

Incorporating environmental considerations into government procurement in South Africa

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1 Introduction

Government procurement contracts are usually of such a great number and high total value¹ that a government's decisions in respect of how, when and with whom it contracts affects a whole array of issues. Government procurement is not only "business", in other words, the procurement of goods and services on the best possible terms, it also has broader social, economic and political implications. Throughout history governments have used their procurement powers to promote objectives which are debatably "secondary" in contrast to the "primary" objective of procurement, in other words procurement on the best possible terms. Examples include using procurement to promote social, industrial and environmental policies.² In this article, particular attention will be given to the latter, in other words, the use of procurement as a tool of environmental policy. The aim is to show that even though South Africa's current use of procurement as an empowerment tool has much to be commended,³ given the growing importance of the notion of sustainable development⁴ it is important for organs of state in South Africa to use procurement also as a tool of environmental policy. It will be shown that such use does not fall outside the current legislative framework governing procurement and that there are a number of ways in which environmental considerations could be incorporated throughout the procurement process.

As a starting point, attention will be given to the notion of green procurement and the potential benefits of using procurement as an environmental tool. A brief overview will also be given of international trends regarding the use of procurement as a means to protect the environment. Next, the focus will be on South Africa's current

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¹ In 2004 government procurement in South Africa was estimated to amount to approximately 14% of gross domestic product (Mkhize paper presented at Supply Chain Management Conference: Transforming Government Procurement System, Durban (22-23 Nov 2004) 11). More recent figures are not available.

² Cane *Administrative Law* (2004) 296; Arrowsmith, Linarelli and Wallace *Regulating Public Procurement: National and International Perspectives* (2000) 237; Turpin *Government Procurement and Contracts* (1989) 73.

³ See generally Bolton *The Law of Government Procurement in South Africa* (2007) ch 10.

⁴ Sustainable development was defined in 1987 in the Brundtland report (http://www.ace.mmu.ac.uk/eae/Sustainability/Older/Brundtland_Report.html (6-4-2007)) as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". Since 1987, the notion of sustainable development has acquired a broader interpretation. More recently, sustainable development has been described as "a far more embracing and holistic concept than environmental sustainability. ... [S]ustainable development is a way of looking at all the sources and resources that can lead to a higher quality of life for the current generation, without compromising future generations" (Watermeyer "Facilitating sustainable development through public and donor procurement regimes: tools and techniques" 2004 *Public Procurement Law Review* (PPLR) 30 35).

use of procurement as a policy tool. It will be seen that at present, procurement is primarily aimed at addressing past discriminatory policies and practices. It will be shown, however, that there is significant scope within the existing legal framework governing procurement for the use of procurement also as a tool of environmental policy. Suggestions will then be made as to how environmental considerations could be incorporated throughout the government procurement process.

2 *Procurement to promote environmentally sound practices*

2.1 The notion of green procurement

The use of procurement to promote environmentally sound practices is referred to as, *inter alia*, green procurement; environmentally preferable purchasing; eco-procurement; environment-orientated procurement; environmentally friendly procurement; environmental procurement; greener purchasing; sustainable procurement; and environmentally responsible procurement.⁵ Despite the variety of terms, they all generally refer to the selection of products and services whose environmental impact are not harmful or the least harmful to the environment and human health when measured against competing products and services. As a starting point, using procurement as a tool of environmental policy means that organs of state should confirm the actual need for purchases and avoid purchases that are unnecessary.⁶ Where purchases are indeed necessary, organs of state should procure green goods or services, *ie* goods or services that cause the least harm to the environment during all the various stages of their life cycle: production, consumption and disposal.⁷ Such procurement could include energy-efficient items and products, for example: light bulbs and computers; office equipment made of environmentally sustainable timber; recyclable paper and plastic products; environmentally friendly public transport; electricity stemming from renewable energy sources; ozone-friendly products; and air conditioning systems that abide by up to date environmental solutions.⁸ It

⁵ Erdmenger "Introduction" in Erdmenger (ed) *Buying into the Environment: Experiences, Opportunities and Potential for Eco-Procurement* (2003) 9; Cogburn and Rahm "Environmentally preferable purchasing: who is doing what in the United States" 2005 *Journal of Public Procurement* 23; Commission of the European Communities: Commission Staff Working Document *Buying Green! A Handbook on Environmental Public Procurement* (2004) (<http://www.ucd.ie/procure/resources/buyinggreen.pdf> (2-4-2007)); Marron "Greener public purchasing as an environmental policy instrument" 2003 *Journal on Budgeting* 71; McCrudden "Social aspects in sustainable public procurement" paper presented at the third expert meeting on sustainable procurement, New York (15-17 June 2005) (<http://www.un.org/esa/sustdev/sdissues/consumption/procurement/mccrudden.pfd> (28-3-2007)).

⁶ As is eloquently stated on Canada's "procurement" website (<http://www.greeninggovernment.gc.ca/default.asp?lang=En&n=256986C5-1&printversion=true> (28-3-2007)), "[t]he ultimate objectives of green procurement are to reduce the consumption of resources in order to reduce the generation of waste, to minimise environmental, health and financial risks, and to reduce costs".

⁷ Erdmenger (n 5) 11.

⁸ www.euroactive.com/en/environment/green-procurement/article-11750?_print (17-7-2006). See also generally Victorian Government: Commissioner for Environmental Sustainability *Government Procurement and Environmental Sustainability: An Overview* (2006) ([http://www.ces.vic.gov.au/ces/wcmn301.nsf/obj/publications/\\$file/CES+Procurement+Overview.pdf](http://www.ces.vic.gov.au/ces/wcmn301.nsf/obj/publications/$file/CES+Procurement+Overview.pdf) (2-4-2007)); Bouer, De Jong, Jonk, Berman, Bersani, Lusser, Nissinen, Parikka and Szuppinger "Green public procurement in Europe 2005: status overview" (2005) (http://ec.europa.eu/environment/gpp/pdf/report_facts.pdf (2-4-2007)); Day "Buying green: the crucial role of public authorities" 2005 *Local Environment* 201; Commission of the European Communities: Commission Staff Working Document (n 5); O'Hara "Environmental protection through the public procurement regime in the European Union and the UK" (2004) (<http://www.dentonwildesapte.com/assets/1/JPO%20UKELA%20Article.pdf> (19-7-2006)).

is important to bear in mind, however, that green procurement is not simply about organs of state procuring environmentally sound goods or services, like recycled stationery; energy-efficient light bulbs; raw materials; or replacing their fleet of vehicles with more environmentally friendly vehicles. Green procurement is also about using suppliers who meet stringent environmental standards “so that greening the supply chain is an integral part of the greener purchasing process”.⁹ Green procurement is, furthermore, also about buying less; instead of organs of state procuring new office equipment, these could be obtained from other departments who have an “oversupply”. Organs of state could, for example, start an “internal re-use service” by way of a web-based notice board. Departments who no longer find any use for certain pieces of office equipment could offer them to other departments.¹⁰

2.2 Overview of international trends

In the not too distant past, governments were largely unconcerned with the role that public procurement could play in protecting the environment. The legal regulation of public procurement insofar as “secondary” objectives are concerned was focused on the principles of non-discrimination, transparency and the equal treatment of contractors. The overriding aims were generally the attainment of value for money; ensuring that contractors compete on a level playing field; and the enhancement of competition. In recent years, however, the international economic and political background has shifted with the emergence of the notion of sustainable development, that is development that meets the needs of the present without compromising those of future generations, and the need to take environmental and social policy considerations into account in all other policies.¹¹

In the European Union, for example, the notion of sustainable development was included in article 6 of the Treaty of Amsterdam 1997,¹² specifying that environmental protection requirements should be integrated into the definition and implementation of the community policies and activities in particular with a view to promoting sustainable development.¹³ Four years later, the European Union heads of state and government launched the European Union’s sustainable development strategy, aimed at encouraging economic growth and social cohesion with due cognisance of environmental protection.¹⁴ In 2002, the council and European parliament adopted the 6th environment action programme.¹⁵ It sets out an environmental roadmap for the next decade and identifies four priority areas where action is urgently needed, *ie* climate change, nature and biodiversity, resource management, and the environment and health. In the context of procurement, the European Commission in its interpretative communication of 4 July 2001 set out the possibilities offered by community law to incorporate environmental considerations into public

⁹ Russel “Introduction” in Russel (ed) *Greener Purchasing: Opportunities and Innovations* (1998) 9.

¹⁰ Commission of the European Communities: Commission Staff Working Document (n 5) 13.

¹¹ Day (n 8) 203. See also Erdmenger, Führ and ICLEI’s European Eco-procurement Programme and Eco-Efficient Economy (ECLEI environmentally preferable purchasing) (eds) *The World Buys Green: International Survey on National Green Procurement Practices* (2001) (<http://www6.iclei.org/procurement/relief/TheWorldbuysgreen.pdf> (28-3-2007)).

¹² <http://www.historiasiglo20.org/europe/amsterdam.htm> (2-4-2007). For a comprehensive guide, see <http://europa.eu/scadplus/leg/en/s50000.htm> (2-4-2007).

¹³ <http://europa.eu/scadplus/leg/en/lvb/a15000.htm> (2-4-2007).

¹⁴ *ibid.*

¹⁵ Decision no 1600/2002/EC of the European parliament and of the council of 22 July 2002 laying down the Sixth Community Environment Action Programme, published in *OJ L* 242 of 10-9-2002 (<http://ec.europa.eu/environment/newprg/index.htm> (6-4-2007)).

procurement procedures,¹⁶ and the court of justice subsequently clarified those possibilities.¹⁷ The new public procurement directives¹⁸ currently make specific mention in their recitals and provisions of the possibilities for adopting environmental considerations in technical specifications, selection and award criteria, and contract performance clauses.¹⁹

Outside the European Union, countries across the world have introduced several green purchasing initiatives in the realization that procurement is not an important means only to reduce their own environmental impacts, but also a way in which to facilitate market creation for environmentally friendly goods and services. In the United States, for example, the introduction of green public procurement has been effected through a number of presidential executive orders, for example, the order prescribing energy efficiency standards for computer equipment acquired by federal agencies based on the “Energy Star” labelling scheme.²⁰ A program has also been set up called environmentally preferable purchasing which encourages and assists agencies in the procurement of green products with environmental information for over 600 products and services.²¹ Japan has eco-procurement legislation in place which obliges federal government departments and agencies to adopt green procurement programmes.²² Japan has also developed the “green purchasing network” that promotes the notion and practices of green procurement. The aim is to bring together companies, public bodies and non-profit organisations interested in green procurement to exchange experiences and develop guides for particular products.²³ In Canada, the federal government has implemented the “green reporting framework: a tool for reporting” that sets out the notion of sustainable development.²⁴ The environmental choice program is Environment Canada’s eco-labelling (or en-

¹⁶ Commission Interpretative Communication of 4 July 2001 on the Community Law Applicable to Public Procurement and the Possibilities for Integrating Environmental Considerations into Public Procurement (COM (2001) 274 final). For commentary, see Thompson “The proposed Commission draft communication on the environment” 2001 *PPLR* NA97; Williams “The proposed Commission draft communication on the environment and the impact of the Nord Pas-de-Calais case” 2001 *PPLR* NA75; Williams “The European Commission’s communication on the environment and public procurement” 2002 *PPLR* NA1.

¹⁷ *C-513/99, Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsinging kaupunki and HKL-Bussiliikenne* (also quoted as 2002 ECR I-07213); *C-448/01 EVN AG, Wienstrom GmbH v Republik Österreich, Stadtwerke Klagenfurt AG* (also quoted as 2004 1 CMLR 22).

¹⁸ Directive 2004/18/EC on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts – [2004] *Official Journal of the European Union* L 134/114 (EC Public Sector Directive); and Directive 2004/17/EC on Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors – [2004] *Official Journal of the European Union* L 134/1 (EC Public Utilities Directive).

¹⁹ See generally O’Hara (n 8); Wallström “Let’s go green” *Energy and the Environment* 54 (<http://www.publicservice.co.uk/pdf/europe/autumn2004/EU8%20Margot%20Wallstrom%20ATL.pdf> (2-4-2007)).

²⁰ For an overview of the evolution of environmentally preferable purchasing in the United States federal government, see Coggburn and Rahm (n 5) 26-33; McCadney “The green society? Leveraging the government’s buying powers to create markets for recycled products” 1999 *Public Contract Law Journal* 135; Sanders “Environmentally preferable purchasing: the US experience” in Russel (n 9) 46.

²¹ See <http://www.epa.gov/epp/> (28-3-2007).

²² The legislation is available at <http://www.env.go.jp/en/laws/policy/green/index.html> (28-3-2007).

²³ For information on the “green purchasing network”, see <http://www.gpn.jp/English/> (28-3-2007).

²⁴ For details, see http://www.tbs-sct.gc.ca/cmp/green-vert/grnproc_e.asp (28-3-2007).

vironmental labelling) program and it provides access to a list of environmentally responsible products and services that have received the EcoLogo certification.²⁵

At an international level, the World Summit on Sustainable Development (WSSD)²⁶ in 2002 encouraged relevant authorities at all levels to take sustainable development considerations into account in decision-making and called for the promotion of public procurement policies that encourage the development and diffusion of environmentally sound goods and services. Member countries of the council of the organisation for economic co-operation and development²⁷ also agreed in 2002 on a recommendation to improve the environmental performance of public procurement.²⁸ At an international level, the legal framework for government procurement is the World Trade Organisation Government Procurement Agreement.²⁹ The government procurement agreement is one of the “plurilateral” agreements under the world trade organization³⁰ and its overall aim is the promotion of world trade by providing access to government markets. In short, it restricts discriminatory policies which favour domestic suppliers and aims to ensure transparency in government procurement processes.³¹ It lays down detailed and elaborate procedures for the conduct of tenders and requires signatories to implement the Agreement by means of national legislation.³² Even though the government procurement agreement contains no reference to the protection of the environment, the sixth recital of the preamble to the World Trade Organisation Agreement, which also informs the government procurement agreement, acknowledges the need to act in harmony with the notion of sustainable development and to safeguard the environment. It is generally accepted, therefore, that the government procurement agreement allows contracting authorities to take account of environmental factors when procuring goods or services, as long as they are non-discriminatory and satisfactorily objective and verifiable.³³

2.3 Potential benefits of green public procurement for the environment

The European commission has co-funded a research project called RELIEF (Environmental Relief Potential of Urban Action on Avoidance and Detoxification of Waste Streams through Green Public Procurement) to systematically measure the likely environmental benefits if green public procurement were to be extensively

²⁵ See <http://www.greeninggovernment.gc.ca/default.asp?lang=En&n=256986C5-1&printerversion=true> (28-3-2007). See also Environment Canada, Corporate Services, Administration Directorate “Towards greener government procurement: an environment Canada case study” in Russel (n 9) 31.

²⁶ Details of the summit are available at <http://www.un.org/event/wssd/> (20-7-2006).

²⁷ http://www.oecd.org/home/0,2987,en_2649_201185_1_1_1_1_1,00.html (2-4-2007).

²⁸ *ibid.*

²⁹ http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (28-3-2007).

³⁰ A “plurilateral” agreement is an agreement that binds only World Trade Organisation members who are signatories to the agreement. Examples of other plurilateral agreements under the World Trade Organisation include the Agreement on Trade and Civil Aircraft, the International Dairy Agreement and the International Bovine Meat Agreement.

³¹ art III, IV, VI, XVI-XIX.

³² art VII-XV, XXIV(5).

³³ Day (n 8) 204. See also Kunzlik “International procurement regimes and the scope for the inclusion of environmental factors in public procurement” 2003 Council of the Organisation for Economic Co-operation and Development *Journal on Budgeting* 107; Background Report prepared by Early, LCC for the Commission for Environmental Cooperation “Green procurement in trade policy” (<http://www.cec.org/files/PDF/ECONOMY/green-procurement-in-trade%20Policy-en.pdf> (28-3-2007)).

adopted across the European Union.³⁴ The findings indicated that if all public authorities in the European Union insisted on green electricity, doing so would save the equivalent of 60 million tonnes of carbon dioxide, which is equal to 18% of the European Union's greenhouse gas reduction commitment under the Kyoto Protocol. Roughly the same savings could be accomplished if public authorities decided on buildings with high environmental quality. If all public authorities further opted for energy-efficient computers, and this encouraged the entire market to do the same, the consequence would be 830 000 tonnes of carbon dioxide savings. If all public authorities opted for efficient toilets and taps in their buildings, this would also decrease water consumption by 200 million tonnes, which is roughly the equivalent of 0.6% of the total household consumption in the European Union.³⁵ Other environmental and economic benefits of procuring green goods and services have been stated to include improved savings from procuring goods that can be re-used or re-manufactured; reduced costs because of efficient waste and hazardous materials management; cost savings from utilising energy-, water- and fuel-conserving devices; lower health costs associated with exposure to toxics; and decreased demand for landfill space.³⁶ The implementation of greener procurement strategies could, furthermore, be a valuable means to promote constructive cultural change and improve employee commitment within individual government departments. If greener government action plans and training programmes engage employees in the change process, they increase organisational awareness, and have the potential to encourage personal or individual responsibility for the environment.³⁷ Green public procurement also assists in the growth of green products and services so that they might be available to a wider range of buyers, including those in the private sector.³⁸

It is clear therefore that green public procurement could have significant benefits for the environment. Governments are generally the largest consumers of goods and services in countries. By using their procurement powers to opt for goods and services that respect the environment, they can make an important contribution towards sustainable development.³⁹ Green public procurement is, of course, also about setting an example. If citizens are expected to be environmentally responsible, for example by separating their waste or using public transport, governments should be committed to reducing their own negative effects on the environment.⁴⁰

There are a number of myths in relation to the procurement of green products and services that need to be refuted. The myths include the perception that green products and services: first cost more than traditional products and services; second are inferior to traditional products and services; and third are not readily available in the market. First, the costs involved in public authorities using their procurement powers to protect the environment have been shown to be significantly less than initial estimations. Statistics, for example, show that between July 2003 and December 2004, King County USA purchased \$17,7 million worth of environmentally preferable products which saved the county roughly \$950 000 compared to the cost of the products traditionally purchased. Environmentally preferable products that

³⁴ For more information on the RELIEF project, see [http://www.iclei-europe.org/index.php?id=relief\(28-3-2007\)](http://www.iclei-europe.org/index.php?id=relief(28-3-2007)).

³⁵ Commission of the European Communities: Commission Staff Working Document (n 5) 6.

³⁶ Environment Canada (n 25) 32.

³⁷ *ibid.*

³⁸ Kunzlik "Making the market work for the environment: acceptance of (some) green contract award criteria in public procurement" 2003 *Journal of Environmental Law* 175 188.

³⁹ *ibid.* See also Victorian Government: Commissioner for Environmental Sustainability (n 8) 6-7.

⁴⁰ *ibid.* See also <http://www.greenerchoices.org/> and [http://www.saferproducts.org/\(2-4-2007\)](http://www.saferproducts.org/(2-4-2007)).

were purchased included products that contained recycled material, reduced waste, saved energy, were less toxic, or were more durable.⁴¹ It has also been shown that the earlier environmental factors discounted in the procurement process, the better the environmental result and, generally, the lower the cost. When whole life costs or life-cycle costs are calculated, taking account also of operational and disposal costs, the cost of greener products and services is often equal to or less than the alternatives.⁴² Second, most green products and services comply with the same technical and quality specifications as their traditional counterparts and may even provide superior characteristics.⁴³ Third, in many countries, particularly the United States, industries have responded well to government and industry demand for green products and services. Green products and services are increasingly being made available in larger quantities.⁴⁴

3 Government procurement as a policy tool in South Africa

3.1 General

Government procurement is afforded constitutional status in South Africa. The procurement clause in the constitution⁴⁵ is section 217 and it provides as follows:

- (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
 - (a) categories of preference in the allocation of contracts; and
 - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.”

Broadly speaking, therefore, the constitution makes provision for the use of procurement as a policy tool. It provides for the implementation of a policy of preferential procurement or what has also been referred to as “affirmative procurement” or “targeted procurement”.⁴⁶ For historical reasons, the use of these terms has thus far led to a limited understanding of the policy goals for which procurement can be used. Targeted procurement is usually understood as a system of procurement which is aimed at providing employment and business opportunities for disadvan-

⁴¹ King County *Environmental Purchasing Program* (<http://www.metrokc.gov.procure/green/about.htm#Programwork> (25-11-2005)).

⁴² Victorian Government: Commissioner for Environmental Sustainability (n 8) 12. Melbourne company Szencorp *eg* invested in cutting-edge greener technologies when refurbishing its Melbourne headquarters. The project is anticipated to have a payback period of only five years. After that period, the technologies will produce ongoing savings (Szencorp *The Szencorp Building* – <http://www.ourgreenoffice.com/> (2-4-2007)). For more examples of savings, see <http://www.iclei-europe.org/index.php?id=relief> (28-3-2007).

⁴³ The White House Task Force on Recycling *Greening the Government: A Guide to Implementing Executive Order 13101* (Revised February 2001) 5 (www.ofee.gov/eo/greening.pdf (2-4-2007)).

⁴⁴ *ibid.*

⁴⁵ Constitution of the Republic of South Africa, 1996.

⁴⁶ See Watermeyer “The use of targeted procurement as an instrument of poverty alleviation and job creation in infrastructure projects” 2000 *PPLR* 226, 233-245; www.targetedprocurement.com (20-4-2007).

tagged (marginalised) individuals and communities – referred to as “target groups”. The aim is to provide opportunities to such 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.⁴⁷ The use of procurement for these goals is no doubt important and can in principle be supported.

3.2 Scope for green procurement within the existing legal framework

The primary legislation that deals with the use of procurement as a policy tool in South Africa is the Preferential Procurement Policy Framework Act (the “procurement act”).⁴⁸ 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”.⁴⁹ In short, the procurement act provides for the preferential treatment of certain contractors during the award stage of the procurement process. In particular, section 2(1)(d) provides that organs of state must have a preferential procurement policy in place. The specific goals of their procurement policies “may include” –

- “(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;
- (ii) implementing the programmes of the Reconstruction and Development Programme as published in *Government Gazette* No 16085 dated 23 November 1994”.⁵⁰

The question is whether these are the only goals that may be pursued by an organ of state through its procurement policy – and, if not, which other goals may be pursued. To ascertain this, it is important to look specifically at section 217(2) of the constitution. It is clear that this subsection does not confine the use of procurement for the purposes set out explicitly in the procurement act. Section 217(2)(a) speaks of a much broader use of procurement as a policy tool; it provides for the implementation of a procurement policy providing for “categories of preference in the allocation of contracts”. This is also how those who drafted the Green Paper on Public Sector Procurement Reform in South Africa⁵¹ understood and interpreted section 217(2). It was proposed that organs of state should buy only from vendors who are in compliance with all environmentally-related legislation; promote environmental awareness amongst suppliers, service providers and contractors; favour procurement of less environmentally damaging products; discriminate in favour of products made from recycled materials; require that suppliers limit packaging to

⁴⁷ *ibid.*

⁴⁸ 5 of 2000.

⁴⁹ See the preamble to the procurement act.

⁵⁰ See the Reconstruction and Development Programme (RDP) White Paper ch 3 entitled “The economic policy framework” (http://www.africa.upenn.edu/Govern_Political/RDP_Wh.html (28-3-2007)) that 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 small, medium and micro enterprises need to play a substantially larger part in economic activity.

⁵¹ Ministry of Finance and Public Works Green paper on public sector procurement reform in South Africa GG 17928 (14-04-1997) cl 4.27.

the minimum necessary to protect the items supplied; favour products which provide information about their effect on the environment; develop the environmental awareness of government officials; develop and maintain a database of vendors in which information relating to their environmental conduct is retained; develop and promote a code of conduct for vendors; and develop a policy with respect to the use of products containing asbestos.

This reading of section 217(2) of the constitution makes a clear connection between procurement and the environment and is a perfectly sound approach.⁵² A contextual or systematic approach to interpretation requires that the meaning of specific provisions in the constitution should be understood in relation to the constitution as a whole.⁵³ Sound interpretation practice thus requires that the procurement clause in the constitution, section 217, should be interpreted with reference to other provisions in the constitution to provide a context for the interpretation of section 217. Although many other provisions in the constitution may also be regarded as of relevance in a contextual interpretation of section 217, a provision which seems to be of specific importance is section 24. This section provides:

“Everyone has the right–

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that–
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.⁵⁴

Procurement is one of the primary means to give effect to this right. Section 24 requires that organs of state must use their procurement powers to protect the environment. Thus far, however, the seemingly obvious link between sections 217 and 24 of the constitution has not been sufficiently explored. At present, organs of state are not explicitly authorised by legislation to take account of environmental factors in the award of contracts. In other words, no express provision is made for the use of procurement to promote environmentally sound practices. As pointed out above, the procurement act is currently directed primarily at persons who were disadvantaged by previous discriminatory policies and practices.⁵⁵

The procurement act does, however, open itself up to a reading that requires compliance with section 24 of the constitution. Section 39(2) of the constitution provides that “[w]hen interpreting any legislation ... every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”. When reading section 2(1)(d) of the procurement act quoted above (“the specific goals [of a preferential procurement policy] *may* include”),⁵⁶ the legislature can be said to have opened the door to the use of procurement as a tool for the promotion of

⁵² The proposal was not subsequently included in the framework of the procurement act or the regulations thereto.

⁵³ Currie and De Waal *The Bill of Rights Handbook* (2005) 156.

⁵⁴ Detailed attention has been given to this constitutional provision in a number of South African literature sources. For some of the most comprehensive literature, see Glazewski *Environmental Law in South Africa* (2005); Currie and De Waal (n 53) ch 24; Van der Linda and Basson “Environment” in Woolman, Roux, Klaaren, Stein, Chaskalson, and Bishop *Constitutional Law of South Africa* (2003).

⁵⁵ See s 2(1)(d)(i) of the procurement act.

⁵⁶ emphasis added.

environmentally sound practices. The goals for which preferential procurement may be used are clearly not restricted to the goals explicitly mentioned. When section 5(1) of the procurement act further provides that “[t]he Minister [of Finance] may make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act”, it clearly gives the minister the authority to promote environmentally sound practices. At the moment, there is no explicit reference in the procurement regulations to green procurement policies.⁵⁷ It is noteworthy, however, that regulation 17 does not lay down a closed list of activities which may be recognized for the purposes of preference points.⁵⁸

Apart from the argument presented above, section 7(2) of the constitution should be taken account of. This provision requires that the state “must respect, protect, promote and fulfil the rights in the Bill of Rights”. “To respect rights” means that they should not be infringed (they may be limited only in accordance with the provisions of limitation clauses); “[t]o protect rights” means to ensure that they are infringed by neither the state nor private individuals; and “[t]o promote and fulfil rights” means to facilitate the exercise of rights by providing the means for their exercise.⁵⁹ There is thus a duty on the state and its organs not only to refrain from infringing rights, but also in some instances, like the present, a positive duty on the state and its organs to enact legislation for the protection of rights.⁶⁰

⁵⁷ Preferential Procurement Regulations GG 22549 (10-08-2001). The regulations are currently (2007) in the process of being repealed. The aim is to bring the regulations more in line with the Broad-Based Black Economic Empowerment Act 53 of 2003, the aim of which is, *inter alia*, “[t]o establish a legislative framework for the promotion of black economic empowerment” in South Africa (see the preamble to the act). At the completion of this research (30 November 2007), the new regulations were still in draft form (Preferential Procurement Policy Framework Act 5 of 2000: Draft Preferential Procurement Regulations, GG 26863, (4 October 2004)). It is important to note, however, that the new draft regulations similarly do not expressly refer to the incorporation of environmental considerations into the procurement process. The Act 53 of 2003 scorecards annexed to the regulations also make reference only to equity ownership, management, employment equity, skills development, preferential procurement, enterprise development and local content in the award of preference points. No reference is made to the award of preference points for the protection of the environment.

⁵⁸ Reg 17(3) provides that “[o]ver and above the awarding of preference points in favour of [historically disadvantaged individuals], the following activities *may* be regarded as a contribution towards achieving the goals of the [Reconstruction and Development Programme]”: the promotion of South African owned enterprises; the promotion of export orientated production to create jobs; the promotion of small, medium and micro enterprises; 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 (emphasis added).

⁵⁹ Rautenbach “Protected conduct and interests and the corresponding duties” 1A23 headed “Purpose of determining the conduct and interests protected by a right and the duties imposed by a right” *Bill of Rights Compendium* (2006) (<http://butterworths.uwc.ac.za> (8-4-2007)).

⁶⁰ See eg *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) par 44 (in considering the obligations imposed by the rights to life, dignity and freedom and security of the person, the court held that “there is a duty imposed on the State and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection”); *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 4 BCLR 301 (CC) par 69 (“[t]he rights contained in the Bill of Rights ordinarily impose, in the first instance, an obligation that requires those bound not to act in a manner which would infringe or restrict the right. ... However, in some circumstances, the correlative obligations imposed by the rights in the Bill of Rights will require positive steps to be taken to fulfil the rights”).

4 *Incorporating environmental considerations throughout the procurement process in South Africa*

Having determined that the use of procurement to promote environmentally sound practices falls within the scope of the current legislative framework governing procurement, with reference in particular to the language of section 217(2)(a) of the constitution, section 2(1)(d) of the procurement act, and regulation 17 of the procurement regulations, suggestions will be made as to how environmental considerations could be incorporated throughout the procurement process.

Mainly three stages can generally be identified in the government (or any) procurement process. Each stage generally consists of certain key events.⁶¹ The first stage is the planning stage, which involves taking account of the following considerations: determining whether there is a need for the goods or services in question; ensuring that the government has the legal powers to acquire such goods or services; obtaining the necessary authorisation for the transaction; and arranging financial support. The second stage is the process of procurement, *ie* the process of selecting a contractor to provide the goods or services required, and the conclusion of a contract with that party. This involves, *inter alia*, drawing up specifications to explain to potential contractors the needs of the government; deciding on the method of procurement (for example a call for tenders or getting quotations); selecting a winning contractor; debriefing the contractor; and signing a formal agreement. The third stage is the process which is often referred to as contract maintenance or contract administration and involves the supervision of contractual performance to ensure the proper delivery of goods or services; accepting the delivery of goods or services; arranging for the payment of the contractor; and dealing with or resolving disputes that may arise. For present purposes, attention will be given to, in particular, the planning stage of the procurement process; the drawing up of tender specifications; ensuring the capability or responsibility of contractors; the use of criteria to compare different tenders; and ensuring that eventual performance under a contract is environmentally sound.

4.1 The planning stage

The planning stage of the procurement process (also referred to as the preparatory stage) is the best time to incorporate environmental considerations into the procurement process. This stage of the procurement process is not as heavily regulated as the other stages (government procurement law is not so much concerned with what organs of state procure but the way in which they procure) and it is therefore easier for organs of state to take account of the environment when faced with procurement decisions.⁶² As noted, the planning stage usually involves taking account of a number of considerations. For present purposes, it is particularly the determination of the need for a product or service that is of utmost importance. Determining need will involve, *inter alia*, an understanding of future needs; the identification of critical delivery dates; the frequency of need; linking the requirement to the budget; doing an expenditure analysis (based on past expenditures); determining the specifications; doing a commodity analysis, *ie* checking for alternatives; and

⁶¹ See Arrowsmith, Linarelli and Wallace (n 2) 1-2.

⁶² Doing so will, of course, to a large extent depend on the awareness and knowledge of procurement officials. It is important, therefore, for procurement officials to be provided with legal, financial and environmental knowledge to facilitate decision-making on how best to include environmental considerations into government procurement procedures.

doing an industry analysis.⁶³ From an environmental point of view it is important for an organ of state to confirm the actual need for goods or services and to avoid the procurement of goods or services that are unnecessary.⁶⁴ Thus, if an organ of state for example needs to broadcast information to the public and identifies the “need” for the procurement of printed flyers, posters, brochures and newspaper ads, it may, after having taken account of the environmental impact of procuring these, decide instead to broadcast information via other means, for example by using websites, electronic means or e-mails.⁶⁵ This method is clearly a more environmentally friendly option although it could be argued that in the South African context, general lack of internet access (by the public) may warrant the use of printed flyers etc. Green procurement is furthermore, and as noted, not necessarily about procuring only or as far as possible environmentally friendly goods or services. Effect can be given to the protection of the environment also by procuring fewer goods or services. If, for example, office furniture is needed, an organ of state could acquire these from other departments that have more than is needed.⁶⁶ Where, on the other hand, procurement is necessary, an organ of state can decide upfront that it will only procure goods or services that are environmentally friendly, for example, recycled-content paper as opposed to virgin paper.⁶⁷ An organ of state may also decide that it will consider “green variants”. It can, in other words, allow itself an option between traditional goods or services and possible green variations when procuring goods or services.⁶⁸

4.2 The drawing up of tender specifications

Tender specifications inform potential tenderers of an organ of state’s needs so as to enable them to decide whether or not the contract is of interest to them and, if so, to prepare responsive tenders. Thus, an organ of state will usually describe the product or service that is required; the number of units needed; and the purpose that is to be served by the product or service. An organ of state will usually also stipulate any standards or requirements that must be met by the product or service, for example, performance characteristics; materials composition; and appearance and finishes etc. During this stage of the procurement process, *ie* the drawing up of specifications, organs of state could stipulate that an environmentally sound product or service is required. This would be the most transparent way in which to incorporate environmental considerations into the procurement process, *ie* by adding an environmental dimension to the object or subject-matter of the contract. An organ of state could, for example, stipulate that the electricity to be supplied under the contract must come, in part or in full, from renewable energy sources; or that the food to be provided under a catering contract must be organically grown.⁶⁹ An organ of state could also call for tenders for 50% recycled-content paper. Contractors who

⁶³ Cl 2.1.1 of the National Treasury: Policy Strategy to Guide Uniformity in Government Procurement Reform Processes in Government (07/04/2003) (<http://www.treasury.go.za/showpfma.htm> – go to “Supply chain management” (28-3-2007)).

⁶⁴ See also par 2.1 above.

⁶⁵ The Commission of the European Communities: Commission Staff Working Document (n 5) 13.

⁶⁶ See par 2.1 above.

⁶⁷ For more detailed discussion on this, specifically in relation to the drawing up of specifications, see par 4.2 below.

⁶⁸ For further discussion on the consideration of “green variants” in the award stage of the procurement process, see par 4.4 below.

⁶⁹ Day (n 8) 205.

offer virgin paper will thus be automatically excluded regardless of the performance or cost of such paper.⁷⁰ Organs of state may not, for example, conclude contracts that are significantly different from the specifications laid down in a tender call. Doing so would defeat the notions of fairness and transparency.⁷¹

When drawing up specifications, it is also important for organs of state to take account of the environmental impact of a product or service throughout its life cycle. This is because while, for example, the manufacturing side of particular goods may be environmentally sound, the use and disposal side thereof may pose environmental difficulties. It is also important to ensure that environmentally sound goods or services are not automatically excluded from consideration. If, for example, an organ of state lays down in the tender specifications that it is calling for “virgin paper”, *ie* paper that contains no recycled content, doing so will by definition exclude recycled-content paper. It is important, therefore, for organs of state to eliminate obstacles to the procurement of environmentally sound goods and services; very careful attention should be paid to the language that is used in the drawing up of specifications.⁷² Organs of state should further aim to identify technical specifications in terms of performance or functional requirements as opposed to laying down detailed and complex specifications.⁷³ Thus, if the contract advertised is for an environmentally friendly heating system for a government building, it would make more sense to specify that offices must have a constant daytime temperature of 20° Celsius (as opposed to laying down detailed and complex specifications).⁷⁴

Legislation in South Africa further emphasises that there must be no bias in the drawing up of specifications.⁷⁵ Tender specifications must not, in other words, be custom-made or tailor-made for a specific supplier; doing so will defeat competition

⁷⁰ See, *inter alia*, *Grinaker LTA Ltd v Tender Board (Mpumalanga)* 2002 3 All SA 336 (T); *Coolcat Restaurante BK h/a Die Kafeteria, UOVS v Vrystaatse Regering* 1999 2 SA 635 (O); *JFE Sapela Electronics (Pty) Ltd v Chairperson: Standing Tender Committee* 2004 3 All SA 715 (C) – confirmed on appeal in *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2005 4 All SA 487 (SCA); *Compass Waste Services (Pty) Ltd v Chairperson, NC Tender Board* 2005 JOL 15344 (NC); *Metro Projects CC v Klerksdorp Local Municipality* 2004 1 SA 16 (SCA).

⁷¹ s 217(1) of the constitution. For detailed discussion on the importance of concluding contracts that are in compliance with tender specifications, see Bolton (n 3) ch 7.

⁷² Coggburn and Rahm (n 5) 40.

⁷³ The Commission of the European Communities commission staff working document ((n 5) 17) promotes this idea.

⁷⁴ See the Local Government: Municipal Finance Management Act 2003: Municipal Supply Chain Management Regulations GG 27636 (30-05-2005) (MFMA SCM Regulations). Reg 27(2)(c) generally provides that “where possible, [specifications should] be described in terms of performance required rather than in terms of descriptive characteristics for design”. There is also a prohibition against the use of particular trade marks, names, patents, designs, types, specific origins or producers “unless there is no other sufficiently precise or intelligible way of describing the characteristics of the work, in which case such reference must be accompanied by the words [sic] ‘equivalent’” (reg 27(2)(e)). Specifications may also not “create trade barriers in contract requirements in the forms of specifications, plans, drawings, designs, testing and test methods, packaging, marking or labelling of conformity certification” (reg 27(2)(d)).

⁷⁵ National Treasury: Supply Chain Management Office “Implementation of supply chain management” 28-10-2004, par 4.1(a) (<http://www.treasury.gov.za/showpfma.htm> – go to “Treasury practice notes” and then to “Supply chain management practice notes” (28-3-2007)); MFMA SCM Regulations (reg 27(2)(a)).

and compliance with the notion of fairness.⁷⁶ For present purposes, this would mean that green tender specifications should not be drawn up in such a way that a specific supplier will inevitably be awarded the contract. It would appear, however, that where environmental considerations will be taken account of during the award stage of the procurement process, *ie* when comparing the merits of competing tenders,⁷⁷ and there are other non-green criteria that will also enable tenderers to score points for the award of a contract, the mere fact that only one or a few suppliers will be able to comply with the green award criteria does not mean that this amounts to a breach of the notion of fairness. In this scenario, the other contractors will still be able to score points on the basis of non-green criteria.⁷⁸ It is also important for green tender specifications to relate to the subject-matter of the contract; an organ of state may not impose environmental criteria on issues which are unrelated to the goods or service in question. Thus, if an organ of state is procuring furniture or vehicles, tender specifications cannot be drawn up to the effect that tenderers must use recycled paper products in their workplaces.⁷⁹

4.3 Ensuring the capability or responsibility of contractors

It goes without saying that organs of state will want to contract with suppliers that have the necessary capability or ability to render performance under a contract. Thus, it is necessary for a contractor to have at least the minimum qualifications to perform, meaning it must be responsible, it must be able to complete the work on time and must be able to do so in a satisfactory manner. The determination of this (responsibility) will generally include a consideration of at least the following: the nature, quality and reliability of the product or service to be rendered;⁸⁰ the experience and track record of a contractor;⁸¹ the possession of appropriate licenses and permits;⁸² the ability of a contractor to comply with the delivery schedule;⁸³ the contractor's record of business ethics and integrity;⁸⁴ the technical knowledge and capacity of a contractor;⁸⁵ the availability of tools or equipment for the contractor's use;⁸⁶ and the financial and economic standing of a contractor.⁸⁷ If upon balancing these factors an organ of state is of the opinion that a contractor does not comply with the minimum qualifications necessary to render performance under the contract, such contractor could be excluded from further consideration. In South African law, contractors can also be excluded from government contract awards on the grounds of fraud or corruption

⁷⁶ s 217(1) of the constitution.

⁷⁷ See par 4.4 below.

⁷⁸ For more detailed discussion on this, see par 4.4 below.

⁷⁹ Commission of the European Communities: Commission Staff Working Document (n 5) 23.

⁸⁰ Trepte *Public Procurement in the EC* (1993) 162.

⁸¹ *ibid.*

⁸² Schooner "The paper tiger stirs: rethinking suspension and debarment" 2004 *PPLR* 211 213.

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ An evaluation of technical capacity will entail a consideration of, *inter alia*, the following: "previous work undertaken of the type and value"; "in-house or available external expertise"; "whether a guarantee of contract performance is being offered and if so in what form"; "membership of approved bodies or trade organisations" (Cirell and Bennett *Compulsory Competitive Tendering: Law and Practice* (1991) par 13.8-3.12). See also Bright *Public Procurement Handbook* (1994) 27.

⁸⁶ Trepte (n 80) 162.

⁸⁷ Bright (n 85) 27; Cirell and Bennett (n 85) par 13.13.

in the procurement process;⁸⁸ the non-payment of municipal rates and taxes and municipal service charges;⁸⁹ and/or unsatisfactory contractual performance under a previous government contract.⁹⁰

It is submitted that in addition to the factors mentioned above to determine minimum qualifications necessary to render performance under a contract, and hence to qualify for further consideration, the environment could also play a role. An organ of state could, for example, exclude contractors from government contract awards if they have been found guilty of contravening environmental laws within a specified period prior to the tender call (for example, five years).⁹¹ It would appear, however, that it would be necessary for express provision to be made in legislation to allow for such exclusions.⁹² Contractors could, furthermore, be excluded from government contract awards if they simply do not have the necessary environmental competence to render performance under a contract that requires this, for example a waste management contract; a construction, building, maintenance or renovation contract; or a transport contract. For such exclusions, there would be no need for the amendment of existing legislation since environmental competence would be an inherent and necessary requirement for the proper performance of the contract. Environmental competence could include, for example, competence in minimising waste formation; preventing spillage of polluting products; reducing fuel costs; and/or minimising the disturbance of natural habitats. Relevant questions that an organ of state could pose may include whether, first, a contractor employs or has access to technicians with the requisite knowledge and experience to deal with the environmental issues of the contract; second, a contractor owns or has access to the essential technical equipment for environmental protection; and third, a contractor

⁸⁸ Prevention and Combating of Corrupt Activities Act 12 of 2004 (s 28(1)(a)); Supply Chain Management Regulations in National Treasury: Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities: Issued in terms of the Public Finance Management Act 1999 GG 27388 (15-03-2005) (PFMA SCM Regulations) (reg 16A9.1(c)); MFMA SCM Regulations (reg 14(1)(e)).

⁸⁹ PFMA SCM Regulations (reg 16A9.1(d)); MFMA SCM Regulations (reg 38(1)(d)(i)).

⁹⁰ PFMA SCM Regulations (reg 16A9.2(a)(iii)); MFMA SCM Regulations (reg 38(1)(d)(ii)). For detailed discussion on the exclusion of contractors from government contract awards in South Africa, see Bolton (n 3) ch 13.

⁹¹ It is important for a time period to be attached to the exclusion of contractors for contravening environmental laws. As argued by Bolton (n 3) ch 13, the exclusion of contractors from government contract awards should not be aimed at punishing contractors but rather to ensure that the government deals with responsible contractors.

⁹² Such provision has been made in the labour law context. S 53(1) of the Employment Equity Act 55 of 1998 provides that “[e]very employer that makes an offer to conclude an agreement with an organ of state for the furnishing of supplies or services to that organ of state or for the hiring or letting of anything (a) must (i) if it is a designated employer, comply with [the chapters on the prohibition against unfair discrimination and affirmative action in the act]; or (ii) if it is not a designated employer, comply with [the chapter on the prohibition against unfair discrimination]”. Failure by an employer to comply with the relevant chapters may, in terms of s 53(4) of the act, serve as a ground for the rejection of its offer or the cancellation of the agreement. See further clause 4.1.6 of the Policy Strategy to Guide Uniformity in Government Procurement Reform Processes in Government (n 63) that provides that accounting officers must ensure that suppliers/contractors comply with all the provisions of national labour laws. See also s 26 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 which provides that “[i]t is the responsibility of any person directly or indirectly contracting with the State or exercising public power to promote equality by (a) adopting appropriate equality plans, codes, regulatory mechanisms and other appropriate measures for the effective promotion of equality in the spheres of their operation; (b) enforcing and monitoring the enforcement of the equality plans, codes and regulatory mechanisms developed by them; and (c) making regular reports to the relevant monitoring authorities or institutions as may be provided in regulations, where appropriate”.

has appropriate research and technical facilities available to cover the environmental aspects of the contract.⁹³

Thus, where for example an organ of state calls for tenders for the award of a waste management contract and it is clear that a specific contractor does not have the necessary environmental competence to render performance under the contract, it should be excluded from further consideration. This will be justifiable in particular where contractors are asked to include proof (in their tender submissions) of previous contracts of a similar nature that they have successfully carried out and the contractor in question fails to provide such proof. Exclusion from further consideration will also be justifiable if contractors are asked to provide proof of educational or professional qualifications that confirm their ability to achieve the environmental objectives of the contract in question and such documentation is lacking.⁹⁴ It is of utmost importance, however, for contractors to be informed beforehand, *ie* in the call for tenders, that contractors will be excluded from consideration if they have been found guilty of contravening environmental laws (within a period of five years prior to the tender call), or if they lack the necessary environmental competence to render performance under the contract. The latter is, of course, in accordance with the notion of fairness;⁹⁵ only contractors who submit responsive tenders should qualify for the award of a contract.

4.4 Criteria for comparing different tenders

It was noted above⁹⁶ that in order for contractors to qualify for the award of a contract, they must possess at least the minimum qualifications necessary to render performance under the contract. At the same time, a contractor must, in relation to the merits of other competing contractors, be able to render satisfactory performance under the contract. The capability or ability of a contractor can thus be said to relate to both the qualification/responsibility of a contractor *and* award criteria, *ie* the criteria used to compare the merits of competing tenders. With regard to the latter (award criteria), the following factors will usually play a role when comparing different tenders: price; delivery period; costs of use or running costs (also referred to as life cycle costs); quality; technical merit; technical assistance; aesthetic and functional characteristics; commitments with regard to spare parts and after-sales service;⁹⁷ the qualifications and competence of the personnel of a contractor;⁹⁸ and the number of staff employed by a contractor.⁹⁹ It is submitted that in addition to these factors that can be said to make up the overall economic advantage of a product or service, organs of state may take account also of the environmental effects of a product or service (without the need for an amendment of the existing legislation).¹⁰⁰ The environment could, in other words, play a role when comparing the merits of competing tenders. Examples of criteria that may play a role in doing so include, *inter alia*, whether or not a contractor has an environmental policy or environmental management system in place; the chemical content of the products to be

⁹³ Commission of the European Communities: Commission Staff Working Document (n 5) 27.

⁹⁴ See Commission of the European Communities: Commission Staff Working Document ((n 5) 28) that uses as an example a contract that involves the removal of asbestos.

⁹⁵ s 217(1) of the constitution.

⁹⁶ par 4.3.

⁹⁷ Trepte (n 80) 162.

⁹⁸ *ibid.*

⁹⁹ *ibid* 54.

¹⁰⁰ For further explanation, see below.

delivered; whether or not the product to be delivered is recyclable or reusable; the material used for the packaging of goods; the level of noise involved; whether or not the product has certain eco-labels attached to it;¹⁰¹ energy usage by the contractor; the possession of environmental certificates; environmental training and knowledge on the part of the contractor; and the general impact of the goods or services on the environment.¹⁰²

The type of goods or services procured will determine the extent to which environmental criteria may be taken account of during the award stage. Environmental criteria are, for example, likely to be relevant in the case of cleaning services; transportation services; plastic and paper products; manufactured goods, for example, furniture, office machinery, toys, lightning and other consumables; food products and services; motor vehicles; optical and/or medical devices; construction work; industrial machinery; textile products; repair and maintenance services; and chemicals and chemical products.¹⁰³

In South Africa, the environment is, at present, generally not a factor that is taken account of when the merits of competing tenders are compared (or during any of the other stages of the procurement process). Organs of state, on face value at least, also do not appear to be legally authorised to do so. As argued, however, the current legislative framework governing procurement does provide scope for the inclusion of environmental considerations into the procurement process. Organs of state are, in other words, allowed to take account of environmental considerations when comparing the merits of competing tenders. It is submitted that the environment could be fitted into the points system created in terms of the procurement act and regulations. In terms of the current points system, points are awarded to contractors on the basis of price and preference. At present, the protection of the environment is not expressly stipulated as something that contractors could be awarded preference points for, but it is submitted, in light of the arguments already made, that organs of state should be able to award preference points also on the basis of environmental considerations without the need for legislative change. In this way, the environment would be one of many other factors that a contractor could score points on, for example, contracting with historically disadvantaged individuals and implementing the programmes of the reconstruction and development programme.¹⁰⁴ The award of environmental points would not displace or conflict with South Africa's current use of procurement to empower previously disadvantaged groups. The environment would merely be added to the many other factors that are already taken account of, all of which are aimed at the economic advancement of previously disadvantaged groups. The current position would further remain unchanged; there would still be a balance between price, on the one hand, and preference on the other.¹⁰⁵ It is

¹⁰¹ Eco-labels endorse products that are considered to be more environmentally sound than like products in the same product group. They are awarded on a voluntary basis to products that meet specific criteria and they aim at enlightening customers about environmentally sound products. Examples of international eco-labels include the European Eco-label (http://ec.europa.eu/environment/ecolabel/index_en.htm (28-3-2007)) and the German Blue Angel (http://www.blauerengel.de/englisch/navigation/body_blauer_engel.htm (28-3-2007)).

¹⁰² See the table provided in Parikka-Alhola, Nissinen and Ekroos "Green award criteria in the most economically advantageous tender in public purchasing" in Thai and Pigo (eds) *Advancing Public Procurement: Practices, Innovation and Knowledge Sharing* (2007) 277-279.

¹⁰³ *ibid* 268-269.

¹⁰⁴ s 2(1)(d) of the procurement act. See also par 3.2 above.

¹⁰⁵ For detailed discussion on the preference points system created by the Procurement Act and Regulations, see Bolton (n 3) ch 10.

still important, however, for award criteria to be sufficiently precise and objectively verifiable to enable contractors to submit responsive tenders, and to enable organs of state to verify and compare tenders in an objective way. In this sense, it would not be sufficient for an organ of state to simply state in the tender documents that during the award stage it will favour tenders which are “environmentally friendly” or “most consistent with sustainable development”. Such criteria would amount to indeterminate criteria and allow organs of state an unfettered discretion at the award stage which defeats the notions of fairness and transparency.¹⁰⁶ On the other hand, it would be possible for an organ of state procuring electricity to award “environment” points to a contractor who can prove that 25% of the electricity supplied will be from renewable energy sources.¹⁰⁷ Doing so would be sufficiently precise and objectively verifiable.

As noted,¹⁰⁸ the initial cost of green products or services may be more than that of non-green products. It is important, however, to take account of the full life-cycle costs of products and services, in particular for present purposes, the purchase price; and the costs of use or running and maintenance costs, for example, energy, water and other resources used during the lifetime of the product; money spent in order to save, for example investing in higher levels of insulation to save energy and hence money in the future; the cost incurred in maintaining or recycling a product; and the cost incurred for the treatment of waste or recycling.¹⁰⁹ Energy-efficient light bulbs, for example, are known to have a higher upfront cost but when compared to traditional light bulbs, their life-cycle costs are much lower; they are roughly four times more energy-efficient and last up to ten times longer. It is, therefore, more cost-effective for organs of state to invest in energy-efficient light bulbs.¹¹⁰ It has furthermore been noted¹¹¹ that an organ of state may decide to consider “green variants”. It can, in other words, first define a standard definition for the product or service that is required and in addition to this it can call for variants, for example, a product with a higher environmental performance or the use of a specific production process.¹¹² It can then stipulate that if a “green variant” provides better value for money after having taken account of all other award criteria, such “green variant” will be chosen. This can be done where an organ of state does not know whether green alternatives exist for the particular goods or service or what the likely cost might be.¹¹³

It seems important to add that even though in the South African context there may be few (especially emerging) contractors who may be able to comply with environmental criteria and hence qualify for environmental points in terms of the preference point system, this does not mean that organs of state should be prohib-

¹⁰⁶ s 217(1) of the constitution. See also the *Concordia* case; the *Wienstrom* case and *Kunzlik* (n 38) 198. In the *Concordia* case, the Community of Helsinki had, before the evaluation of tenders, specified and published a system for awarding extra points for certain levels of noise and emission. The court held that this system was adequately specific and measurable. In the *Wienstrom* case, the court provided further clarification and said that in order to give tenderers equal opportunities in formulating the terms of their tenders, the contracting body must formulate its award criteria in such a way that “all reasonably well-informed tenderers of normal diligence interpret them in the same way” (par 57). The contracting body should also only set criteria against which the information provided by the tenderers can actually be verified.

¹⁰⁷ Day (n 8) 207.

¹⁰⁸ par 2.3 above.

¹⁰⁹ Commission Interpretative Communication of 4 July 2001 (n 16) 21.

¹¹⁰ Westphal “Greening procurement: an attempt to reduce uncertainty” 1999 *PPLR* 1 9.

¹¹¹ par 4.1 above.

¹¹² Commission Interpretative Communication of 4 July 2001 (n 16) 13.

¹¹³ O’Hara (n 8) 4.

ited from taking account of environmental considerations in the award of contracts. Of utmost importance is that contractors are informed beforehand, *ie* in the call for tenders, that consideration will be given to environmental considerations in the award of contracts. The environment will, furthermore, not be the only factor for which an (emerging) contractor could score points. As noted, in terms of the current preference point system, contractors would be able to score points also for other factors, such as those already stipulated in section 2(1)(d) of the procurement act and regulations.¹¹⁴

Lastly, it is important for green tender specifications and minimum qualification criteria (for example environmental competence) to relate to the subject-matter of the contract.¹¹⁵ In the South African context, however, it would appear that this need not *necessarily* be the case in the application of green award criteria.¹¹⁶ In terms of the current legislative framework, contractors are awarded preference points for, for example, contracting with historically disadvantaged individuals, even though this does not relate directly to the subject-matter of the contract.¹¹⁷ It would seem, therefore, that under the current legislation contractors could qualify for “environment” points in instances when the protection of the environment is directly related to the subject-matter of the contract (for example a waste management contract)¹¹⁸ *and* when the environment is not directly related to the subject-matter of the contract. In the South African context, therefore, using procurement as a tool of environmental policy would not only be about procuring green goods and services, but also about generally preferring contractors who employ environmentally sound practices. Thus, even if an organ of state is not, for example, acquiring goods or services, but is in fact selling or letting an asset, it would be able to give preference to contractors who employ environmentally sound practices. It would be able to do so irrespective of whether the environment is directly related to the subject-matter of the contract.¹¹⁹ As noted, however, it is of the utmost importance for contractors to be informed beforehand, in the call for tenders, that environmental considerations will be taken account of during the award stage of the procurement process.

¹¹⁴ See the *Concordia* case. In brief, the Community of Helsinki, Finland decided to put its bus service out to tender and used award criteria such as overall price, quality of the bus fleet, and operational quality. Under one of the award criteria, bidders could score extra points if they complied with certain emission and noise levels. On the basis of these extra points, HKL was the successful bidder. Concordia Bus, an unsuccessful bidder, then opposed the decision arguing, *inter alia*, that “awarding points according to the nitrogen oxide emissions and reduced noise levels of the busses cannot be permitted ... in a case where not all the operators in the sector in question have, even theoretically, the possibility of offering services eligible for those points” (par 72). The court held, *inter alia*, that since under the point system in question, additional points could be awarded to contractors on the basis also of other criteria, *eg* the use of low floor busses, the number of seats and tip-up seats, and the age of the busses, it was not a breach of the principle of equal treatment to award points according to nitrogen oxide emissions and reduced noise levels of the busses (par 81-86). For detailed discussion and comment on the case, see Kunzlik (n 38).

¹¹⁵ See par 4.2 and 4.3 above.

¹¹⁶ It would also not be important for the exclusion of a contractor for non-compliance with environmental laws to be directly related to the subject-matter of the contract.

¹¹⁷ See generally the procurement act and regulations and, in particular, the preference point system created in the act and regulations. No requirement is stipulated for the award of preference points to be directly related to the subject-matter of the contract.

¹¹⁸ See *eg* the *Concordia* case (the court found that the award criteria relating to the level of nitrogen oxide emissions and the noise levels of the busses, which were to be used for the provision of transport services, complied with the requirement of being linked to the subject-matter of the contract).

¹¹⁹ For the application of s 217(1) of the constitution to the sale and letting of assets, see Bolton (n 3) 67-68.

4.5 Ensuring environmentally sound contractual performance

To ensure the effective and efficient use of procurement as a tool of environmental policy, it is not enough for only the foregoing stages of the procurement process to incorporate environmental considerations. It is important for the contract itself to also incorporate environmental considerations, in particular, the green criteria expressly stipulated in the call for tenders. Environmental clauses must, however, be objectively verifiable. They must also not amount to undisclosed tender specifications or criteria for comparing competing tenders. All contractors, if eventually awarded the contract, should be able to comply with the environmental clauses.¹²⁰ It would, for example, be prohibited to require of the successful or preferred bidder to register under an environmental management scheme if this was not expressly stipulated in the call for tenders. It would, however, be permitted for an organ of state to include a contractual clause that restricts the type of vehicles and equipment that a contractor intends to use in the execution of the contract provided such clause is directly related with the subject-matter of the contract, for example, a waste management contract. It would also be permitted for an organ of state to generally include contractual clauses to the effect that: (i) goods must be delivered in the appropriate quantity, *ie* in bulk (so as to be more environmentally efficient in terms of transport impact); (ii) goods must be delivered outside peak traffic times (to minimize traffic congestion); and/or (iii) any packaging used for the delivery of goods must be taken back, recycled or re-used (to dissuade suppliers from using avoidable or unnecessary packaging).¹²¹

5 Conclusion

Even though in South Africa environmental considerations are generally not incorporated into government procurement procedures, this does not mean that there is no scope within the existing legal framework for doing so. The wording of section 217(2) of the constitution, section 2(1)(d) of the procurement act and regulation 17 of the procurement regulations, in particular, allows for an interpretation that includes the use of procurement as a tool of environmental policy. There are different ways in which environmental considerations could be incorporated throughout the procurement process. As a rule, the planning stage of the procurement process is the best time to incorporate environmental considerations into procurement decisions since unlike the other stages in the procurement process this stage is not as heavily regulated. The environment can further play a significant role in the drawing up of specifications. Organs of state could stipulate that they will only consider green goods or services. The environment can also play a role when determining the responsibility of contractors. Contractors could be excluded from consideration if they have been found guilty of contravening environmental laws, or if they simply do not have the necessary environmental competence to render performance under

¹²⁰ Commission of the European Communities: Commission Staff Working Document (n 5) 36.

¹²¹ *ibid* 37. See also Waara and Carlsson “Environmental concerns in Swedish local government procurement” in Thai and Pigo (n 102) 239. Where conditions for the performance of a contract are stated upfront, *ie* in the tender specifications, and a contractor fails to indicate its willingness to comply with such conditions (for example to participate in an environmental awareness campaign; to undertake environmental remediation works; or to participate in a nature conservation programme), it can be excluded from further consideration. Its tender can, in other words, be regarded as non-compliant (Kunzlik “‘Green procurement’ under the new regime” in Nielsen and Treumer (eds) *The New EU Public Procurement Directives* (2005) 117, 124).

a contract that specifically requires this. The former ground for exclusion would, however, require a legislative amendment. Environmental criteria can also, in addition to the usual criteria such as price and technical capability, be applied during the award stage of the procurement process. It is important, however, that green award criteria: (i) do not confer an unrestricted freedom of choice on an organ of state, meaning award criteria must be specific and objectively quantifiable; (ii) are expressly mentioned in the tender documentation; and (iii) generally comply with the principles in section 217(1) of the constitution, *ie* fairness, equity, transparency, competitiveness and cost-effectiveness. Insofar as the actual contract is concerned, organs of state could ensure that contracts contain specific clauses aimed at the protection of the environment. In the case of construction contracts, for example, the contract could expressly restrict the use of certain vehicles or types of equipment in the performance of the contract. Contractors could also be contractually obliged to implement an environmental policy for the duration of the contract.

SAMEVATTING

INAGNEMING VAN OMGEWINGSFAKTORE BY DIE TOEKENNING VAN STAATSKONTRAKTE IN SUID-AFRIKA

Die groot aantal en hoë geldwaarde van staatskontrakte het die gevolg dat die staat se besluite ten opsigte van hoe, wanneer en met wie kontrakte gesluit word, belangrike implikasies inhou. Die openbare verkryging van goedere en dienste is nie net “besigheid” nie, dit het ook wyer sosiale, ekonomiese en politieke implikasies. Regerings gebruik hul koopkrag ook om doelwitte na te streef wat “sekondêr” is in vergelyking met die “primêre” doelwit van verkryging, naamlik met die beste bedinge. Voorbeelde sluit in die gebruik van openbare verkryging om sosiale, industriële en omgewingsbeleidsrigtings te bevorder. In hierdie artikel word die fokus geplaas op die gebruik van openbare verkryging ter bevordering van omgewingsbeleid. Daar word gepoog om aan te toon dat alhoewel Suid-Afrika se huidige gebruik van verkryging as ’n bemagtigingsmiddel lofwaardig is, dit ook belangrik is, in die lig van die toenemende belang van die konsep van “volhoubare ontwikkeling”, dat Suid-Afrika verkryging gebruik ter bevordering van sy omgewingsbeleid. Daar word aangetoon dat hierdie gebruik van openbare verkryging nie buite die huidige wetsraamwerk val nie, en dat daar ’n hele aantal maniere is waarop omgewingsfaktore geïnkorporeer kan word in die verkrygingsproses.