

THE USE OF GOVERNMENT PROCUREMENT AS AN INSTRUMENT OF POLICY

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INTRODUCTION

Governments make considerable use of contracts to obtain goods and services, such as office equipment, computer systems, advertising and construction services (to mention a few), from outside suppliers. These contracts are referred to as contracts of procurement or, more accurately, public sector procurement contracts.¹ They are of such a high volume² that a government's decisions in respect of how, when and with whom it contracts, inevitably have effects upon a whole range of issues. Public procurement is 'business' because it is a means for the state to obtain goods and services at reasonable cost but such procurement also has broader social, economic and political implications.³ It is, therefore, not uncommon for governments to use procurement as a means of promoting objectives unconnected with the immediate object of procurement. In other words, it is often employed to promote objectives which are 'secondary' or 'collateral' to the 'primary' objective of procurement — the acquisition of goods and services on the best possible terms.⁴ Examples of such secondary objectives include the promotion of social, industrial and environmental policies.⁵

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¹ For literature on public sector procurement generally, see Jacques Labuschagne *Staatskontrakte ter verkryging van goedere, dienste en werke* (Unpublished LLD thesis, Unisa, 1985); Lawrence Baxter *Administrative Law* (1984) at 65 and 395–6; Sue Arrowsmith, John Linarelli & Don Wallace, Jr *Regulating Public Procurement: National and International Perspectives* (2000); Sue Arrowsmith *Civil Liability and Public Authorities* (1992) ch 3; Sue Arrowsmith *Government Procurement and Judicial Review* (1988); Colin Turpin *Government Contracts* (1972); Colin Turpin *Government Procurement and Contracts* (1989); Nicholas Seddon *Government Contracts: Federal, State and Local* (1995) ch 6; Peter Cane *An Introduction to Administrative Law* 3 ed (1996) 14–15, 39 and 257–63; A C L Davies *Accountability: A Public Law Analysis of Government by Contract* (2001) 1–3; P P Craig *Administrative Law* 4 ed (1999) ch 5; Sue Arrowsmith *The Law of Public and Utilities Procurement* (1996); Sue Arrowsmith & Keith Hartley *Public Procurement* vol I (2002); Sue Arrowsmith & Keith Hartley *Public Procurement* vol II (2002).

² In South Africa, public sector procurement was found, in 1996, to be 13 per cent of gross domestic product. See the Green Paper on Public Sector Procurement Reform in South Africa GG 17928, 14 April 1997. A study conducted in the European Union revealed that civil public procurement in the public sector and certain major utilities account for about 11 per cent of European Union gross domestic product. See The European Commission 'The single market review' in *Public Procurement* (1997) Vol II.

³ Labuschagne op cit note 1 at 282–3; Turpin *Government Contracts* op cit note 1 at 244; P E Morris 'Legal regulation of contract compliance: An Anglo-American comparison' (1998) 19 *Anglo American LR* 87 at 87–8.

⁴ Arrowsmith et al *Regulating Public Procurement* op cit note 1 at 237; Turpin op cit note 1 at 73; Cane op cit note 1 at 258.

⁵ *Ibid.*

It is in relation to such secondary objectives that public sector procurement is of particular significance in South Africa. In the past, discrimination, unfair practices and the marginalization of people denied various groups in society the privilege of being economically active within the public sector procurement system.⁶ The public procurement system favoured large and established businesses and it was very difficult for newly established businesses to enter the system.⁷ This article is aimed at determining how the South African government has made provision for the use of public sector procurement as a means of addressing the imbalances of the past. It will begin by giving an overview of the use and the justifications for the use of public sector procurement as an instrument of policy generally. Next, South Africa's use of procurement as a means to implement policy will be examined. Specific attention will be given to s 217 of the Constitution,⁸ the Preferential Procurement Policy Framework Act⁹ (the Procurement Act) and the Preferential Procurement Regulations¹⁰ that have been promulgated to give substance to the Procurement Act. From the discussion of these legislative instruments it will be evident that special considerations apply to the selection criteria applicable to contractors. The relevant statutory provisions pertaining to procurement will then be analysed by looking at how the South African courts have applied and interpreted these provisions. Thereafter, controversies surrounding the current preferential procurement policies will be examined. The potential implications of the World Trade Organisation Government Procurement Agreement (WTO GPA) for South Africa will also be examined, including implications for the pursuit of national policy.

POLICY PROMOTION THROUGH PUBLIC SECTOR PROCUREMENT

In the international arena, public procurement has often been used as a tool to implement secondary policies.¹¹ A study undertaken for the European

⁶ See speech by the Minister of Transport at the 7th Annual Government Tendering Conference 'Operations of our public and private sectors need to achieve economic efficiency, while at the same time being transparent and accountable' at Vodaworld, Midrand, 28 March 2001 (available at www.polity.org.za/html/govdocs/speeches/2001/index.html [6 August 2004]).

⁷ See Message from the Minister of Finance, Trevor Manuel, in Green Paper on Public Sector Procurement Reform in South Africa op cit note 2. See also Debbie Sharp, Pinky Mashigo & Patrick Burton *Assessment of Public Sector Procurement to Small, Medium and Micro-enterprises* (a study undertaken by Moropa Information Management for Ntsika Enterprise Promotion Agency, 1999) 7; S M Gounden *The Impact of the Affirmative Procurement Policy on Affirmable Business Enterprises in the South African Construction Industry* (Unpublished PhD thesis, University of Natal, 2000) at 3.11, where it is noted that prior to 1994 around 95 per cent of state contracts were awarded to white-owned businesses.

⁸ The Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution).

⁹ Act 5 of 2000.

¹⁰ GN R725, GG 22549, 10 August 2001.

¹¹ See generally Gounden op cit note 7 at 1.4; Sue Arrowsmith 'Public procurement as an instrument of policy and the impact of market liberalization' (1995) 111 *LQR* 235; Arrowsmith *The Law of Public and Utilities Procurement* op cit note 1 ch 16; Arrowsmith et al *Regulating Public Procurement* op cit note 1 ch 5; Arrowsmith *Government Procurement and Judicial Review* op cit note 1 at 81-96; Craig op cit note 1 at 144; Cane op cit note 1 at 258-9; Turpin op cit note 1 at 73-9; Turpin *Government Contracts* op cit note 1 ch 9; Seddon op cit note 1 at 27-30.

Community in 1995,¹² indicates that public sector procurement has been used by governments to stimulate economic activity, protect national industries against foreign competition, improve the competitiveness of certain industrial sectors, and to remedy regional disparities. It has also been employed to achieve certain more direct social policy objectives — to foster job creation, to promote fair labour conditions, to promote the use of local labour, as a means to prevent discrimination against minority groups, to protect the environment, to encourage equality of opportunity between men and women and to promote the increased utilization of the disabled in employment.¹³

The freedom of governments to use procurement as a policy tool has, however, to a large extent, been curbed in recent years by the implementation of measures aimed at achieving free trade in public markets.¹⁴

JUSTIFICATION FOR THE USE OF PROCUREMENT AS A POLICY TOOL

A number of concerns have been raised regarding the use and effectiveness of public sector procurement as an instrument of policy. Ron Watermeyer,¹⁵ for example, points out that the benefits of policies which are promoted through procurement are often doubtful or minimal.¹⁶ Even where beneficial effects can be achieved, the cost implications involved may be substantial. Longer tendering periods to secure participation by the relevant target groups, the training of emerging businesses as well as the administration associated with the enforcement of policies may result in increased costs. The question also arises as to how or in what manner these costs should be met.¹⁷ There is, furthermore, the difficulty of enforcing clauses in procurement contracts aimed at achieving secondary policies. According to Nicholas Seddon,¹⁸ 'the

¹² See Christopher McCrudden *Public Procurement and Equal Opportunities in the European Community: A study of contract compliance in member states of the European Community and under European Community Law* (Contract File No. SOC 9310257105B04, Oxford University, 1995).

¹³ The use of procurement as a tool to implement social policies is particularly prevalent in developing countries and countries with a history of marginalization such as South Africa.

¹⁴ These include, most notably, the WTO GPA and the restrictions in place under European Community Law. For an overview of the WTO GPA see Arrowsmith et al *Regulating Public Procurement* op cit note 1 ch 4. For application of the rules under European Community Law see Case C-21/88, *Du Pont de Nemours Italiana v Unita Sanitaria Locale No 2 di Carara* [1990] I — ECR 889, where the European Court of Justice found that regional support for an undeveloped region amounts to discrimination against foreign manufactured products. See also Case 45/87R (the 'Dundalk water case'), *EC Commission v Ireland* [1989] I CMLR 225, where the European Court of Justice held that the use of a standard in specifications to preclude tenders based on different specifications — which might be just as acceptable for the project — amounts to an obstacle to free trade.

¹⁵ Ron Watermeyer 'The use of targeted procurement as an instrument of poverty alleviation and job creation in infrastructure projects' (2000) 9 *Public Procurement LR* 231.

¹⁶ In the United Kingdom, the European Commission found that regional preference schemes appear to have had minimal impact. It was estimated that they applied to contracts representing only 0,02 per cent of government procurement and that there was no evidence that they had made a significant contribution. See *Public Procurement: Regional and Social Aspects* COM (89) 400 Final (Commission Communication of September 22, 1989) (89C 311/07) paras 34 and 35.

¹⁷ See Arrowsmith et al *Regulating Public Procurement* op cit note 1 at 238; Arrowsmith *Government Procurement and Judicial Review* op cit note 1 at 95–6, where she notes that '[i]f no special provision is made, then any premium paid [should be] met from the budget of the user department'.

¹⁸ Seddon op cit note 1 at 29.

only effective remedy for breach of these kinds of clauses is to exclude the contractor from future government business'.¹⁹ He notes, however, (and correctly so) that this kind of action will be effective only if there are many suppliers within the market. It is also contended that discriminatory procurement policies (where governments buy only domestically produced goods) are detrimental to international trade. This contention has been one of the main reasons for the current restrictions on the use of procurement as a policy tool.

There are, however, commentators who appear to be in favour of the use of procurement as a policy tool. Sue Arrowsmith,²⁰ for example, points out that 'where properly employed, procurement may prove a useful and effective instrument'.²¹ She notes that public procurement is 'a valid and valuable tool for the implementation of social policies; and one which should not be denied to government[s] without convincing justification'.²² Similarly, P P Craig²³ notes that:

'[C]ontracts made by public bodies should not be viewed solely as commercial bargains. The very power to grant contracts should be able to be utilized to advance socially desirable objectives, precisely because such authorities cannot be and should not be politically neutral towards such matters. It may not always be possible to pass legislation which enshrines such objectives, and even where this has been done, the use of contracting power may be an effective method of enforcing such legislative norms.'

Fernández Martin and Oliver Stehmann²⁴ also point out that a preferential procurement policy can offer advantages over more direct methods of assistance because 'it does not raise public spending directly ... is less likely to be channelled into the purse of organized crime [and is] more efficient than tax-financed State aid which barely reaches recipients'.²⁵ P E Morris²⁶ argues for the use of procurement as a tool to achieve anti-discrimination objectives and raises a number of justifications in support of his argument, namely, the moral justification that governments should not support contractors who violate anti-discrimination laws; the evidence that orthodox legislative methods of combating discrimination are ineffective; and the fostering of

¹⁹ See also Reg 15 of the Preferential Procurement Regulations, where provision is made for penalties for the fraudulent attainment of preferences and/or the non-attainment of specified goals in the performance of a contract. Regulation 15(2)(d) specifically provides that an organ of state may 'restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years'. See also the ILO Convention no 94, which regards debarment from future contracts as the most appropriate sanction for failure to comply with labour clauses in public contracts.

²⁰ Arrowsmith (1995) 111 *LQR* 235 op cit note 11 at 245.

²¹ She uses as examples of success stories the development of the Airbus aeroplanes in Europe which were supported initially by means of subsidies and preferential procurement and the development of the micro-electronics industry in the United States.

²² Arrowsmith (1995) 111 *LQR* 235 op cit note 11 at 247-8.

²³ Craig op cit note 1 at 138.

²⁴ José Maria Fernández Martin & Oliver Stehmann 'Product market integration versus regional cohesion in the community' (1991) 16 *European LR* 216 at 238.

²⁵ See also P A Geroski 'Procurement policy as a tool of industrial policy' (1990) 4 *International Review of Applied Economics* 182 at 196, who points out that 'procurement policy can be used effectively — and probably more effectively than R & D subsidies — to stimulate industrial innovation'.

²⁶ Morris op cit note 3 at 87-8.

competition by awarding contracts on merit and not awarding contracts to contractors who violate anti-discrimination laws.²⁷ According to Morris,²⁸

[p]rocurement is an important item of public expenditure with far-reaching social, economic and political implications. To argue . . . that public procurement is a sacred cow which should be “outside the political arena” is restrictive and unwarranted. Purchasing policies pursued by public authorities should be open to modification in the light of pressing social or economic problems — even if this does require procurement decisions not to be guided exclusively by commercial criteria.’

The issue of public procurement liberalization in the context of international trade is addressed by Federico Trionfetti,²⁹ who points out that discriminatory procurement (in the sense of home-biased procurement) does not necessarily constitute a barrier to trade, nor does it necessarily affect international specialization. The crucial question is the ‘*size of government demand with respect to domestic output*’. It is only when government demand is larger than domestic supply that discriminatory procurement ‘will affect international specialization and will most likely reduce the volume of trade’.³⁰

To illustrate this, Trionfetti³¹ uses the example of a country where the food supply is \$30, government demand is \$20 and private demand is \$60. In this scenario, the country would be importing \$50 of food (\$20 (government demand) + \$60 (private demand) = \$80 (total demand) – \$30 (local supply) = import amount). Should the government only buy domestic food it would mean that \$20 of food is sold to the government and the rest to the private sector. Since food is a homogeneous good, the private sector absorbs the supply that is left (\$10) and total imports remain unchanged. Thus, discriminatory procurement does not affect domestic supply or trade flows. The situation is, however, different where the (domestic) food supply is lower than government demand. So, in our example above, if the domestic food supply were \$10 and the government’s demand remained at \$20. The result here is that imports now amount to \$70 (\$20 (government demand) + \$60 (private demand) = \$80 (total demand) – \$10 (local supply) = import amount). Should the government decide to buy only domestic food, domestic supply will have to increase by \$10 to match the government’s demand of \$20. At the same time, imports will decrease to \$60. Further resources will have to be diverted to food production. Discriminatory procurement will thus affect

²⁷ In South Africa, suppliers, service providers and contractors, in so far as labour is concerned, are bound by various pieces of legislation, i.e. the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997, the Employment Equity Act 55 of 1998 and the Occupational Health and Safety Act 85 of 1996. The non-observance of these pieces of legislation (to maximize profits) inevitably gives rise to unfair competitive advantages in the tendering process. It is, therefore, important to ensure that those who participate in public sector procurement adhere to labour standards. See also Mokgadi Pela ‘Heavy penalties for non-compliance on equity’ *The Cape Times, Business Report* (7 October 2003) in which Snuki Zikalala, the Department of Labour’s Communication Chief states that companies failing to comply with employment equity legislation risk being blacklisted and disqualified from future government tenders, and being fined up to R3 million.

²⁸ Morris op cit note 3 at 87–8.

²⁹ Federico Trionfetti ‘Discriminatory public procurement and international trade’ (2000) 23 *World Economy* 57 at 65.

³⁰ Ibid.

³¹ Trionfetti op cit note 29 at 65–6.

the relative production specialization within the country as well as act to reduce the volume of trade.³²

One could of course argue that the opening up or liberalization of trade is simply a façade used by developed countries to gain an even bigger advantage over the developing and least-developed countries. The opening up of markets (in the developing and least-developed countries) would result in foreign firms having an unfair advantage over domestic firms tendering for the same contracts. Most industries in these countries have not gone through the full development cycle experienced by other developed economies. Consequently, many industries would have difficulty competing for contracts if preference and support for locally manufactured products were to be abolished.

The use of procurement as a means to further national policy is, therefore, not without controversy. On the whole, however, the justifications in favour of the use of procurement as a policy tool can be said to outweigh the justifications against such use. It is acknowledged that, in some instances, there may be time and cost premiums attached to the use of procurement as a means to further socio-economic objectives. This premium should, however, be regarded as an integral part of a country's growth and transformation. Very often, the question is not whether a government can afford to use procurement as a policy tool but rather whether it can afford not to.

The South African government has chosen to embark upon the use of procurement as an instrument to correct the imbalances of the past. This decision requires further examination.

PUBLIC SECTOR PROCUREMENT AS A POLICY TOOL IN SOUTH AFRICA

In South Africa, public sector procurement has become an important tool to remedy past injustices.³³ So much so, that the Constitution makes express provision for a procurement policy providing for the preferential allocation of contracts and the advancement of certain persons, or categories of persons, when procuring goods, works or services.³⁴ Section 217(1) provides that '[w]hen an organ of State³⁵ in the national, provincial or local sphere of

³² For a further examination of whether discriminatory procurement (in the sense of home-biased procurement) produces trade effects, see Aaditya Mattoo 'The government procurement agreement: Implications of economic theory' (1996) 19 *World Economy* 695 at 699–708.

³³ See generally Labuschagne op cit note 1 ch 8; Watermeyer op cit note 15 at 226; Baxter op cit note 1 at 65; Sharp op cit note 7; Arrowsmith et al *Regulating Public Procurement* op cit note 1 ch 5; Green Paper on Public Sector Procurement Reform in South Africa op cit note 2 ch 3; Gounden op cit note 7. For an overview of public sector procurement in South Africa prior to 1994 see generally Labuschagne op cit note 1; Gounden op cit note 7 at 3.11–3.12.

³⁴ It is not common for public sector procurement to be included in a country's constitution; its inclusion in South Africa's Constitution serves to illustrate its importance as a policy instrument. Public sector procurement was also included in South Africa's interim Constitution, Act 200 of 1993, in s 187. No specific provision was made, however, for the use of procurement as a policy tool. See Gounden op cit note 7 at 3.14.

³⁵ An organ of state is defined in s 239 of the Constitution as '(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution — (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer'.

government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'. This section goes on to provide, in subsec (2), that subsec (1) 'does not prevent the organs of State or institutions referred to in that sub-section from implementing a procurement policy providing for (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination'. Subsection (3) then requires the enactment of national legislation to 'prescribe a framework within which the policy referred to in subsection (2) must be implemented'.

Section 217 therefore makes provision for the implementation of a policy of preferential procurement or what has also been referred to as 'affirmative procurement' or 'targeted procurement'.³⁶ Targeted procurement can be described as a system of procurement which is aimed at providing employment and business opportunities for disadvantaged (marginalized) individuals and communities, which are referred to as 'target groups'. The aim of such a policy is to provide opportunities for these target groups to participate in public procurement even though they may not have all the necessary resources, capacity or expertise to perform contracts in their own right. The system has been described as a vehicle for achieving a number of social objectives, including job creation, increasing the use of local resources, economic empowerment, poverty alleviation, and reducing disparities in employment and business ownership patterns in society.³⁷ Targeted procurement thus attempts to link the achievement of social objectives to procurement with the minimum possible cost to the government.

The South African government embarked upon a reform process of the public sector procurement system with the release, in November 1995, of a 'ten-point plan'.³⁸ The plan included a variety of measures to achieve the above objectives. These included: the improvement of access to tendering information; the development of tender advice centres; the broadening of a participation base for small contracts; the waiving of security requirements on certain construction contracts; the unbundling of large projects into smaller projects; the promotion of early payment cycles by government; the development of a preference system for small, medium and micro enterprises (SMMEs)³⁹ owned by historically disadvantaged individuals (HDIs);⁴⁰ the

³⁶ See Watermeyer op cit note 16 at 233–45; www.targetedprocurement.com [6 August 2004].

³⁷ Ibid.

³⁸ See Sharp op cit note 7 at 16; Gounden op cit note 7 at 3.15–3.20.

³⁹ The National Small Business Act 102 of 1996 defines 'small business' in s 1 (xv) as 'a separate and distinct business entity, including cooperative enterprises and non-governmental organisations, managed by one owner or more which, including its branches or subsidiaries, if any, is predominantly carried on in any sector or sub sector of the economy mentioned in column I of the Schedule and which can be classified as a micro-, a very small, a small or a medium enterprise by satisfying the criteria mentioned in columns 3, 4 and 5 of the Schedule opposite the smallest relevant size or class as mentioned in column 2 of the Schedule; (vii)'. See also Gounden op cit note 7 ch 4; Sharp et al op cit note 7 at 7–8 for a detailed definition of SMMEs. Sharp et al however point out that the definition of SMMEs exists is often misinterpreted or misused by agencies purporting to support the growth of SMMEs. According to them, service agencies tend to formulate their own definitions.

⁴⁰ Defined in Part I of the Preferential Procurement Regulations 2001 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

simplification of tender submission requirements; the appointment of a procurement ombudsman; and the classification of building and engineering contracts. In April 1997, a 'Green Paper on Public Sector Procurement Reform'⁴¹ was released that contained all the principles of the ten-point plan. It also included a proposal for the drafting of an affirmative procurement policy. The essential characteristics of this policy are 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 working towards consistent and uniform definitions, strategies, monitoring and reporting mechanisms to realize policy objectives.

In February 2000 the Procurement Act was promulgated. The purpose of the Act is the enhanced participation of HDIs and SMMEs in the public sector procurement system. Of particular significance is s 2 of the Act which prescribes the basis upon which an organ of state⁴² may implement a preferential procurement policy. It allows an organ of state, in its procurement policy, to aim for specific goals which may include 'contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability'.⁴³ It requires (within the context of a points system of evaluating tenders) that 'any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender'.⁴⁴ The Act then requires that the contract be awarded 'to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) [of s 2 (1)] justify the award to another tenderer'.⁴⁵

The Preferential Procurement Regulations were promulgated in August 2001 to give substance to the provisions of the Procurement Act. According to the new evaluation system contemplated in these regulations, preferences will be applicable to all tenders irrespective of the amount. Over and above the award of preference points in favour of HDIs, points will also be awarded for, inter alia, the promotion of South African owned enterprises; the promotion of export-orientated production to create jobs; the promotion of SMMEs; 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 female; and/or (3) who has a disability: 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'.

⁴¹ Green Paper on Public Sector Procurement Reform in South Africa op cit note 2.

⁴² Section 1 of the Procurement Act defines an organ of state as '(a) a national or provincial department as defined in the Public Finance Management Act, 1999 (Act No. 1 of 1999); (b) a municipality as contemplated in the Constitution, (c) a constitutional institution defined in the Public Finance Management Act 1 of 1999; (d) Parliament; (e) a provincial legislature; (f) any other institution or category of institutions included in the definition of "organ of state" in section 239 of the Constitution and recognized by the Minister by notice in the *Government Gazette* as an institution or category of institutions to which this Act applies'.

⁴³ Regulation 1(f) of the Preferential Procurement Regulations 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'.

⁴⁴ These provisions are set out in s 2(1)(d) and (e) of the Procurement Act.

⁴⁵ Section 2(1)(f) of the Procurement Act.

⁴⁶ Regulation 17(3).

creation of new jobs or the intensification of labour absorption; the promotion of enterprises located in a specific province, region, municipality, or in rural areas; the empowerment of the workforce by standardizing the level of skill and knowledge of workers; the development of human resources; and the upliftment of communities.⁴⁶ The regulations are, therefore, aimed at enhancing the involvement of black businesses in the public tendering system and uplifting disadvantaged communities. They also aim to promote the inclusion of the informal business sector into the main-stream economy.

The application and interpretation of the preferential procurement legislation by the South African courts

The most controversial procurement provision is arguably s 2(1)(f) of the Procurement Act. This subsection provides, as we have seen, that a 'contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) [of s 2(1)] justify the award to another tenderer'.⁴⁷ The court in *Grinaker LTA Ltd v Tender Board (Mpumalanga)*⁴⁸ held that this provision is preemptory.⁴⁹ In other words, the contract *must* be awarded to the tenderer who scores the highest points unless additional objective criteria exist.⁵⁰ The interpretation of this phrase has been a particularly thorny issue. Thus far, the courts have defined the meaning of the phrase as referring to criteria 'over and above'⁵¹ or criteria 'besides; as well as'⁵² those contemplated in paras (d) and (e) but have not given an indication as to what these additional criteria might be.⁵³ Whilst this section must, in accordance with the presumption that the legislature does not intend to enact invalid or purposeless provisions, be given its due weight, the criteria which might justify the award of the tender to a tenderer appear to be very limited. It appears as if the legislature affords 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. This limits even further the discretion that an organ of state has in relation to objective criteria.

⁴⁷ A similar provision is contained in regulation 9 of the Preferential Procurement Regulations which provides that 'a contract may, on reasonable and justifiable grounds, be awarded to a tender[er] that did not score the highest number of points'.

⁴⁸ [2002] 3 All SA 336 (T).

⁴⁹ For a detailed discussion on preemptory and directory statutory provisions see J R de Ville *Constitutional and Statutory Interpretation* (2000) ch 5.

⁵⁰ *Grinaker* supra note 48 at 350 para 40. See also *RHI Joint Venture v Minister of Roads and Public Works and others* 2003 (5) BCLR 544 (CK) at 556 para 25; *Sebenza Kahle Trade CC v Emalahleni Local Municipal Council and another* [2003] 2 All SA 340 (T).

⁵¹ Referring to Webster's *Third New International Dictionary*.

⁵² Referring to Collins's *English Dictionary*.

⁵³ See *Grinaker* supra note 48 at 353 paras 55–6 (considerations of price and HDI factors as objective criteria relied upon by Tender Board in justifying award of tender not objective criteria in terms of s 2(1)(f); these were criteria to be considered under s 2(1)(d) and (e)); *RHI Joint Venture* supra note 50 at 557 paras 32–3 ('local labour, resources and affirmable business enterprises' not amounting to objective criteria in addition to those contemplated in s 2(1)(d) and (e); these factors were provided for in preference point system and were allocated due and proper weight in terms thereof; improper to afford weight to factors for second time).

As for the other provisions pertaining to procurement, the courts have thus far strictly enforced them. Emphasis is placed on the right of tenderers to be furnished with reasons for an unsuccessful tender⁵⁴ as well as the right to procedural fairness in the public sector procurement process in general.⁵⁵ The furnishing of reasons is, of course, of particular significance insofar as emerging contractors are concerned: it enables them to learn what is required to win tenders and to improve on their mistakes.⁵⁶ Failure to furnish reasons, particularly to emerging contractors, would defeat the whole purpose of the Procurement Act as it is likely that these contractors will continue to be unsuccessful in obtaining tenders and for the same reasons, of which they would remain unaware.

Insofar as s 2(1)(f) of the Procurement Act is concerned, the courts need to be applauded for affording peremptory status to the provision.⁵⁷ This serves a number of important purposes. It ensures uniformity in tender procedures which, in turn, goes towards ensuring the integrity of the tendering process and promotes public confidence in tendering procedures. Effect is given to the intention of the legislature in enacting the provision and general compliance with the purpose of the statute is encouraged.⁵⁸ At the same time, it ensures that the state does not pay more for contracts than is justified.

South Africa's current use of procurement as a means to promote socio-economic objectives is, however, not without controversy.

Controversies surrounding the current preferential procurement policies

A number of issues can be (and have been) raised regarding the use and effectiveness of procurement as a policy tool in South Africa. Of particular significance is the problem of 'fronting' — this occurs where black people are

⁵⁴ See *Grinakers* supra note 48 at 348–9 para 32. See, however, Part IV para 24.6 of the State Tender Board: General Conditions and Procedures (St 36), which provides: 'Any decision by the Board regarding the awarding of a contract shall be final and the Board is *not obliged* to give any reason for the acceptance or passing over of a tender' (italics added). The courts have, however, on numerous occasions held that an unsuccessful tenderer is entitled to be furnished with reasons for the non-acceptance of its tender. The most important authority in this regard is *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA). See also the cases referred to infra.

⁵⁵ See *RHI Joint Venture* supra note 50 at 558–9 paras 34–40 (where it was held that policy of a 'fair distribution of work amongst Provinces' contractors . . . should have been brought to the attention of prospective tenderers in the invitation to tender. Every tenderer was entitled to know, prior to tendering for the contract, that preference would be given to tenderers who had not been awarded a contract previously. From a practical and financial point of view the necessity for this to have been disclosed is obvious. Those contractors who had previously been successful would then have been able to decide whether or not the expense of preparing and submitting a tender was warranted' (para 37); *Sebenza* supra note 50 at 347e–j. See also *GNH Office Automation CC v Provincial Tender Board* 1996 (9) BCLR 1144 (Tk) at 1164I–1165H; *Umfolozi Transport (Edms) Bpk v Minister van Vervoer* [1997] 2 All SA 548 (A) at 552j.

⁵⁶ See also Sharp et al op cit note 7 at 34, whose findings reveal that SMMEs 'wish to be told what it is that they are doing wrong'.

⁵⁷ See *Grinakers* supra note 48 at 350 para 40; *RHI Joint Venture* supra note 50 at 556 para 25; *Sebenza* supra note 50 at 347e–j.

⁵⁸ The main purpose of the Procurement Act of course being the enhanced participation of HDIs and SMMEs in the public sector procurement process with the aim of correcting the imbalances caused apartheid.

signed up as fictitious shareholders in essentially 'white' companies.⁵⁹ Further issues are the variety of procurement practices and documentation currently in use; and the lack of financial support and credit facilities available to emerging contractors. In addition, there are problems in relation to delayed payment of contractors (particularly in the case of emerging contractors) and with the training of emerging contractors.

Ebrahim Rasool,⁶⁰ then the Western Cape MEC for Finance and Economic Development, acknowledged the problem of fronting and indicated that 'strong punitive action will be instituted against offenders'.⁶¹ According to Rasool, the Western Cape Provincial Government is pursuing the drafting of a policy on fronting, and the development of a supplier's database, to assist the provincial government in effective 'patrolling'.⁶² More recently, the then 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.⁶³ 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.'⁶⁴

Sigcau⁶⁵ has also acknowledged the variety of procurement practices and documentation currently being used and that there is a need for consistency to avoid non-uniform procurement practices. According to Sigcau, national government departments, and a number of provincial government departments, have standardized targeted procurement documents as current

⁵⁹ This practice has been described by Mongezi 'Monk' Gocin, a venture capitalist and black economic empowerment consultant to a number of multinationals and state enterprises, as 'an act of terrorism against empowerment'. See Siphon Nqobo 'Fronting only moves the process backwards' *The Cape Times, Business Report* (15 October 2003).

⁶⁰ See Ebrahim Rasool Revised Western Cape Preferential Procurement Policy, 18 February 2002 (available at www.polity.org.za/pol/search/content/?show=32613 [6 August 2004]).

⁶¹ See Regulation 15 of the Preferential Procurement Regulations, which provides for penalties where preferences (in terms of the Procurement Act or the Regulations) are obtained fraudulently or specified goals are not attained in the performance of a contract. Penalties include (in addition to other remedies that may be available) the recovery of costs, losses or damages; cancellation of the contract; financial penalties; and exclusion (debarment) for a period not exceeding 10 years.

⁶² See Nqobo op cit note 59, wherein Mongezi "Monk" Gocin proposes that criteria for a fronting-control framework be legally incorporated with a multi-stakeholder consultancy. The framework is proposed to include monitoring (to enjoy a strong government or legislative imprimatur); sanctions (where companies acquire contracts through misrepresentation or fronting, they must be made liable for prosecution); continuous improvement (contract adjudication and deliberations must be subjected to a continuous improvement process, where the reporting structure can highlight gaps of interference in the value chain of bidder assessments); and public awareness (the Do Not Front message must be as ubiquitous as the Proudly South African Campaign).

⁶³ Lynda Loxton 'Public works to award credits to end fronting' *The Cape Times, Business Report* (14 September 2003).

⁶⁴ See Statement by the Minister of Public Works, Stella Sigcau at the GCIS Parliamentary Media Briefing, 12 September 2003 (available at www.polity.org.za/pol/search/content/?show=41042 [6 August 2004]).

⁶⁵ See Speech by the Minister of Public Works, Stella Sigcau, at the Kwazulu-Natal Construction Industry Conference, 8 September 2003 (available at www.polity.org.za/pol/search/content/?show=40898 [6 August 2004]).

practice for preferential procurement in the construction industry. Standardized documents, however, need to be used in all sectors of government and also at parastatal level.⁶⁶

On the issue of the lack of financial support and credit facilities for emerging contractors,⁶⁷ it is noteworthy that the 'Emerging Contractor Development Programme' (set up in 1997), has managed more than 50 000 construction-related projects of varying sizes, worth R431 million.⁶⁸ In 1998 and 2001, two strategic initiatives were also introduced by the Department of Public Works in order to accelerate the participation of HDIs, and women in particular, as prime contractors capable of executing multi-million rand contracts. As a result of this, major infrastructure projects exceeding R800 million in value have been delivered. Collectively, all these initiatives have ensured a steady increase, over the years, of the stake held by previously marginalized groups. In the last two years, it is estimated, more than 40 per cent of the Department of Public Works' capital-works budget has gone into the hands of previously disadvantaged persons as compared to a figure of only 4 per cent in 1994. Some of South Africa's major banks are also reported to have embarked on major empowerment initiatives in this sphere.⁶⁹

The delayed payment of contractors is, however, a major concern as it inevitably affects the growth of (particularly) emerging contractors.⁷⁰ It prevents them from obtaining new work because the limited profits they make are retained by clients as security for previous contracts.⁷¹ At the same

⁶⁶ Parastatals are institutions which are directly or indirectly controlled by the state (e.g. Transnet, Eskom and Telkom). They are often perceived as having an unfair advantage in competing for contracts with the private sector because they price on the basis of operating costs alone, they have tax concessions, they are not obliged to earn an adequate return on their investment, and they undercut the prices of competitors despite making losses. As a general rule parastatals should therefore be discouraged from tendering in competition with the private sector and if they do, a percentage loading should be applied to protect the private sector. See also Sharp et al op cit note 7 at 27–31, who point out: 'Parastatals view themselves as independent of government and therefore free to decide their own processes and implementation strategies, whether with reference to government policy or not'. See also Wiseman Khuzwayo 'Regressive tender process fails in its delivery' *The Sunday Independent, Business Report* (13 July 2003), where James Ngobeni, the acting chief executive of the SA Black Technical and Allied Careers Organisation (Sabtaco), points out that 'there are no uniform guidelines [in the public procurement process]. Parastatals define their own procurement policies because they are not bound by government guidelines'.

⁶⁷ See Address by Jeff Radebe, Minister of Public Enterprises 'Restructuring of state owned enterprises and related opportunities for black economic empowerment' The Consultative Business Forum, Durban, 12 September 2000 (available at www.polity.org.za/html/govdocs/speeches/2000/sp0912a.html [6 August 2004]).

⁶⁸ See Speech by the Minister of Public Works op cit note 64.

⁶⁹ Absa Limited and First Rand Bank Limited are reported to have 'lifted the wraps on major empowerment initiatives'. First Rand Bank unveiled a procurement-driven strategy while Absa launched a R250 million fund to help aspiring entrepreneurs. See Thebe Mabanga 'Banks jump the gun on empowerment' *Mail & Guardian*, 10–16 October 2003.

⁷⁰ See Wiseman Khuzwayo op cit note 66, where it is reported that contractors experience difficulties in getting progress payments for work done. Specific mention is made of a contractor who (allegedly) went into provisional sequestration after being awarded a R7,2 million tender to upgrade a nursing college.

⁷¹ According to Sigcau, most public sector organisations require performance guarantees of between 5 and 10 per cent. A few provincial departments have, however, implemented performance guarantees over and above a retention system and are committing up to 20 per cent of a contractor's working capital over a long period of time. Some clients on the other hand are waiving performance guarantees or retention for emerging contractors, mostly in cases where a consultant is appointed to supervise the project. There is therefore a lack of consistency insofar as the performance guarantee requirements are concerned. The way each corporation is applying its performance guarantee varies between 35 per cent on complex risky projects to 0 per cent on low-risk projects. According to Sigcau, even though performance guarantees do not impact on the cash flow of the contracts, they do impact of the ability of contractors to secure work. See Speech by the Minister of Public Works, Stella Sigcau, op cit note 64.

time, emerging contractors entering the public sector market are coming in at the lower end of that market, thus making the sector extremely competitive and unsustainable from a profits perspective. Many contractors have little experience of tendering and project management. To address this problem the Department of Public Works has implemented the 'Contracting Entrepreneurial Training' (CET) programme. This provides assistance to contractors in respect of the pricing of contracts and the compilation of accounts and invoices. According to Sigcau, banks view contractors that participate in this 'mentorship' programme much more positively than they do other contractors. A mentorship programme is seen as necessary to make up for inexperience and the lack of a track record, and is important in assuring banks and other financial institutions of reduced business risk.

Watermeyer⁷² points out various 'major changes' that have taken place in South Africa since the implementation of affirmative procurement policies. Targeted procurement has, in his view, been successfully used, by means of construction projects, to direct capital flows into underdeveloped and disadvantaged rural communities. He makes reference to a number of projects that have been successfully implemented, such as the Malmesbury prison complex which, Watermeyer points out, is the project which gave birth to targeted procurement in South Africa in 1996.⁷³ According to Sodurland and Schutte,⁷⁴ this contract proved to be more efficient at channelling money into communities than some focused poverty alleviation programmes in South Africa involving the construction of community buildings.

The financial premiums borne by the state in adopting affirmative procurement policies in the construction industry in particular have proved to be nominal compared to the initial projected outcomes and the overall benefits attained.⁷⁵ It has been shown that the use of affirmative procurement in the construction industry has had a positive impact on the participation of affirmable business enterprises (ABEs),⁷⁶ with levels of participation varying across construction sub-sectors and categories. The manner in which ABEs are structured, including their internal business processes, does, however, establish operational limitations, which influence their scope of activities. Similar characteristics were, however, observed in non-ABEs of a similar size. The conclusion can therefore be drawn that these problems relate to the business development and growth of small and medium enterprises in general. Insofar as sub-contracting relationships are concerned, research findings indicate that there has been an increase in structured joint ventures between

⁷² Watermeyer op cit note 15 at 245–7.

⁷³ Malmesbury is a small rural town approximately 70 km from Cape Town.

⁷⁴ See Sodurland & Schutte *Review of the Malmesbury Prison Complex and Associated Housing Estate* (prepared for the National Department of Public Works, September 1998).

⁷⁵ Gounden op cit note 7.

⁷⁶ Defined in brief as businesses that are owned, managed and controlled by previously disadvantaged persons and which have annual average turnovers within prescribed limits; Gounden op cit note 7 ch 4.

ABEs and larger established contractors.⁷⁷ An analysis of these joint ventures confirms that they provide a means of transferring expertise, provided that they are appropriately structured.

The above discussion shows that there are a number of issues surrounding the use of public sector procurement as a policy tool. Although the government claims that major progress is being made, the intended beneficiaries of targeted procurement do not seem to agree with these claims.⁷⁸ A further concern is the World Trade Organisation Government Procurement Agreement (WTO GPA) and the possible implications it may have for procurement in South Africa.

THE POTENTIAL IMPLICATIONS OF THE WTO GPA FOR SOUTH AFRICA

The WTO⁷⁹ regulates international trade and fulfils three main functions: it is the pre-eminent forum for negotiating multilateral trade agreements (which in effect, regulate national trade-related economic policies); it has established legal instruments governing international trade; and it has dispute settlement procedures to resolve trade friction between members. South Africa is a founding member of the WTO and is classified by the WTO as a developed country (as opposed to a developing or least-developed country).⁸⁰ This has not, however, prevented South Africa from negotiating favourable conditions and extended implementation periods in respect of several of its sensitive economic sectors.

The GPA is one of the 'plurilateral' agreements under the WTO⁸¹ and its overall aim is the promotion of world trade by providing access to government

⁷⁷ A joint venture has been described as 'an "economic marriage" which like a marriage itself, offers great opportunities to exploit and share resources, skills and financial strength. There is an indispensable need for mutual trust, sharing of resources and information, and confidentiality in joint venture relationships'. See Gounden op cit note 7 at 8.24.

⁷⁸ See also Lynda Loxton 'Cosatu urges parliament to tighten preferential law' *The Cape Times, Business Report* (10 September 2003) — the Congress of South African Trade Unions (Cosatu) argues that the government's preferential procurement policies have resulted in many controversial trade-offs, often resulting in job losses and the enrichment of a few. According to Cosatu, some government departments, parastatals and municipalities are side-stepping the law and importing equipment and services that could have been sourced locally. Cosatu blames this on ambiguities in the law and the excessive emphasis on export promotion policies rather than the development of local, competitive and labour-intensive industries. According to Cosatu, the Procurement Act is too broad to allow for common understanding of its objectives; it does not give enough direction on how it should be applied and allows for arbitrary interpretations of its key provisions. The South African Chamber of Business raises the further argument that many small businesses which are owned and operated by white families who do not want to bring in outside shareholders are being excluded from government procurement contracts. Even though some of these firms would like to outsource some of their work to smaller black firms, and so empower a wider group of people, this does not receive recognition. See also Sharp et al op cit note 7 at 35, who points out findings of 'racial prejudice in the allocation of tenders. Whites believe that the move towards affirmative procurement to blacks is hampering the growth of their businesses'. She also points out that 'established businesses believe that government has sacrificed the value of experience and expertise'.

⁷⁹ Available at www.wto.org.

⁸⁰ Controversy surrounds South Africa's classification as a developed country in the WTO and there is debate as to whether South Africa should seek to be reclassified as a 'developing' country. See the Green Paper on Public Sector Procurement Reform in South Africa op cit note 2 ch 4.

⁸¹ A 'plurilateral' agreement signifies an agreement that only binds WTO members who are signatories to the agreement. Examples of other plurilateral agreements under the WTO include the Agreement on Trade and Civil Aircraft, the International Dairy Agreement and the International Bovine Meat Agreement.

business. It restricts discriminatory policies which favour domestic suppliers and aims to ensure transparency in government procurement processes.⁸² It lays down detailed and elaborate procedures for the conduct of tenders and requires signatories to implement the agreement by means of national legislation.⁸³ An important effect of the GPA, therefore, is that it prohibits signatories from giving preferential treatment to local suppliers.⁸⁴

South Africa is not a signatory to the GPA but has, in recent years, been increasingly subjected to pressure from its main trading partners to accede to the agreement. This has raised considerable debate because, should South Africa give in to this pressure, there would be significant implications for public sector procurement in South Africa. Acceding to the GPA would mean that South African firms would be able to tender for valuable contracts issued by other member countries. Such a move could, however, preclude the government from applying preferences in awarding contracts on the basis of national policies — such as promoting local business and encouraging black economic empowerment. The restrictions imposed by the GPA are, however, not absolute. The GPA provides considerable scope for the negotiation of exemptions and exclusions. Governments may, for example, list or specify which entities will be covered by the agreement and may also maintain their own specific lists of permanent suppliers. It is therefore suggested that if, or rather *when*, South Africa accedes to the GPA, it should adopt a balanced approach that recognizes both the potential costs as well as the potential benefits that accession to the GPA may provide. Doing so will ensure that accession to the GPA is not done in a way which is inconsistent with national priorities. Consideration should perhaps also be given to securing developing country status in acceding to the agreement. South Africa would then qualify for ‘Special and Differential Treatment’ which will permit it to promote infant industries, revitalize rural and underdeveloped regions, and safeguard the balance of payments.⁸⁵ South Africa may also *gradually* accede to the GPA: it could open up to foreign competition on a case-by-case basis, weighing up the overall (socio-economic/efficiency) costs and benefits.⁸⁶ As pointed out by Arrowsmith,⁸⁷ limits on immediate competition (from foreign suppliers) should be regarded as appropriate if this is done as a means to facilitate objectives such as regional development, restructuring and the provision of assistance to new and viable enterprises.

⁸² Articles III, IV, VI, XVI–XIX.

⁸³ Articles VII–XV, XXIV(5).

⁸⁴ Article XVI specifically provides that ‘entities shall not, in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets’ Offsets in government procurement is explained as ‘measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements’.

⁸⁵ See Green Paper on Public Sector Procurement Reform in South Africa op cit note 2 ch 4.

⁸⁶ See also Trionfetti op cit note 30 at 72, who suggests gradual accession to the GPA in the case of developing countries.

⁸⁷ Arrowsmith op cit note 11 ((1995) *LQR* 235) at 245–6.

CONCLUSION

Only a few years have passed since South Africa's political and economic emancipation. As a result, most industries in South Africa would find it very difficult to compete both locally and abroad if all forms of preference and support for locally manufactured products were to be abolished. As pointed out by Trionfetti,⁸⁸ 'an abrupt opening up of the procurement market when market size is very uneven may cause excessive pressure on the firms in the small market and leave no time for them to adjust to the competition'. Public procurement is, as Arrowsmith notes, 'a valid and valuable tool for the implementation of social policies; and one which should not be denied to government[s] without convincing justification'.⁸⁹

Overall it can be said that 'affirmative procurement has come a long way; both the government and business are moving from beginner status to mature models of affirmative procurement'.⁹⁰ There is, however, still a long way to go. As pointed out by Sharp,⁹¹ the current lack of data collection and records (by organs of state) prevents the effective monitoring of targeted procurement.⁹² It not only prevents the assessment of the degree to which SMMEs are successfully being targeted, but also negatively impacts on the transparency of the tendering process. On the other hand, in view of the decisions in *Grinaker, RHI Joint Venture* and *Sebenza*,⁹³ (in particular) it appears that the South African courts see it as their task strictly to enforce the use of procurement as a policy tool. Particular emphasis is also placed on the importance of procedural fairness in the public sector procurement process — that is, potential contractors should be made aware of any secondary requirements they have to meet in order to be successful⁹⁴ and unsuccessful tenderers have the right to be furnished with reasons.

Ultimately it can be said that the success of South Africa's use of procurement as a policy tool depends on a number of factors. These include endorsement and support from policy makers, senior administrators and those responsible for the procurement of goods, services and works; and commitment at the highest levels of government to the attainment of the stated objectives. Comprehensive and unambiguous supporting documentation is required to enable specific objectives to be achieved. Furthermore, effective monitoring and reporting systems are needed, as is a means by which

⁸⁸ Op cit note 30 at 72.

⁸⁹ Arrowsmith op cit note 11 ((1995) *LQR* 235) at 247–8.

⁹⁰ See Reg Rumney, Executive Director of Business Map Foundation 'We've come a long way' *Mail & Guardian* (5–11 September 2003).

⁹¹ Op cit note 7 at 26.

⁹² See the State Tender Board's User Manual: Directives to Departments in Respect of Procurement (ST37), which states that records must be kept and that a breakdown of procurement must be provided to the Department of State Expenditure on a quarterly basis.

⁹³ *Supra* nn 48 and 50.

⁹⁴ See also art 18(4) of the Polish Act on Public Procurement, which expressly provides: 'When applying national preferences in a procurement proceeding, the procuring entity shall inform the suppliers and contractors about the national preference when it starts the procurement procedure.' This article also provides that 'the declaration regarding the national preference cannot be changed thereafter'.

the bona fides of target groups can be readily ascertained. It is also imperative that there be business development of target groups; motivation on the part of target groups to take advantage of the opportunities presented; and a comprehensive training and skills development programme to ensure that officials and service providers who engage in procurement activities are competent and conversant with all aspects of preferential procurement.⁹⁵

ENGLISH PUBLIC LAW BEFORE 1939

‘Let me start by reminding you of the state of our public law up to the outbreak of war in 1939. It was still governed by the theory that the central government of the country was carried on by the King himself with the assistance of his Ministers and other servants and agents. It was a maxim of the law that “the King could do no wrong.” This was extended to mean that the Government Departments could do no wrong. If an army driver drove his 100-ton tank so negligently that he ran into the side of a house doing damage to the extent of £100, the householder could not sue the War Office for damages. The War Office was regarded in law as the Crown. It could do no wrong. The householder could therefore only sue the driver of the tank. It was just bad luck for the householder that the driver had not even 100 pence with which to pay the bill. The law ignored the fact that the War Office had put the overpowering vehicle into the driver’s control.

It was another maxim of the law that the King could not be sued in his own courts. This was extended to mean that the Government Departments could not be sued in the Royal Courts of Justice. If the Ministry of Works employed a builder to do work and they did not pay, he could not sue the Minister in the courts for the price. All he could do was to submit a humble petition to the King and then the Attorney-General, if he thought fit, could endorse it with the fiat “Let right be done.” His right to payment depended therefore on the discretion of the Attorney-General.

In point of fact the position was not as bad as it sounds from my description of it, because in practice the Government Departments did not take advantage of the immunity which the law afforded them. If an army driver was ordered to pay damages for negligence, the War Office always used to foot the bill. If a Government contractor was not paid for his work, the Attorney-General invariably granted his fiat. Nevertheless you can see how dangerous this immunity might be if the central Government came to be controlled by people with totalitarian ideas. The Government Departments could assert their great powers without any possibility of being challenged in the courts. They would, indeed, be above the law.’

Sir Alfred Denning *The Changing Law* (1953) 20–1.

⁹⁵ Watermeyer op cit note 16 at 441.