework Act 2000 (Act No.5 of 2000) Draft Preferential Procurement Regulations 2004—available at www.bwasa.co.za/content/Default.aspx?Node=581 (accessed: July 10, 2006); and Business Women’s Association “Comment on the Second Phase of Broad-Based Black Economic Empowerment”—available at www.bwasa.co.za/content/Default.aspx?Node=1045 (accessed: July 10, 2006). Thirdly, the draft Regulations apply to “black” South African citizens regardless of when citizenship was obtained. This could have the effect of preference being afforded to persons who were never affected by South Africa’s past discriminatory policies and practices. See also Dekker, “New Procurement Regulations Cause Upset” (2005) 30 I.M.I.E.S.A. 47.

⁵ Penfold and Reyburn, cited above, at p.25-17 fn.2.

⁶ Emphasis added. See also s.2(1)(e) which is similarly cast in directory terms; the section provides that “any specific goal for which a point *may* be awarded, must be clearly specified in the invitation to submit a tender” (emphasis added). See further 4.7 below.

⁷ Emphasis added.

⁸ Emphasis added.



of preference in the award of government contracts, organs of state are not obligated to take account thereof when awarding preference points.⁹ An organ of state *may* furthermore, in terms of reg.12(1), award preference points for the procurement of “locally manufactured products” provided that the intention to do so is communicated to potential tenderers in the call for tenders.

The mandatory award of preference points for “equity ownership by HDIs” is subject to strict rules. Equity ownership is tied to:

“the percentage of an enterprise or business owned by individuals or, in respect of a company, the percentage of a company’s shares that are owned by individuals, who are actively involved in the management of the enterprise or business and exercise control over the enterprise, commensurate with their degree of ownership at the closing date of the tender”.¹⁰

Preference points may not, for example,

“be claimed in respect of individuals who are not actively involved in the management of an enterprise or business and who do not exercise control over an enterprise or business commensurate with the degree of ownership”.¹¹

An attempt is therefore made to reduce the risk of “fronting” or “window dressing” (discussed below).¹² The same is evident with regard to the rules that apply to equity claims for a trust.

“Equity claims for a Trust may only be allowed in respect of those persons who are both trustees and beneficiaries and who are actively involved in the management of the Trust”.¹³

Documentation to substantiate the validity of the credentials of trustees must also, in terms of reg.13(7), be submitted to the relevant organ of state.

Regulation 13(5)(a) further provides that “[e]quity within private companies must be based on the percentage of equity ownership”. Preference points may not, however, be awarded to public companies.¹⁴ No reasons are provided in the Regulations for drawing a distinction between public and private companies. It is submitted that the distinction drawn is justified because public and private companies differ in a number of respects.¹⁵ A private company can be formed by two or more persons or even a single person; the right to transfer shares is restricted; the number of members is limited to 50; and the public may not be approached for the subscription of shares or debentures. A public company, on the other hand, needs at least seven members; there is generally no restriction on the maximum number of members; members of the public may be invited to subscribe for shares

⁹ RDP goals, in terms of reg.17(3)(a)–(k), include the following: the promotion of South African owned enterprises; the promotion of export orientated production to create jobs; the promotion of SMMEs; the creation of new jobs or the intensification of labour absorption; the promotion of enterprises located in a specific province, region, municipality or rural areas; the empowerment of the workforce by standardising the level of skill and knowledge of workers; the development of human resources; and the upliftment of communities. Regulation 17(3) does not, however, appear to lay down a closed list of activities which may be recognised for the purposes of preference points. It simply states that the activities mentioned “may” be regarded as a contribution towards achieving the goals of the RDP.

¹⁰ reg.13(2). See also reg.13(3) which provides that should the percentage ownership change after the closing date of a tender, the organ of state must be notified thereof and the tenderer will not be eligible for any preference points.

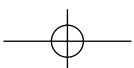
¹¹ reg.13(4).

¹² At 4.8.2.

¹³ reg.13(6).

¹⁴ reg.13(5)(b).

¹⁵ Beuthin and Luiz, *Beuthin’s Basic Company Law* (3rd edn., 2000), Ch.4; Benade et al, *Entrepreneurial Law* (3rd edn., 2003), Pt 3; Cilliers and Benade, *Corporate Law* (3rd edn., 2000), Chs 3 and 4.



and debentures; and shares are freely transferable. The sheer size and flexibility of a public company, compared to a private company, may therefore make it unduly onerous, if not impossible, for an organ of state to determine with accuracy the percentage of equity ownership in a public company.

Regulation 13(5)(b) further provides that preference points may not be awarded to tertiary institutions. A consortium or joint venture may, however,

“based on the percentage of the contract value managed or executed by their HDI members, be entitled to equity ownership in respect of an HDI”.¹⁶

The number of points scored must then be added to the number of points scored for achieving specified goals and the points scored for price in order to establish the total number of points scored.¹⁷ A further “strict rule” for the allocation of preference points for “equity ownership by HDIs” is contained in reg.13(12) which relates to sub-contracting. This requires further examination.

4.5.2 Restrictions on sub-contracting

Regulation 13(12) provides that:

“[a] person awarded a contract as a result of preference for contracting with, or providing equity ownership to, an HDI, may not subcontract more than 25% of the value of the contract to a person who is not an HDI or does not qualify for such preference”.

It has been argued that the above provision:

“may well have unintended consequences. It binds contractors who were awarded contracts as a result of HDI content, to a fairly restrictive sub-contracting regime, while permitting a non-HDI contractor to sub-contract freely to other non-HDIs”.¹⁸

This is, in principle, correct. It is submitted, however, that reg.13(12), like regs 13(4), 13(6) and 13(7) discussed above, is primarily aimed at reducing the risk of “fronting” or “window dressing”.¹⁹ Regulation 13(12) is aimed at preventing tenderers, who are awarded tenders *based* on HDI content, from sub-contracting the whole or a substantial portion of the value of the work (25 per cent +) to a contractor *without* an HDI component. To allow this would defeat the basis for the award of the tender, i.e. HDI content. On the other hand, where a contract is awarded to a non-HDI contractor, there is no need for protections to be in place to prevent “fronting”. It therefore makes sense for a non-HDI contractor who is awarded a contract to sub-contract to whomever it chooses; doing so does not defeat the basis for the award of the tender.

A further argument is that

“in order for [Regulation 13(12)] to work in practice, the contractor will have to be informed of the causal link between his or her HDI credentials and the award of the contract—which assumes a measure of transparency in the process that may be practically difficult to achieve in every case”.²⁰

¹⁶ reg.13(8).

¹⁷ regs 13(9) and 13(10).

¹⁸ Penfold and Reyburn, cited above, p.25-23 fn.1.

¹⁹ Discussed at 4.8.2 below.

²⁰ Penfold and Reyburn, cited above, p.25-23 fn.1.

The Constitution emphasises in s.217(1) that organs of state must contract for goods or services in accordance with a system which is, inter alia, “transparent”. The courts have also on a number of occasions held that an unsuccessful tenderer is entitled to reasons for the non-award of a tender.²¹ Thus, an unsuccessful tenderer is entitled to know the points awarded to it for price, HDI and RDP goals compared to the points awarded to the successful tenderer for price, HDI and RDP goals.²² This implies that a successful tenderer, like an unsuccessful tenderer, will know if it ultimately won the tender due to its HDI content or not, and if it does not, it should be notified thereof. There should, therefore, be no difficulty in practice for an organ of state to inform the winning tenderer of the causal link between its HDI credentials and the award of the contract. Compliance with reg.13(12) can simply be made part of the terms or conditions of the contract. Non-compliance will therefore amount to breach of contract giving rise to the usual remedies. An organ of state can also have recourse to the penalties provided for in reg.15 which are examined in 4.8 below.

4.6 Notification of attainment of “specific goals”

Where an organ of state intends to award preference points for “specific goals”, s.2(1)(e) of the Procurement Act stipulates that this fact must be made known to potential tenderers.²³ The courts have on a number of occasions held that the conduct of the government procurement process, the evaluation of tenders and the award of a contract to a successful tenderer are all forms of “administrative action” within the meaning of s.33 of the Constitution and the Promotion of Administrative Justice Act (Paja).²⁴ This means that tenderers are entitled to, inter alia, procedural fairness and this includes the right to know what criteria will be applied in the selection process. Section 2(1)(e) of the Procurement Act which requires that “any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender” is therefore in line with the principle of fairness in s.217(1) of the Constitution and also s.33(1) of the Constitution and

²¹ *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* [1998] 2 S.A. 109, W, p.111C–D; *Aquafund (Pty) Ltd v Premier of the Western Cape* [1997] 2 All S.A. 608, C, p.618a–d; *Goodman Bros (Pty) Ltd v Transnet Ltd* [1998] 4 S.A. 989, W, p.998F/G–I; *Transnet Ltd v Goodman Brothers (Pty) Ltd* [2001] 1 S.A. 853, SCA, p.871, at [10]; *Grinaker LTA Ltd v Tender Board (Mpumalanga)* [2002] 3 All S.A. 336, T, at [32]; *Du Bois v Stompdrift-Kamanassie Besproeiingsraad* [2002] 5 S.A. 186, C, pp.198H/I–199B; *JFE Sapela Electronics (Pty) Ltd v Chairperson: Standing Tender Committee*, cited above, at pp.731h–732b.

²² para.29.1 of the State Tender Board: General Conditions and Procedures (St 36) provides that tenders are not available for perusal by the public, but a tenderer or interested party may submit a written request for the following information where it has not been made available in the *Government Tender Bulletin*: the names and addresses of all tenderers; the brand name of the product and the name of the manufacturer, if available, in respect of the accepted tender only; and where applicable, *the preference percentages claimed by the successful tenderer*. Paragraph 29.2 also makes provision for the furnishing of other information as provided by law or deemed necessary by the Tender Board.

²³ See National Treasury: Supply Chain Management Office: “Supply Chain Management” May 10, 2005, para.2.3 which further states the following: “accounting officers/authorities are required to ensure that when bids are invited, the specific goals to be promoted, and the preference points allocated *together with measurables for the promotion of each goal* must form part of the bid documentation. These measurables must clearly indicate *how* the bidder will be awarded a score out of the maximum points allocated” (emphasis added).

²⁴ 3 of 2000. *Claude Neon Ltd v Germiston City Council* [1995] 3 S.A. 710, W, pp.720I/J–721B; *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en andere* [1997] 2 All S.A. 548, A, pp.552j–553a; *Aquafund (Pty) Ltd v Premier of the Western Cape* [1997] 2 All S.A. 608, C, p.617f; *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* [1998] 2 S.A. 109, W, p.117G–H; *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust* [1999] 4 S.A. 375, T, pp.381H/I–382G; *Nextcom (Pty) Ltd v Funde NO* [2000] 4 S.A. 491, T, p.504G–J; *Transnet Ltd v Goodman Brothers (Pty) Ltd* [2001] 1 S.A. 853, SCA, p.867, at [39] and p.871, at [9]; *Grinaker LTA Ltd v Tender Board (Mpumalanga)* [2002] 3 All S.A. 336, T, at [32]; *Logbro Properties CC v Bedderson NO* [2003] 2 S.A. 460, SCA, at [5].

Paja.²⁵ Any goals contemplated in s.2(1)(e) of the Procurement Act must, however, be “measurable, quantifiable and monitored for compliance”.²⁶ As noted before, it is particularly the emphasis placed on monitoring, enforcement and evaluation in the South African system which distinguishes it from other countries’ policies.²⁷

4.7 Exceptions to scoring the highest points

Section 2(1)(f) of the Procurement Act provides that the contract must be awarded to the tenderer who scores the highest points in terms of the preference point system created by the Act.²⁸ If, however, there are objective criteria in addition to those contemplated in paras (d) and (e) of s.2(1) of the Act that justify the award of the tender to another tenderer, the tender may be awarded to a tenderer who did not score the highest points.²⁹ Section 2(1)(f) has been a very controversial provision in the Procurement Act; a number of cases that have appeared before the courts have involved the interpretation to be afforded to s.2(1)(f). The primary issue has been the meaning to be afforded to the phrase “objective criteria in addition to those contemplated in paragraphs (d) and (e)” of s.2(1) of the Act.

In *Grinaker LTA Ltd v Tender Board (Mpumalanga)*,³⁰ the court held that s.2(1)(f) of the Procurement Act is peremptory; the contract must be awarded to the tenderer who scores the highest points unless additional objective criteria exist.³¹ The court then defined the meaning of the phrase “objective criteria in addition to those contemplated in paragraphs (d) and (e)” as referring to criteria “over and above”³² or criteria “besides; as well as”³³ those contemplated in paragraphs (d) and (e) of s.2(1) of the Procurement Act. The court, however, failed to give an indication as to what would be regarded as such. The court simply held that the considerations of price and HDI factors taken into account by the tender board in justifying the award of the tender to the tenderer who did not score the highest points were not objective criteria within the meaning of s.2(1)(f). These criteria (considerations of price and HDI factors), the court held, had to be considered under ss.2(1)(d) and 2(1)(e) of the Procurement Act.

²⁵ See *RHI Joint Venture v Minister of Roads and Public Works* [2003] 5 B.C.L.R. 544, Ck, at [37] (held that tenderers had a right to be informed prior to tendering that preference would be given to tenderers who had not been awarded a contract previously; those interested in tendering would then have been in a position to determine whether or not it was worthwhile to submit tenders).

²⁶ Procurement Act, s.2(2).

²⁷ See also Arrowsmith, Linarelli and Wallace, cited above, Ch.5. Criticism has, however, been levelled on the absence of “a suitable monitoring and evaluation mechanism” in practice to determine the effectiveness of targeted procurement as an instrument of social policy (Manchidi and Harmond, cited above, p.9).

²⁸ National Treasury: Supply Chain Management Office: “Supply Chain Management” May 10, 2005, para.2 provides: “[s]hould, during any stage of the evaluation and/or adjudication process, it becomes [sic] evident that the bidder who scored the highest number of points is an unacceptable or non-responsive bidder and this bidder also scored the highest points for price, the points scored by each bidder must be recalculated using the new lowest acceptable bidder’s price as the basis (Pmin) for calculation purposes. Accounting officers/authorities are not allowed to award the bid to the bidder next-in-line as this may lead to an incorrect award of the bid. Recalculation of the points may result in a different bidder, other than the one who was next-in-line, scoring the highest number of points”.

²⁹ A similar provision is contained in reg.9: “a contract may, on reasonable and justifiable grounds, be awarded to a tender[er] that did not score the highest number of points”.

³⁰ [2002] 3 All S.A. 336, T.

³¹ *ibid.*, at [40].

³² Referring to *Webster’s Third New International Dictionary*.

³³ Referring to the *Collins English Dictionary*.

The court in *RHI Joint Venture v Minister of Roads and Public Works*³⁴ similarly held that “local labour, resources and affirmable business enterprises” did not amount to objective criteria in addition to those contemplated in ss.2(1)(d) and 2(1)(e) of the Procurement Act. As in the *Grinaker* case, these factors were provided for in the preference point system and were allocated due and proper weight in terms thereof. It was therefore improper to afford weight to these factors a second time. Like the *Grinaker* case, however, the court failed to give an indication as to what would be regarded as “objective criteria in addition to those contemplated in paragraphs (d) and (e)” of s.2(1) of the Procurement Act.³⁵

Before proceeding to comment on the courts’ interpretation of the phrase “objective criteria in addition to those contemplated in paragraphs (d) and (e)” of s.2(1) of the Procurement Act, it should be noted that the courts correctly afforded s.2(1)(f) preemptory status.³⁶ Affording s.2(1)(f) preemptory status serves a number of important purposes. It ensures uniformity in tender procedures which, in turn, goes towards the integrity of the tendering process and the public’s confidence in tendering procedures. It ensures that effect is given to the intention of the legislature in enacting the provision and ensures that there is general compliance with the purpose of the statute (the main purpose of the Procurement Act being the enhanced participation of HDIs and SMMEs in the government procurement process with the aim to correct the imbalances caused due to South Africa’s history of unfair discriminatory policies and practices) whilst at the same time ensuring that the state does not pay more for contracts than is justified.³⁷

In so far as the meaning of the phrase “objective criteria in addition to those contemplated in paragraphs (d) and (e)” of s.2(1) of the Procurement Act is concerned, it is submitted that whilst the phrase must, in accordance with the presumption that the legislature does not intend to enact invalid or purposeless provisions be given its due, the criteria which might justify the award of a tender to a tenderer appear to be very limited. The legislature seems to afford a very limited discretion to organs of state with regard to the award of a contract to a tenderer who does not score the highest points. The Regulations are also very detailed with regard to the goals that are to be achieved in the award of tenders which limit even further the discretion that organs of state have in relation to “objective criteria”.³⁸ It would appear therefore that preference points may “primarily” be awarded for HDI and RDP goals. It has, however, been suggested that “the fact that someone had won a tender a certain number of times may be considered as one of the objective criteria” justifying the award of a tender to such person even though he or she does not score the highest points.³⁹ An example of this may be where there is a need for the carrying out of work originally awarded by way of competitive

³⁴ [2003] 5 B.C.L.R. 544, Ck, at [32]–[33].

³⁵ See also *Sebenza Kahle Trade CC v Emalahleni Local Municipal Council* [2003] 2 All S.A. 340, T, p.347e–j where the court simply held that “[t]he award [of the tender] was contrary to the provisions of section 2(1)(f) of [the Procurement Act] (. . .) there were no possible ‘objective criteria’”.

³⁶ *Grinaker LTA Ltd v Tender Board (Mpumalanga)* [2002] 3 All S.A. 336, T, at [40]; *RHI Joint Venture v Minister of Roads and Public Works* [2003] 5 B.C.L.R. 544, Ck, at [25].

³⁷ See also *RHI Joint Venture v Minister of Roads and Public Works* [2003] 5 B.C.L.R. 544, Ck, at [25] where the court noted that “[i]t is obvious that a special responsibility rests on a Tender Board to ensure that the tenders that it awards will, as far as possible, cost the Province the least”—referring to *Grinaker LTA Ltd v Tender Board (Mpumalanga)*, cited above, and *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province*, cited above.

³⁸ reg.17.

³⁹ Opinion of the Principal State Law Advisor in the Parliamentary Monitoring Group Minutes of the Joint Meeting of the Finance Portfolio Committee and the Finance Select Committee, held on January 18, 2000, to discuss the Procurement Bill, p.7.

tendering and the application of the Procurement Act and Regulations that needs to conform to a basic project.

The fact that points may “primarily” be awarded for price, HDI and RDP criteria in the award of government tenders does not mean that other or additional criteria may not be specified in an organ of state’s call for tenders; such other criteria may simply not be used for the purposes of calculating the points to be awarded to tenderers. The exception, however, appears to be “locally manufactured products”: reg.12(1) allows organs of state to award preference points for “locally manufactured products” provided that the intention to do so is made known to potential tenderers in the call for tenders. As a general rule, however, it would appear that criteria other than price, HDI and RDP goals, such as technical capability and environmentally sound practices cannot be afforded points. They can be specified in a call for tenders but they would serve more as “qualification criteria” or “entry level requirements”. Thus, they would serve as a means to determine whether or not a specific tenderer is a “complying” tenderer in the sense of having submitted an “acceptable tender”.⁴⁰ Only once a tenderer is regarded as a “complying tenderer” would it then stand in line for the allocation of points based on price, HDI and RDP criteria.

A number of regulations also provide that “[o]nly the tender with the highest number of points scored may be selected”.⁴¹ An exception to this rule, however, is contained in reg.9 which provides that “a contract may, on reasonable and justifiable grounds, be awarded to a tender that did not score the highest number of points”. The question that arises is the precise meaning to be given to the phrase “reasonable and justifiable grounds”.

As noted above, s.2(1)(f) of the Procurement Act provides that the contract must be awarded to the tenderer who scores the highest points, but “objective criteria in addition to those contemplated in paragraphs (d) and (e)” of s.2(1) of the Procurement Act may justify the award to another tenderer. Like reg.9 therefore, there appear to be exceptions to the rule that the contract “must” be awarded to the tenderer who scores the highest points. As explained, the criteria which might justify the award of a tender to a tenderer appear to be very limited. Section 2(1)(f) is an exception to the general rule and a restrictive interpretation should therefore be given to the phrase “objective criteria in addition to those contemplated in paragraphs (d) and (e)” of s.2(1) of the Act.⁴² It is submitted that the phrase “reasonable and justifiable grounds” in reg.9 should similarly be afforded a restrictive interpretation. Preference points may primarily be awarded for HDI and RDP goals. A possible exception, as noted above, and which may also be applicable in this context, may be where a particular contractor has won a tender on a number of occasions and the current tender involves a repetition of similar work done by such contractor, i.e. work that needs to conform to a basic project. The tender may then be awarded to such contractor even though it does not score the highest points.⁴³ It has further

⁴⁰ An “acceptable tender” is defined in s.1(i) of the Procurement Act as “any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document”. In this regard, see *JFE Sapela Electronics (Pty) Ltd v Chairperson: Standing Tender Committee*, cited above, at p.729e–g (argued by unsuccessful tenderer that successful tenderer’s tender not “acceptable tender” within meaning of s.1 of Procurement Act—tender did not meet all requirements of tender call and should not have been considered; court agreed and held, inter alia, that “[b]y reason of [the respondents’] misconstruction of the requirement of acceptability laid down in the [Procurement Act] (. . .) the respondents were not in a position to and accordingly failed to consider whether [the successful tenderer’s] tenders should be excluded”; court found that award of tender tainted by error of law and was therefore reviewable).

⁴¹ regs 3(4), 4(4), 5(4), 6(4), 8(8) and 13(11).

⁴² Steyn, *Die Uitleg van Wette* (5th uitgawe, 1981), p.80.

⁴³ See also reg.12(1) which provides for preferences to be afforded to “locally manufactured products”.

been held⁴⁴ that a tender may be awarded to a tenderer who did not score the highest points if: the successful tenderer has more specifically relevant experience in the performance of the contract; there is an insignificant price difference between the tender of the successful tenderer and the tender of the tenderer scoring the highest points; and the referees of the successful tenderer are uniformly positive about its experience and expertise in the performance of similar contracts compared to the highest tenderer's referees about its experience and expertise in the performance of similar contracts.

4.8 Penalties

4.8.1 General

In so far as non-compliance with the provisions of the Procurement Act is concerned, s.2(1)(g) provides that should it transpire that preference points were awarded to a successful tenderer based on false information supplied by such tenderer, the contract awarded to the tenderer may be cancelled at the sole discretion of the organ of state. The cancellation of the contract also does not prejudice any other remedies the organ of state may have against the tenderer.

Regulation 15 also sets out a number of penalties that an organ of state "must" apply upon detecting that: (1) a preference under the Procurement Act or Regulations was obtained on a fraudulent basis⁴⁵; or (2) any of the specified goals in the Procurement Act and Regulations are not attained in the performance of a contract. Penalties include, inter alia, the recovery of all costs, losses or damages incurred; cancellation of the contract including damages suffered due to such cancellation; financial penalties; and debarment for a period not exceeding 10 years.⁴⁶ Debarment, in particular, may give rise to undue hardship since many contractors are substantially dependent on the government for business. The debarment of a contractor should therefore not be taken lightly.⁴⁷

4.8.2 Fronting or "window dressing"

It is particularly in the context of fronting or "window dressing"⁴⁸ that the penalties provided for in the Procurement Act and Regulations will find application. Broadly, fronting refers to the practice of black people being signed up as fictitious shareholders in essentially "white" companies.⁴⁹ A common

⁴⁴ *First Base Construction CC v Ukhahlamba District Municipality* [2006] J.O.L. 16724, E.

⁴⁵ reg.14 provides that "[a] tenderer must, in the stipulated manner, declare that (a) the information provided is true and correct; (b) the signatory to the tender document is duly authorised; and (c) documentary proof regarding any tendering issue will, when required, be submitted to the satisfaction of the relevant organ of state". Regulation 16 further provides that "[n]o contract may be awarded to a person who has failed to submit an original Tax Clearance Certificate from the South African Revenue Service ('SARS') certifying that the taxes of that person to be in order or that suitable arrangements have been made with SARS".

⁴⁶ reg.15(2). See also the State Tender Board Act 86 of 1968: Amendment to Regulations of the State Tender Board Act in terms of s.13 which makes provision for penalties for tender offences.

⁴⁷ For detailed examination on the debarment or exclusion of contractors from government contract awards in South Africa, see Bolton, "The Exclusion of Contractors from Government Contract Awards" (2006) 10 *Law, Democracy and Development* 25.

⁴⁸ Can also be referred to as "tokenism", i.e. a partnership or employment situation where colour or gender participation is not real or meaningful; the disadvantaged person or entity is there simply as a convenient "token" concession to a rule or qualifying condition.

⁴⁹ The BBBEEA defines "black people" in s.1 as a generic term for "Africans, Coloureds and Indians" and the term BBBEE is defined 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, but are not limited to (. . .) (e) preferential procurement".

example of fronting, it has been noted,⁵⁰ is where companies start a new BEE company which does precisely the same as the existing company but all the work is channelled through the BEE vehicle. The turnover and the work is still done by the existing “non-BEE company” and most of the profits are taken by the company. Another example is where a company is black owned (50 per cent +) but the shares are allocated on an earn-out basis or are deferred ordinary shares. In other words, when dividends are paid, the black owned company which is a shareholder, only gets a small percentage of the profit.⁵¹

The practice of fronting has been described as “an act of terrorism against empowerment”.⁵² It is “about misrepresentation. It’s the use of people or names or objects to represent an ideal while masking a more evil truth”.⁵³ Ebrahim Rasool, the then Western Cape Minister of Finance and Economic Development, has acknowledged the problem of fronting and has indicated that “strong punitive action will be instituted against offenders”. According to Rasool, the Western Cape Provincial Government is pursuing the development of a policy on fronting and a supplier’s database to assist it to do effective patrolling.⁵⁴ More recently, the Minister of Public Works, Stella Sigcau, announced the introduction of a credit system to evaluate procurement contracts in a bid to stamp out the practice of fronting.⁵⁵ According to Sigcau, the credit system:

“will monitor actual performance of contractors and consultants on contracts. Credits will be given to contractors and consultants based on actual performance rather than on the promises that were traditionally made when tendering. These credits can then be redeemed on award of contract and future performance can earn the contractor more credits. Contributions that will be recognised for purposes of this system will include BEE, empowerment of women, youth and the disabled, community development, social responsibility programmes, learnerships and bursaries”.⁵⁶

It is currently (July 12, 2006) the role of rating agencies such as Empowerdex, EmpowerLogic and Tradeworld to make sure that when a company is rated, BEE is meaningful and tangible and in accordance with the BBBEEA. The Department of Trade and Industry is also in the process of

⁵⁰ Derby “BEE Fronting, a Reality for Some Time” (2004)—available at www.moneyweb.co.za/economy/empowerment/383654.htm (confirmed access: April 14, 2006).

⁵¹ The South African Association of Consulting Engineers (SAACA) has also identified three basic types of fronting by consultants: (1) “where the business relationship between black and white individuals is designed purely for white individuals to procure work without the black individuals advancing their technical and/or intellectual skills. Black individuals also do not benefit financially from [sic] the work carried out”; (2) “where established companies create or use black empowerment shell companies that do not have staff or separate shareholders to undertake significant portions of the work procured”; and (3) “when companies use the name of influential black individuals, who receive a fee for the use of their names without bringing about the necessary black empowerment changes” (Anonymous “Consultants Face Action for Fronting” (no date) 28 I.M.I.E.S.A. 13).

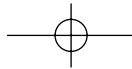
⁵² S. Nqobobo “Fronting only moves the process backwards” *Cape Times, Business Report*, October 15, 2003, p.2.

⁵³ R. Bonorchis “Fronting is pervasive: it’s crept into South African boardrooms” *Business Report*, May 15, 2005—available at www.busrep.co.za (confirmed access: October 31, 2005).

⁵⁴ Western Cape Provincial Government, Rasool: Revised Western Cape Preferential Procurement Policy, February 18, 2003—available at www.polity.org.za/pol/search/content/?show=32613 (accessed: December 9, 2003).

⁵⁵ L. Loxton “Public works to award credits to end fronting” *Cape Times, Business Report* September 14, 2003, p.1.

⁵⁶ Ministry of Public Works, Statement by the Minister of Public Works, Stella Sigcau, at the GCIS Parliamentary Media Briefing, September 12, 2003—available at www.polity.org.za/pol/search/content/?show=41042 (confirmed access: April 14, 2006).



drafting codes of good practice on empowerment which will assist to combat fronting practices.⁵⁷ Only companies that comply with the codes will be awarded contracts whereas companies that resort to fronting to secure contracts will be guilty of fraud which will render invalid the contract awarded to it. The aim is for rating agencies to properly investigate the empowerment components of companies that apply to be rated and to confirm their empowerment status also after the award of an empowerment certificate. Reliance will thus no longer be placed simply on the documentation provided by companies. Actual visits may be conducted with structured questionnaires to validate information provided by companies. The Companies Act⁵⁸ is also being revised which is likely to give rise to provisions that will lead to greater transparency.⁵⁹ Thus, even though fronting serves as a barrier to the effective use of procurement as a policy tool, preventative measures are being put in place.⁶⁰

4.8.3 Failure to use framework in Procurement Act

No provision is made in the Procurement Act or Regulations for instances where an organ of state implements a preferential procurement policy but fails to comply with the framework provided therefore in the Act. In terms of reg.2(2), however, organs of state that implement a preferential procurement policy “must” use the framework provided in the Procurement Act and Regulations.⁶¹ A party who is not awarded a contract because the policy of the organ of state is not in line with the Procurement Act or Regulations would therefore not necessarily be without a remedy. Depending on the circumstances, such a party may be entitled to the remedies provided for in s.8 of Paja, such as an order setting aside the award of a contract, an interdict or a declaratory order.

5. Conclusion

The use of government procurement as an instrument of policy is not without controversy. On the whole, however, particularly in the South African context, procurement as a policy tool can be said to be justified. Affirmative procurement does not amount to an infringement of the right to equality in

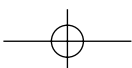
⁵⁷ Code 000: Framework for the Measurement of Broad Based Black Economic Empowerment, Statement 001: Fronting Practices and Other Misrepresentation of BEE Status—available at www.dti.gov.za/bee/2NDPHASE.htm (confirmed access: April 14, 2006).

⁵⁸ 61 of 1973.

⁵⁹ Senior Business Correspondent “New companies law to take tough stand on fronting” September 22, 2004—available at www.eprop.co.za/news/article.aspx?idArticle=4602 (confirmed access: April 14, 2006). The aim is to introduce the revised Companies Act in late 2006 or early 2007.

⁶⁰ See N. Joseph “City man fined for fronting” *Cape Argus*, June 1, 2005—available at www.capeargus.co.za (confirmed access: April 14, 2006) who reports that a businessman and his company has been fined R500,000 and ordered to pay R750,000 to the Criminal Assets Recovery Account (as the proceeds of crime) by the Bellville Regional Court because he resorted to fronting to procure government tenders. See also Moloi (“Combating Corruption and Fronting” (2006) *Building Women* 32 at 33) who writes that the Minister of Public Works, Stella Sigcau, has vowed that the following steps will be taken to ensure that people who defeat the objectives of BEE in the construction industry face the full might of the law: “[t]he fronting enterprise will be handed over to the National Prosecuting Authority for further forensic investigation and prosecution where necessary; [t]he fronting enterprise will be blacklisted with the National Treasury as well as the Construction Industry Development Board; [c]ontracts executed by fronting enterprises will be cancelled where service delivery is not likely to be heavily affected; [a]ll contractors claiming BEE status will have to submit an accreditation certificate that attests to their claim before doing business with the department”.

⁶¹ See also 4.2.3 above.



s.9 of the Constitution. The Constitutional Court has held that s.9 refers to a substantive conception of equality as opposed to a formal conception of equality. The right to equality “acknowledges and accommodates group differences and encompasses the right to *reparation* for past inequality”.⁶² Affording preferences to previously disadvantaged groups in the award of government contracts therefore does not infringe on the right to equality or the principle of fairness in s.217(1) of the Constitution.

The primary legislation that deals with the use of procurement as a policy tool in South Africa is the Procurement Act and the Regulations thereto. On the whole, effect is given to the constitutionally prescribed use of procurement as a policy instrument. Case law also illustrates the judiciary’s commitment to enforce compliance with the prescribed use of procurement as a policy tool. The preference point systems created by the Procurement Act illustrate the importance that is still attached to the attainment of value for money when the state procures goods or services. The allocation of preference points is determined by the value of contracts—the higher the value of contracts, the fewer preference points may be allocated. Very careful consideration has thus been given to the balancing of costs and benefits in the use of procurement as a policy tool. Contractors are further allowed themselves to decide how to incorporate social benefits, which may involve, for example, the use of targeted groups as sub-contractors or as joint venture partners. In deciding proposals, contractors will clearly use the most gainful methods to maximise their overall points score. This, in turn, harnesses to maximum effect the skills, knowledge and creativity of the private sector in implementing social benefits in the most efficient and cost-effective way.⁶³

Contractors that belong to target groups further do not have a right to preferential treatment simply because they fall within a specific target group. All the principles in s.217(1) of the Constitution (fairness, equity, transparency, competitiveness and cost-effectiveness) find application when organs of state contract for goods or services and the principle of equity is only one of those principles. All the principles must be afforded weight in a given set of circumstances to ensure overall compliance with s.217. The term procurement in the South African context should further be understood to encompass both the acquisition of goods and services and the sale and letting of assets. Thus, whenever organs of state contract with private parties, they are bound by the principles of affirmative procurement.

⁶² Albertyn and Kentridge, cited above, p.178, emphasis added.

⁶³ See also Arrowsmith, Linarelli and Wallace, cited above, p.274.