# The regulation of preferential procurement in state-owned enterprises*

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## 1 *Introduction*

State-owned enterprises, also referred to as parastatals or public entities, are enterprises or institutions that are directly or indirectly controlled by the state. Examples include Transnet, Telkom, Eskom, Safcol, Denel, Metrorail, the South African Post Office, the Council for Scientific and Industrial Research, the Industrial Development Corporation, the National Ports Authority, Petro SA, South African Airways, the South African Rail Commuter Corporation, the South African Revenue Services, the State Information Technology Agency, the South African Telecommunications Regulatory Authority and the Universal Service and Access Agency of South Africa.[1] The courts have held that these enterprises fall within the definition of an organ of state in section 239 of the constitution.[2] State-owned enterprises are also bound by section 217 of the constitution, which deals with the procurement procedures of organs of state.[3] Section 217(1) provides that organs of state in the national, provincial or local sphere of government, or any other institution identified in national legislation must contract for goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. State-owned enterprises do not fall within the "national, provincial or local sphere of government" as referred to in section 217(1), but are identified in the Public Finance Management Act[4] as institutions which are bound by section 217(1) of the constitution. State-owned enterprises are referred to as "public entities" in the Public Finance Management Act and section 51(1)(*a*)(iii) reiterates the requirements in section 217(1) of the constitution, *ie* fairness, equity, transparency, competitiveness and cost-effectiveness. The Public Finance Management Act further draws a distinction between national and provincial public entities and the different categories of public

* State-owned enterprises are also referred to as parastatals or public entities. For purposes of this article the term state-owned enterprises will be used. Where necessary and appropriate, however, use will be made of the terms parastatals and public entities.

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1 http://www.soepf.org.za/soepf/members.html; http://www.dpe.gov.za/home.asp?id=925.

2 S 239 of the Constitution of the Republic of South Africa, 1996 defines an organ of state as "(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer". Regarding Telkom, Transnet and South African Airways, see *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting* 1996 3 SA 800 (T) 811; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) 870F-G par 8; *Hoffmann v South African Airways* 2001 1 SA 1 (CC) par 23. See also *Baloro v University of Bophuthatswana* 1995 4 SA 197 (BSC) 230H-231D, 235J-236C.

3 See generally Bolton *The Law of Government Procurement in South Africa* (2007); Penfold and Reyburn "Public procurement" in Woolman *et al* (eds) *Constitutional Law of South Africa* (2003).

4 1 of 1999 (as amended by Act 29 of 1999).



[ISSN 0257 – 7747]

entities are listed in schedules 2 and 3 to the Public Finance Management Act.[5] Section 217(2) of the constitution in addition allows organs of state, and thus also public entities or state-owned enterprises, to implement a procurement policy that provides for categories of preference in the allocation of contracts, and the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination. Section 217(3) requires national legislation to be enacted to provide a framework within which preferential procurement policies must be implemented. The national legislation has taken the form of the Preferential Procurement Policy Framework Act (the procurement act)[6] and in 2001 regulations to the act were enacted.[7] The Promotion of Administrative Justice Act[8] moreover finds application to the procurement procedures of state-owned enterprises. It is well-established that the solicitation, evaluation and award of public tenders constitute administrative action and are subject to this act.[9]

Of importance for current purposes is the application of the procurement act and regulations to state-owned enterprises. In 2004, the judgment in the unreported case of *Fidelity Springbok*[10] raised the possibility that the procurement act and regulations might be applicable to state-owned enterprises. In more recent judgments, this possibility appears to have been cleared. This was important because the consequences of the application or non-application of the procurement act and regulations to state-owned enterprises are significant. If, for example, state-owned enterprises *are* bound by the procurement act and regulations, the use of their procurement powers for policy purposes is constrained and must be exercised within the prescribed framework of the procurement act and regulations. If, on the other hand, state-owned enterprises do *not* fall under the ambit of the procurement act and regulations, they have more freedom in the use of their procurement powers for empowerment and development purposes. The aim of this article is to confirm and in some instances to clarify the relevance of the procurement act and regulations for state-owned enterprises. First, a brief overview will be given of the procurement act and regulations in order to provide a context for the issue at hand. Next the relevant judicial decisions will be analyzed. This will be done "historically", *ie* from the 2004 judgment when the matter was first raised until the most recent 2009 judgment. A discussion will then follow where the following issues will be clarified: (a) the application of the procurement act and regulations to state-owned enterprises; (b) the consequences for state-owned enterprises of using the framework or prescripts of the procurement act and regulations in their procurement policies and practices; (c) the use by state-owned enterprises of different preferential procurement mechanisms; and (d) the Broad-Based Black Economic Empowerment Act ("empowerment act")[11] and its relevance for preferential procurement in state-owned enterprises.

[5] For definitions of the different entities see s 1 of the Public Finance Management Act. See also the complete list of public entities on the treasury website as at 31-03-2009 (http://www.treasury.gov.za/legislation/pfma/public%20entities/default.aspx).
[6] 5 of 2000.
[7] Preferential Procurement Regulations *GG* 22549 (10-08-2001).
[8] 3 of 2000.
[9] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) par 21.
[10] *Fidelity Springbok Security Services (Pty) Ltd v South Africa Post Office Ltd* 2004 JOL 13215 (T).
[11] 53 of 2003.

## 2 *Overview of the procurement act and regulations* [12]

As noted, the procurement act is the national legislation that has been enacted to give effect to section 217(3) of the constitution. The procurement act only applies to organs of state as defined therein, *ie* –

> "(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 as defined in the Public Finance Management Act, 1999 (Act No. 1 of 1999);
> (d) Parliament;
> (e) a provincial legislature;
> (f) *any* other institution or category of institution included in the definition of 'organ of state' in s 239 of the Constitution and recognised by the Minister [of Finance] by notice in the *Government Gazette* as an institution to which this Act applies."[13]

The above definition therefore differs from the definition of an organ of state in section 239 of the constitution.[14] Section 2 of the procurement act provides a framework for the implementation of preferential procurement policies, which is further fleshed out in the regulations. All organs of state that fall under the ambit of the procurement act must use the framework provided for in the act and regulations. They may not, for example, adopt a more generous preferential procurement policy unless the minister of finance directs otherwise.[15] The procurement act and regulations create a points system for the evaluation and adjudication of bids in terms of which points are awarded on the basis of price (also functionality under the regulations) and the attainment of two specific goals for preference purposes. First, preference may be afforded to persons or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability, and second for the implementation of the government's Reconstruction and Development Programme.[16] For contracts between R30 000 and R500 000 the 80/20 points system applies and in terms of it bidders are awarded points out of 80 for price and a maximum of 20 points for preference.[17] For contracts above R500 000 the 90/10 points system applies, with points out of 90 for price and a maximum of 10 points for preference.[18] A contract must be awarded to the bidder scoring the highest points in terms of the

[12] For detailed discussion and analysis, see Bolton (n 3) ch 10. See also Steytler and De Visser *Local Government Law of South Africa* (2007) 14-10 to 14-13; Rogerson "Pro-poor local economic development in South Africa" 2004 *Urban Forum* 180; Penfold and Reyburn (n 3); Gounden *The Impact of the National Department of Public Works' Affirmative Procurement Policy on the Participation and Growth of Affirmable Business Enterprises in the Construction Sector* (2000 thesis University of Natal); Watermeyer "The use of targeted procurement as an instrument of poverty alleviation and job creation in infrastructure projects" 2000 *Public Procurement Law Review* (*PPLR*) 226; Letchmiah "The process of public sector procurement reform in South Africa" 1999 *PPLR* 15.

[13] s 1(iii), emphasis original.

[14] See n 2 above. The empowerment act provides yet another definition of an "organ of state". See par 6.4 below.

[15] reg 2(2) of the procurement regulations.

[16] a 2(1)(d) of the procurement act. See further reg 17(3) which lists a number of Reconstruction and Development Programme goals which include, *inter alia*, the promotion of South African-owned enterprises, the creation of new jobs or the intensification of labour absorption, and the promotion of enterprises located in rural areas.

[17] s 2(b)(ii) of the procurement act and reg 3 of the procurement regulations.

[18] s 2(b)(i) of the procurement act and reg 4 of the procurement regulations.

relevant points system unless there are objective criteria that justify the award of the contract to another bidder.[19]

## 3 Fidelity Springbok Security Services (Pty) Ltd v South Africa Post Office Ltd[20]

As noted, the judgment in the unreported case of *Fidelity Springbok* raised the possibility that the procurement act and regulations might be applicable to state-owned enterprises. The plaintiff in this case argued that a valid verbal contract had been concluded between itself and the Post Office in terms of which the existing contract between them was renewed – the plaintiff would continue to render security services to the Post Office.[21] The Post Office, however, argued that as an organ of state within the meaning of section 239 of the constitution and the procurement act, it was bound to contract in accordance with a "constitutionally compulsory tender process" and to "follow a clear precise procedure when it requests services to be rendered on its behalf".[22] The Post Office, in other words, argued that the verbal agreement in question was invalid. The plaintiff, however, argued that the Post Office is not an organ of state for purposes of the procurement act, because even though it is an organ of state under section 239 of the constitution, it has not been recognised by the minister by notice in the *Government Gazette* as an institution or category of institutions to which the procurement act applies.[23] The procurement act therefore does not apply to the Post Office and the plaintiff asked the court to find that section 217 of the constitution similarly does not apply to it.[24] Motata J disagreed and held as follows:

> "Clearly the South African Post Office Ltd is a parastatal wherein the provisions of section 217 of the Constitution *read with the [Procurement]Act* enjoin and/or prescribe to the defendant to conduct and/or act in a specified manner when it wants services to be rendered for it. This is the domain of the defendant as adumbrated by the statutory provisions … Section 217 of the Constitution is a constitutional provision and has to be complied with … the South African Post Office Ltd is an organ of State and as such falls within the provisions of the Constitution *read with the [Procurement] Act*."[25]

The court accordingly held that the agreement in question was invalid. Of importance, however, is that Motata J was of the view that the South African Post Office Ltd, a state-owned enterprise, is an organ of state for the purposes of the procurement act.[26]

[19] s 2(1)(*f*) of the procurement act. See also reg 9 of the procurement regulations which provides for the award of a tender to a bidder that does not score the highest points provided there are "reasonable and justifiable" grounds for doing so.
[20] 2004 JOL 13215 (T).
[21] par 7-8.
[22] par 11.
[23] Referring to s 1(iii)(*f*) of the procurement act.
[24] par 15.
[25] par 15-16, footnotes omitted, emphasis added.
[26] See further *Abagibeli Insurance Administrators (Pty) Ltd v The SA Rail Commuter Corp Ltd* 2007 JDR 0440 (T) where the court assumed, without deciding, that the *SA Rail Commuter Corp Ltd*, a state-owned enterprise, is bound by the procurement act and regulations (par 21-23, 76 and 82). See also *Scribante Construction (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2008 JDR 0658 (E). Nowhere in the judgment did the court expressly state that the procurement act and regulations were applicable to the Coega Development Corporation (a state-owned enterprise). On a reading of the judgment as a whole, however, it would appear that the court was of the view that the Coega Development Corporation is bound by the procurement act and regulations.

 [ISSN 0257 – 7747]

### 4 Cae Construction CC CK 2000/035940/23 v Petroleum Oil and Gas Corporation of SA (Pty) Ltd[27]

The applicant in the *Cae Construction* case submitted a tender for the supply of electrical maintenance services to the Petroleum Oil and Gas Corporation of SA (Pty) Ltd (Petro SA). Petro SA however decided to cancel the tender process and the applicant took the decision to cancel on review. The parties disagreed on the reasons for cancellation.[28] The applicant argued that Petro SA cancelled the tender process because it was re-evaluating its need for the services advertised as indicated to the applicant in a letter dated 8 February 2006. The applicant argued that this reason for cancellation did not comply with regulation 10(4) of the procurement regulations, which was incorporated into Petro SA's procurement policy.[29] In terms of regulation 10(4) Petro SA could only cancel the tender process if –

> "(a) due to changed circumstances, there is no longer a need for the goods or services tendered for; or
> (b) funds are no longer available to cover the total envisaged expenditure; or
> (c) no acceptable tenders are received."

The applicant argued that since Petro SA, after the cancellation of the tender process, made use of labour brokers for the services advertised, there was clearly a need for the services.[30] The cancellation of the tender process was fatally flawed and had to be reviewed and set aside.[31] The decision to cancel the tender process was moreover, the applicant argued, in violation of section 6(2) of the Promotion of Administrative Justice Act.[32] Petro SA argued that it cancelled the tender process because no acceptable tenders were received. The applicant's tender in particular was not acceptable for a number of reasons, the most important of which being that the applicant was factually insolvent.[33] Petro SA moreover contended that the applicant had been given an opportunity to respond to the "unacceptability" of its tender and Petro SA's decision to cancel the tender process.[34] The court noted that Petro SA is not an organ of state for purposes of section 1(iii) of the procurement act and it has not been recognised by the minister by notice in the *Government Gazette* as an institution or category of institutions to which the procurement act applies.[35] Petro SA is, however, an organ of state for purposes of section 217 of the constitution.[36] The court noted that Petro SA has a procurement policy which provides that "the evaluation of … tenders shall comply with the Procurement Act together with the regulations under the Act".[37] This is also stipulated in the "Instructions to Tender" document, which provides that the scoring system in the procurement act applies. The court noted, however, that no provision is made in Petro SA's procurement policy for the withdrawal or cancellation of a tender process.[38] Clause 7 of Petro SA's procurement policy on which the applicant relied only referred to the application of

[27] 2006 JDR 1066 (C).
[28] See par 4 and 5. See also par 11-16.
[29] par 7.
[30] par 7-8.
[31] par 7 and 20.
[32] par 8.
[33] par 12-13.
[34] par 12-14.
[35] par 32.
[36] par 27.
[37] par 28.
[38] par 28.

the procurement act and regulations in relation to the "evaluation" of quotations or tenders and that the 80/20 or 90/10 points scoring system would apply.[39] The court held that "this qualified application of the [procurement act] cannot on the wording of the policy be read to suggest the wholesale application of the [procurement act] to Petro SA".[40] In Petro SA's invitation to tender, it also did not bind itself to accept the lowest or part of or all of any tender submitted. Petro SA's "Standard Terms and Conditions of Tendering" document further made clear that "Petro SA reserves the right to reject any or all Tenders for any reasons whatsoever and is under no obligation to accept the lowest or any other tender".[41]

The court concluded that Petro SA is not bound by regulation 10(4) of the procurement regulations. There could, moreover, be no contention that the parties had agreed that regulation 10(4) would apply to the tender process.[42] This does not, however, mean that Petro SA did not have good reasons to cancel the tender process. The court held that the letter relied upon by the applicant as Petro SA's reasons for cancelling the tender process was not written in response to a request for reasons, but rather in response to the renewal of the applicant's existing contract with Petro SA.[43] Petro SA cancelled the tender process because no acceptable tenders were received.[44] It correctly regarded the applicant's tender as unacceptable, because the applicant lacked financial ability or creditworthiness.[45] The decision to cancel the tender process was not in contravention of section 6(2) of the Promotion of Administrative Justice Act; it was rational and reasonable when measured against the reasons given for cancellation. Of importance, therefore, is that the court held that even though Petro SA to a large extent applies the procurement act and regulations in its procurement practices, it is not an organ of state for purposes of the procurement act and regulations. Petro SA also did not specifically include or incorporate regulation 10(4) of the procurement regulations in its procurement processes.

## 5 TBP Building and Civils (Pty) Ltd v East London Industrial Development Zone (Pty) Ltd[46]

In the recent case of *TBP Building* case the East London Industrial Development Zone invited tenders for the construction of an industrial warehouse. The applicant submitted a tender, but was unsuccessful and sought an interdict to prevent the implementation of the contract between East London Industrial Development Zone and the preferred bidder pending the finalisation of a proposed review of the tender award. Of relevance for current purposes is that East London Industrial Development Zone did not strictly follow the points system in the procurement act, *ie* 90 points for price only and 10 points for preference.[47] Instead, it relied on the points system in the procurement regulations which provides also for "functionality" in the award of points.[48] East London Industrial Development Zone, in reliance on the procurement regulations, awarded 70 points for price, 20 points for functionality and 10

39 par 34.
40 par 34.
41 par 35.
42 par 36.
43 par 38.
44 par 43.
45 par 44.
46 In case no 230/09 (EC) (17-03-2009) (unreported).
47 s 2(b)(i) of the procurement act.
48 See reg 8 in the procurement regulations.

points for preference. The court held that East London Industrial Development Zone is not an organ of state within the meaning of section 1(iii) of the procurement act.[49] Even though East London Industrial Development Zone is a public entity (state-owned enterprise) under the Public Finance Management Act and as such is bound by an instruction issued by the National Treasury requiring public entities to adhere to "the prescripts of the [procurement act] … and its associated regulations",[50] such instruction (also) did not render East London Industrial Development Zone an organ of state under the procurement act. The consequence of this is that the procurement procedures of East London Industrial Development Zone cannot be tested on the ground of lawfulness, *ie* whether East London Industrial Development Zone strictly complied with the points system in the procurement act. The court held, however, that East London Industrial Development Zone is directly bound by section 217(1) of the constitution and the Promotion of Administrative Justice Act. Its procurement procedures must be fair, equitable, transparent, competitive and cost-effective and they must comply with administrative law rules. In this respect the court found that East London Industrial Development Zone followed proper procedures. All bidders were informed that the points system to be used was 70 for price, 20 for functionality and 10 for empowerment aspects and not 90 for price (only) and 10 for empowerment aspects as stipulated in the procurement act. The procedures followed by East London Industrial Development Zone were transparent and fair and allowed for competition and cost-effectiveness. There was no indication that there may have been favouritism, corruption or the like in the award of the tender. The court moreover noted that the preferential procurement system created in the procurement act is not the only way of achieving the "standards and values set out in section 217(1) of the Constitution".[51] Those entities that are not directly bound by the procurement act and regulations (like East London Industrial Development Zone and also other state-owned enterprises) can use a different system provided that they still comply with the "broad goals of fairness, equity, transparency, competitiveness and cost-effectiveness" in section 217(1) of the constitution.[52] The court held that East London Industrial Development Zone's procurement procedures complied with these broad goals and refused to award the interdict sought.

## 6 *Discussion*

### 6.1 The application of the procurement act and regulations to state-owned enterprises

The judgment in *Fidelity Springbok* raised the possibility that the procurement act and regulations might be applicable to state-owned enterprises. This possibility has now been cleared. It is submitted that the reasoning applied in the *Cae Construction* and *TBP Building* cases is academically sound. By virtue of the definition of an organ of state as stipulated in section 1(iii) of the procurement act, state-owned

49 par 15.
50 par 18-19.
51 par 26.
52 par 26.

enterprises are not bound by the procurement act and regulations.[53] Furthermore, even though the minister of finance has the power, in terms of section 1(iii)(f) of the procurement act, to recognise those "other" institutions included in section 239 of the constitution by means of a notice in the *Government Gazette* this has, as yet, not been done.[54] It would appear that the reasoning behind the exclusion of state-owned enterprises from the ambit of the procurement act is that they are involved with strategic developmental delivery and that this should not be impeded. The argument is that state-owned enterprises need flexibility in the implementation of their preferential procurement programmes.[55] A rigid approach to preferential procurement would not be feasible for most state-owned enterprises as many of the goods and services regarded as "mission critical" to state-owned enterprises are only available from global suppliers. Global suppliers are also used when there are problems with the capacity, capability or competitiveness of the local supply base.[56] Certain state-owned enterprises, like Transnet and Eskom, however, implement the Competitive Supplier Development Programme managed by the Department of Public Enterprises.[57] The Competitive Supplier Development Programme was approved by cabinet in 2007 and can be used as an alternative to the National Industrial Participation Programme managed by the Department of Trade and Industry.[58] In essence, the aim of the Competitive Supplier Development Programme is to increase the competitiveness, capacity and capability of the local supply base. Measures include the identification of items for which local supply could be expanded, developed or improved, and for setting targets in this regard. State-owned enterprises then use planning, specification, procurement and strategic sourcing as instruments to achieve the targets and to create a conducive environment for the development of local supply networks.[59]

There are of course arguments that have been made for the inclusion of state-owned enterprises under the ambit of the procurement act and regulations. Cosatu, in its submission for the redrafting of the procurement act, is of the view that all levels of government, including state-owned enterprises, should apply the same rules when using procurement for policy purposes.[60] The Business Association of South

[53] See also the study undertaken by Moropa Information Management for Ntsika Enterprise Promotion Agency (prepared by Sharp, Mashigo and Burton) *Assessment of Public Sector Procurement to Small, Medium and Micro-enterprises* (1999) 27-31) where it is stated: "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."

[54] This is based on a search conducted on LexisNexis Butterworths (http://butterworths.uwc.ac.za) on 18 June 2009. See also Penfold and Reyburn (n 3) 25-14.

[55] Parliamentary Monitoring Group, Minutes of the Joint Meeting of the Finance Portfolio Committee and the Finance Select Committee, held on 12 Jan 2000, to discuss the Preferential Procurement Policy Framework Bill.

[56] Department of Public Enterprises: Introduction to the Competitive Supplier Development Programme (http://www.dpe.gov.za/res/DPE1.pdf; p 1 of the document).

[57] For Eskom, see http://www.unido.org/fileadmin/user_media/UNIDO_Worldwide/Offices/ UNIDO_Offices/Kenya/20080515_CSDP_Eskom_15May08_FINAL.pdf and for Transnet, see http://sasre.railwaysafrica.com/wp-content/uploads/2009/01/transnete28099s-competitive-supplier-development-program-csdp.pdf.

[58] This is an import-offset programme (for government expenditure) managed by the department of trade and industry. See further http://www.dti.gov.za/offerings/offering.asp?offeringid=127.

[59] See generally Department of Public Enterprises (n 56).

[60] Cosatu "Submission on the Review of the Preferential Procurement Policy Framework Act 5 of 2000" Submission to the Select Committee on Finance, 9 Sep 2003 (www.cosatu.org.za/docs/2003/Policy FrameworkAct5.pdf).

Africa appears to be arguing for this as well.[61] There are clearly advantages to the use of uniform procurement processes. In 1997, the Green Paper on Public Sector Procurement Reform[62] identified uniformity in tender procedures, policies and control measures, including tender documentation and contract options as one of the key criteria to achieve good governance in procurement. The use of widely disparate procurement practices among organs of state has the potential to create confusion not only among bidders, but also organs of state themselves who may not understand which rules apply under which circumstances. It is submitted, however, that a certain degree of latitude is needed in the case of state-owned enterprises, many of whom as noted earlier procure goods and services that are available only from global suppliers. A blanket inclusion of state-owned enterprises under the ambit of the procurement act and regulations in any event appears unlikely in the near future.

At present (18 June 2009), the procurement act and regulations are in the process of being redrafted. Draft procurement regulations released in 2004[63] give no indication of a wholesale inclusion of state-owned enterprises under the ambit of the procurement act and regulations. A change has been made to the definition of an "organ of state" in regulation 2(1) of the draft regulations, but this change does not have the result of bringing all state-owned enterprises under the ambit of the regulations or the procurement act. Whereas the current regulation 2(1) simply refers to the application of the regulations to organs of state as contemplated in s 1(iii) of the procurement act, regulation 2(1) in the draft 2004 regulations refers also to "public entities listed in Schedules 3A and 3C to the [Public Finance Management Act]". This change has no bearing on the majority of public entities or state-owned enterprises, many of which are listed in schedules 2, 3B and 3D to the Public Finance Management Act.[64] State-owned enterprises like Transnet, Eskom, Telkom, Denel, the Industrial Development Corporation of South Africa Ltd, South African Airways, the South African Post Office Ltd, the Council for Scientific and Industrial Research, the South African Rail Commuter Corporation Ltd, and the East London Industrial Development Zone Corporation would still fall outside the ambit of the procurement act and regulations. Of the state-owned enterprises listed in paragraph 1 above, only the South African Revenue Services, the State Information Technology Agency, and the Universal Service and Access Agency of South Africa would, in terms of regulation 2(1) of the draft 2004 regulations, fall under the ambit of the new regulations and procurement act.

It should be added that the court in the *TBP Building* case referred to an instruction that had been issued by the National Treasury to Public Finance Management Act public entities stipulating that "the prescripts of the [procurement act] … and its associated regulations should be adhered to".[65] It is unfortunate that the court did not refer to this instruction in any further detail, or give any indication of its precise content and date of issue. Attempts to locate the instruction on the treasury website[66] up until 18 June 2009 have proved futile. Nevertheless, the consequences

61 Business South Africa (BSA) Submission to the Parliamentary Select Committee on Finance: Preferential Procurement Policy Framework Act 5 of 2000 (http://www.ahi.co.za/current/econpolcir7903.html).

62 Ministry of Finance and Public Works Green paper on public sector procurement reform in South Africa *GG* 17928 (14-05-1997).

63 Preferential Procurement Policy Framework Act 5 of 2000: Draft Preferential Procurement Regulations *GG* 26863 (04-10-1004).

64 See the list of public entities on the treasury website (n 5).

65 par 18-19 in the case.

66 www.treasury.gov.za.

for state-owned enterprises of using the framework or "prescripts" of the procurement act and regulations are examined in greater detail below. It will be seen that irrespective of the actual existence of the instruction referred to, the consequences would be the same.

### 6.2 The consequences for state-owned enterprises of using the framework or prescripts of the procurement act and regulations

In practice, it appears that most (if not all) state-owned enterprises have preferential procurement policies in place and in most (if not all) instances, they use the framework provided in the procurement act and its accompanying regulations.[67] Unlike those entities that fall within the current definition of section 1(iii) of the procurement act, however, state-owned enterprises appear to be selective in their use of the framework provided in the procurement act and regulations. For example, instead of allocating 80 or 90 points out of 100 for price and 20 or 10 points out of 100 for preference, different points systems are sometimes used. The facts in *SA Post Office v De Lacy*[68] serve as a good example. None of the facts of the case and the issues in dispute are relevant for current purposes. Suffice it to say that in calling for tenders, the Post Office (a state-owned enterprise) allocated points out of 100 as follows: 40 for "technical (ability, quality, proposed solution)", 30 for "commercial" and 30 for "preference".[69] Thus, instead of allocating a "maximum" of 20 or 10 points for preference as is stipulated in the procurement act and regulations,[70] 30 points were allocated.[71] The use of this points system was not in dispute in this case and it was hence not something that the court was required to give judgment on. It is submitted, however, that even though the points system used by the post office in this case differs from the points system prescribed in the procurement act and regulations in that more preference points are allocated during the award stage, there is still compliance with the "standards and values set out in section 217(1) of the Constitution".[72] As noted by the court in the *TBP Building* case,[73] entities that are not directly bound by the procurement act and regulations are free to use a different preference point system provided that the "broad goals of fairness, equity, transparency, competitiveness and cost-effectiveness" in section 217(1) of the constitution are complied with.[74] The award of 30 points out of 100 for preference can, moreover,

[67] See *eg* the facts in the *Cae Construction* case in par 4 above. See also the case of *TBP Building* case in par 5 above where the court noted that the National Treasury had issued an instruction to Public Finance Management Act public entities, and this included the East London Industrial Development Zone, that "the prescripts of the [Procurement Act] … and its associated regulations should be adhered to".

[68] (19/08) [2009] ZASCA 45 (13 May 2009).

[69] par 41.

[70] See par 2 above.

[71] See also *Cade Transport (Pty) Ltd v Crossroads Distribution (Pty) Ltd* 2008 JDR 0910 (T) where preference counted for 30 points out of 100. The post office was similarly the entity that called for tenders and it was the second respondent in this case.

[72] See the judgment in the *TBP Building* case discussed in par 5 above – par 26 of the case.

[73] See par 5 above.

[74] par 26 in the *TBP Building* case.

not be said to be totally disproportionate to the likely benefits to be achieved by using procurement as a policy tool.[75]

In some instances, state-owned enterprises also apply the procurement act and regulations only in respect of certain aspects of their procurement processes. In the *Cae Construction* case, for example, the court noted that Petro SA's procurement policy referred to the application of the procurement act and regulations only in relation to the "evaluation" of quotations or tenders and that the 80/20 or 90/10 points scoring system would apply.[76] Petro SA's procurement policy made no reference to the cancellation or withdrawal of a tender process. In its invitation to tender document, Petro SA also did not commit itself to accept the lowest or part of or all of any tender submitted. Petro SA's "Standard Terms and Conditions of Tendering" document further made clear that "Petro SA reserves the right to reject any or all Tenders for any reasons whatsoever and is under no obligation to accept the lowest or any other tender".[77] The court refused to find that Petro SA's qualified application of the procurement act and regulations resulted in the wholesale application of the act and regulations. In particular, the court required for there to be evidence of an intention on the part of Petro SA for regulation 10(4) of the procurement regulations to find application to the cancellation of the tender process. Such intention, the court found, was lacking. The court also found that there could be no argument that the parties had agreed that regulation 10(4) would apply to the tender process. The court concluded that even though Petro SA had valid reasons to cancel the tender process, it was not bound to comply with regulation 10(4) in making the decision to cancel.

In conclusion, even though most state-owned enterprises use the framework provided for in the procurement act and regulations, this does not make them organs of state for purposes of the procurement act and regulations.[78] As seen, the preferential procurement policies and practices of state-owned enterprises cannot be challenged with reference to the procurement act and regulations as legislation. The court in the *TBP Building* case held that because East London Industrial Development Zone does not fall within the definition of an "organ of state" as provided in the procurement act, the procurement act does not bind East London Industrial Development Zone by virtue of its status as legislation. The procurement act and regulations only had indirect application, with the result that the procurement procedures of East London Industrial Development Zone had to be examined with reference to administrative law rules and the broad requirements or standards in section 217(1) of the constitution.

[75] *Cf Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 1 SA 324 (Ck) where the court emphasised the importance of value for money in the government procurement process. In this case, the tender board awarded a contract to a bidder who quoted roughly R200 million more than other bidders and justified the award on the ground of factors related to the reconstruction and development programme. The court held that using procurement as a policy tool is important, but its use should not be elevated to such a degree that it goes beyond even that which the government intended it to be (351D-E). It is untenable to award a contract to a bidder who quotes approximately R200 million more than other bidders and to justify this on ideological grounds (351I-352B). The use of procurement as a policy tool does not override other considerations such as fairness and competitiveness. The court set aside the award of the tender and ordered that new tenders be called for. The decision was cited with approval in *South African Post Office Ltd v Chairperson, Western Cape Provincial Tender Board* 2001 2 SA 675 (C) 686A-E.

[76] par 34 in the case.

[77] par 35 in the case.

[78] See the *Cae Construction* and *TBP Building* cases discussed above.

### 6.3 The use by state-owned enterprises of different preferential procurement mechanisms

In South Africa, preference is generally afforded to contractors during the award stage of the procurement process. All contractors are, in other words, allowed to participate in public procurement procedures and preference only plays a role during the award stage.[79] There are, however, also other mechanisms that may be employed when using procurement as a policy tool. Examples include product or service description; set-asides; offer-back; the exclusion of contractors for non-compliance with government policies; the use of contract conditions; preferences in choosing providers to participate; methods for the design of the procurement process; and the giving of general assistance.[80]

In brief, "product or service description" is where the entity calling for tenders describes the product or service needed. The entity could for example stipulate that the paper to be supplied should be made from recycled material or that intensive labour rather than machinery should be used for construction work. The use of "set-aside" practices is where certain requirements are set aside solely for particular groups, for example women or black-owned businesses.[81] "Offer back" is a variation of the set-aside approach in terms of which the most competitive bidder in a "favoured" group is awarded part of the requirement advertised, but only if it is willing to match the best tender submitted in the competition as a whole. The offer-back approach is, however, usually limited to a small part of the work to ensure that "non-favoured" groups also participate. The exclusion of contractors for failing to comply with government policies may relate to labour legislation or the commission of fraud or corruption. An entity could, for example, exclude contractors who do not implement employment equity measures in their workplaces or whose directors have been convicted of fraud or corruption in government procurement procedures. The use of "contract conditions" refers to the incorporation of very specific conditions in contracts and the exclusion of bidders who refuse to accept those conditions. An entity could, for example, include a condition in the contract advertised that the winning bidder must prohibit unlawful discrimination in employment or that it must offer work and training to unemployed persons in the performance of the contract. Preference in choosing providers to participate is similar to setting-aside, but the difference is that setting-aside takes place when the particular need arises. If, for example, there are a number of qualified providers for a particular contract and they cannot easily be distinguished based on commercial considerations, such as experience or financial standing, an entity may select contractors from a particular group to participate. An entity may, furthermore, design the procurement process in a way to facilitate participation by a particular group. Work could, for example, be divided into small contracts and / or the procedures may be simplified to attract small businesses. An entity may also offer general support to particular groups to enable them

[79] See par 2 above.

[80] See Arrowsmith *The Law of Public and Utilities Procurement* (2005) par 19.13-19.26; Arrowsmith, Linarelli and Wallace *Regulating Public Procurement: National and International Perspectives* (2000) ch 5. See also generally Arrowsmith and Kunzlik (eds) *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (2009); McCrudden *Buying Social Justice: Equality, Government Procurement, & Legal Change* (2007).

[81] For an exposition of how set-aside methods are used in the United States and Canada, see McCrudden (n 80) ch 6 and 7. See also Cibinic and Nash *Formation of Government Contracts* (1998) ch 10. Up to date information on set-aside schemes in the United States is available at www.sbaonline.sba.gov/.

to compete for government contracts. This could be done by providing training on procurement rules or the completion and submission of bid documents.[82]

Some of the above preferential procurement mechanisms are expressly prohibited in the South African context. The National Treasury has, for example, issued a practice note which prohibits the issuing of bid documents that contain conditions that promote set-asides or exclude certain categories of potential bidders from bidding for government contracts.[83] The practice note makes express reference to sections 217(2) and 217(3) of the constitution and the procurement act and states that –

> "[t]he preferences contemplated in the Constitution and [procurement act] provide for the protection or advancement of categories of persons, disadvantaged by unfair discrimination *without prohibiting any category of bidders from bidding for government contracts*."[84]

Of importance, however, is that the practice note only applies to "national and provincial departments, constitutional institutions and public entities as defined in schedule 3A and 3C of the Public Finance Management Act".[85] Again, this has no bearing on the majority of state-owned enterprises, many of which are, as noted, listed in schedules 2, 3B and 3D to the Public Finance Management Act.[86] In light hereof, it would appear that the majority of state-owned enterprises are not prevented from using different mechanisms in their use of procurement for empowerment or development purposes. They would seem to have a choice whether to use product or service description; set-asides; offers-back; the exclusion of contractors for non-compliance with government policies; the use of contract conditions; preferences in choosing providers to participate; methods for the design of the procurement process; the giving of general assistance; or the award of preference during the award stage of the procurement process.[87] Whether all these practices would pass constitutional muster is, however, questionable. On the one hand, it may be argued that using set-aside practices or excluding certain bidders from participating in procurement procedures falls within the "categories of preference" as envisaged in section 217(2) of the constitution. On the other hand, it may be argued that these practices fall foul of the principles in section 217(1) of the constitution, in particular, the principles of fairness, equity, competitiveness and cost-effectiveness.[88]

It is submitted that the use of set-aside practices or excluding certain bidders from participating in procurement procedures would not pass the requirements in section 217(1) of the constitution. Section 217(1) lays down five principles that must be complied with when state-owned enterprises contract for goods or services: fairness, equity, transparency, and in particular, competitiveness and cost-effectiveness. Even though the principle of equity, which encompasses the giving of preference,

[82] Arrowsmith (n 80) par 19.13-19.26.

[83] National Treasury: Supply Chain Management Office, Practice Note Number SCM 2 of 2006 "Prohibition of Set-Asides and the Use of Cost Estimates as Benchmarks, Measures Attached to Specific Goals for which Preference Points are Awarded" 23 Jan 2006.

[84] par 1.1.5, emphasis added.

[85] par 2.

[86] See par 6.1 above.

[87] See *eg* the range of preferential procurement mechanisms employed by Eskom ("Implementation of Eskom's Black Economic Empowerment Strategy" May 2008, p 10 of the document at http://www.eskom. co.za/content/32-416%20(0)%20Black economic empowerment%20Directive%20 15.05.08~1.pdf)).

[88] See the opinion given by the office of the chief state law advisor in National Treasury: Supply Chain Management Office, Practice Note Number SCM 2 of 2006 "Prohibition of Set-Asides and the Use of Cost Estimates as Benchmarks, Measures Attached to Specific Goals for which Preference Points are Awarded" 23 Jan 2006, par 1.1.6.

cannot be ignored when state-owned enterprises contract for goods or services, the principle (of equity) is only one of the five principles. It must be balanced with the other principles and the weight afforded to it will be determined by the facts and circumstances of the particular case. A recent analysis moreover confirms that the methods that relate to preferencing at the short-listing and award / tender evaluation stage of the procurement process, while not guaranteeing that socio-economic objectives will be met, are the methods that are most likely *not* to compromise the notions of fairness, equity, transparency, competitiveness and cost-effectiveness, if appropriately managed.[89] Organs of state that are bound by the procurement act and regulations of course do not have a choice as to which mechanism to employ when using procurement for policy purposes. They must use the framework provided in the procurement act and regulations and afford preference during the award stage of the procurement process. *All* organs of state, irrespective of whether they are bound by the procurement act, may however potentially exclude contractors for non-compliance with labour laws, the non-payment of taxes and municipal service charges, unsatisfactory performance under a previous contract, failure to comply with conditions of contract relating to subcontractors and joint ventures, and / or for fraud or corruption in government procurement procedures.[90]

### 6.4 The empowerment act and its relevance for preferential procurement in state-owned enterprises

As noted, the procurement act and regulations are in the process of being redrafted. This is being done with the aim to bring them more in line with the empowerment act. The aim of the empowerment act is, *inter alia*, to establish a legislative framework for the promotion of Black economic empowerment in South Africa. The empowerment act was introduced because even though much progress had been made since 1994, the extent to which Black people (a generic term for "Africans, Coloureds, and Indians")[91] participated meaningfully in the economy remained limited. It was resolved that what was lacking was a comprehensive Black economic empowerment strategy that drew together the various elements of the government's transformation programme in a more coherent and focused way. Most importantly, it was resolved that there was a need for a common definition and understanding of what is meant by Black economic empowerment. The empowerment act allows the minister of trade and industry to, *inter alia*, issue guidelines and codes of good practice on Black economic empowerment and to establish a Black economic empowerment advisory council to advise the president on the implementation of Black economic empowerment and related matters. Section 9, in particular, provides that "the Minister [of Trade and Industry] may by notice in the *Gazette* issue codes of good practice on [Black economic empowerment] that may include … qualification

[89] Watermeyer "Facilitating sustainable development through public and donor procurement regimes: tools and techniques" 2004 *PPLR* 30. See also Arrowsmith "A taxonomy of horizontal policies in public procurement" in Arrowsmith and Kunzlik (n 80) 137-138) who points out the costs and disadvantages of set-aside practices due to a lack of competition.

[90] See generally Bolton (n 3) ch 13; Williams "The use of exclusions for corruption in developing country procurement: the case of South Africa" 2007 *Journal of African Law* 1. See also Bolton "Incorporating environmental considerations into government procurement in South Africa" 2008 *TSAR* 31-51 where it is argued that there is scope in South African law for the use of procurement as an environmental policy tool. In certain circumstances, use could be made of "product or service description" when advertising contracts.

[91] s 1 of the empowerment act.

criteria for preferential purposes for procurement and other economic activities". Section 10 then provides that –

> "[e]very organ of state and public entity must take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of this Act in –
> (a) determining qualification criteria for the issuing of licenses, concessions or other authorizations in terms of any law;
> (b) *developing and implementing a preferential procurement policy*;
> (c) determining qualification criteria for the sale of [state-owned enterprises]; and
> (d) developing criteria for entering into partnerships with the private sector."[92]

An organ of state is defined as "(a) a national or provincial department as defined in the [Public Finance Management Act]; (b) a municipality as contemplated in the constitution; (c) Parliament; (d) a provincial legislature; and (e) a constitutional institution listed in Schedule 1 to the [Public Finance Management Act]".[93] A state-owned enterprise falls outside of this definition, but it does fall within the definition of a "public entity", which is defined in the empowerment act as "a public entity listed in schedule 2 or 3 to the [Public Finance Management Act]".[94] Most state-owned enterprises are listed as public entities in schedules 2 and 3 to the Public Finance Management Act and hence fall within the scope of section 10 of the empowerment act.[95] In February 2007 codes of good practice were issued. A "generic scorecard" measures progress made in achieving Black economic empowerment by enterprises and entities and the elements of the scorecard include ownership, management control, employment equity, skills development, preferential procurement, enterprise development, and socio-economic development initiatives. Based on the overall performance of an enterprise or entity in terms of the generic scorecard, it is awarded a BBBlack economic empowerment status ranging from a level 1 contributor (the best score available) to a level 8 contributor, with a non-compliant contributor earning the lowest score available.

It is clear, therefore, that even though state-owned enterprises are not directly bound by the procurement act and regulations, they are bound to use their procurement powers for policy purposes within the framework of the empowerment act. They are also bound to "take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of [the empowerment act]".[96] In most instances, the relevant code will be the "generic scorecard" which measures progress made in achieving Black economic empowerment by enterprises and entities interested in doing business with state-owned enterprises. Transnet, for example, uses the "generic scorecard" in its procurement practices and has a policy that it prefers to do business with contractors that have at least a level 5 contributor rating.[97]

Entities falling under the ambit of the procurement act and regulations, on the other hand, must use the framework provided for in section 2 of the procurement act and regulations when implementing preferential procurement policies. Even though section 10 of the empowerment act stipulates that "[e]very organ of state … *must*

[92] emphasis added.
[93] s 1 of the empowerment act.
[94] s 1 of the empowerment act.
[95] See the list of public entities on the treasury website (n 5).
[96] s 10 of the empowerment act.
[97] Transnet's procurement policy can be found at http://www.transnet.net/Documents/TRANSNET_Proc_Policy_Guide_at_a_glance.pdf.

take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of this Act",[98] the procurement act is the national legislation that gives effect to section 217(3) of the constitution. It is the procurement act that provides a national framework for the implementation of preferential procurement policies. Until such time that the procurement act and regulations are amended and brought into line with the empowerment act, the "generic scorecard" issued under the empowerment act is not applicable to entities that fall under the ambit of the procurement act and regulations. The national treasury has, moreover, reiterated this in circulars that provide information on the latest developments regarding the alignment of preferential procurement with the aims of the empowerment act. At local government level, municipalities and municipal entities have been advised that they are "required to apply the current [procurement act and regulations] until such time that the amendment to the legislation takes effect and the revised Regulations pertaining thereto are promulgated".[99] At national and provincial government level accounting officers of departments and constitutional institutions, head officials of provincial treasuries, and accounting authorities of public entities listed in schedules 3A and 3C to the Public Finance Management Act have similarly been informed that they "are required to apply the current [procurement act and regulations] until such time that the revised Act is officially enacted by Parliament and the revised Regulations pertaining thereto are formally promulgated by the Minister of Finance".[100] The majority of state-owned enterprises are (once again) excluded from this circular. Public entities that are listed in schedules 2, 3B and 3D to the Public Finance Management Act are bound to use their procurement powers for policy purposes within the framework of the empowerment act.

## 7 *Conclusion*

The judgments in the *Cae Construction* and *TBP Building* cases confirm that by virtue of the definition of an organ of state in section 1(iii) of the procurement act, state-owned enterprises are not bound by the provisions in the procurement act and its accompanying regulations. State-owned enterprises have, moreover, not been recognised by the minister of finance as entities that fall under the ambit of the procurement act as required by section 1(iii)(f) of the procurement act. This means that state-owned enterprises have more freedom in the use of their procurement powers for empowerment and development purposes. They are not bound by the strict framework laid down in the procurement act and regulations and are free to use a range of mechanisms in the implementation of procurement for policy purposes. It is important, however, for state-owned enterprises to be vigilant against using mechanisms that may be unconstitutional. The use of set-aside practices or the exclusion of certain contractors from participating in procurement procedures for example is unlikely to pass constitutional muster. A court is likely to find that these practices fall foul of the requirements in section 217(1) of the constitution, in particular the principles of fairness, equity, competitiveness and cost-effectiveness.

[98] emphasis added.

[99] National Treasury: MFMA Circular No. 43 – Supply Chain Management: Restriction of Suppliers (25 May 2007 at http://www.treasury.gov.za/legislation/mfma/circulars/circular%2043.aspx; p 5 of the circular).

[100] Supply Chain Management: "Alignment of Preferential Procurement with the Aims of the empowerment act and its Related Strategy" (18 April 2007) par 4.1 (http://www.treasury.gov.za/divisions/sf/sc/ circular%20070419.pdf).

 [ISSN 0257 – 7747]

Admittedly, it would appear that in practice most state-owned enterprises use the framework or prescripts of the procurement act and regulations in their procurement policies and practices. Use is made of a points system in terms of which points are allocated for price and preference. Because state-owned enterprises are not strictly bound by the procurement act and regulations, however, they are able to allocate points on a different basis. As noted, in the recent case of *SA Post Office v De Lacy* the post office allocated 30 points out of 100 for preference. The post office, in other words, allocated 10 points more than the maximum points stipulated in the procurement act and regulations. The mere fact that state-owned enterprises further make use of the framework or prescripts of the procurement act and regulations does not make the procurement act and regulations applicable *per se*. As noted by the court in the *TBP Building* case the primary question is whether the procurement system used complies with the broad standards of fairness, equity, transparency, competitiveness and cost-effectiveness in section 217(1) of the constitution. The system used must also comply with the general requirement of fairness under the Promotion of Administrative Justice Act. The majority of state-owned enterprises are, furthermore, bound by the preferential procurement provisions in the empowerment act. Transnet is an example of a state-owned enterprise that uses the Department of Trade and Industry's "generic scorecard" when rating suppliers for preference purposes.

In conclusion, it should be added that currently state-owned enterprises are facing numerous challenges. Most of the challenges appear to stem from the fact that state-owned enterprises are required to comply not only with the codes of good practice issued under the empowerment act, but also with numerous other policies and standards, some of which contradict the codes. Examples of contentious policies and standards include the guidelines issued by the Department of Public Enterprises for the sale of non-core assets by state-owned enterprises[101] and the Department of Transport's "Public Sector Black economic empowerment Charter".[102] The National Ports Regulations[103] further prescribe that in the second, third and fourth years following the commencement of the regulations at least 25% per year of all licences and concessions to operate in the ports should be given to operators having at least a level 4 Black economic empowerment rating, and in the years thereafter the allocation should be increased to at least 75%.[104] It would appear, therefore, that state-owned enterprises are required to contend with an ever-increasing and perhaps somewhat chaotic plethora of empowerment norms and standards. This issue requires more in-depth examination and will be examined elsewhere.


**SAMEVATTING**

**DIE REGULERING VAN VOORKEURVERKRYGING IN ONDERNEMINGS WAARVAN DIE STAAT REGHEBBENDE IS**

Artikel 217 van die Grondwet van die Republiek van Suid-Afrika, 1996 bepaal dat die publieke verkryging van goedere en dienste in ooreenstemming moet wees met 'n stelsel wat regverdig, billik, deursigtig, mededingend en kostedoeltreffend is. Daar word verder in artikel 217 voorsiening gemaak vir die gebruik van verkryging as 'n bemagtigings- of ontwikkelingsinstrument en volgens artikel 217 moet nasionale wetgewing geïmplimenteer word om 'n raamwerk in plek te stel vir dié gebruik. Die nasionale


[101] National Department of Public Enterprises: Broad-Based Black Economic Empowerment Guidelines for State Owned Enterprises' Non-Core Property Disposals (April 2007 at http://www.info.gov.za/view/ DownloadFileAction?id=95884).

[102] See http://www.dti.gov.za/bee/beecharters/gazettetrade004a.pdf.

[103] National Ports Regulations *GG* 30486 (23-11-2007).

[104] par 3.1 and 3.2.

wetgewing het neerslag gevind in die Wet op die Raamwerk vir Voorkeurverkrygingsbeleid 5 van 2000 (die "raamwerkwet") en in 2001 is regulasies uitgevaardig. Die fokus van die artikel val op die verkrygingsprosedure wat gevolg word deur ondernemings waarvan die staat reghebbende is, ook bekend as parastatale of publieke entiteite. Die artikel, met verwysing na regspraak, bevestig en in sekere gevalle verduidelik die toepaslikheid van die raamwerkwet en regulasies vir ondernemings waarvan die staat reghebbende is. Aandag word geskenk aan die volgende kwessies: (i) die toepassing van die raamwerkwet en regulasies op ondernemings besit deur die staat; (ii) die nagevolge vir ondernemings besit deur die staat vir die gebruikmaak van die raamwerk of voorskrifte van die wet en regulasies in hul verkrygingsbeleide en gewoontes; (iii) die gebruik van verskillende voorkeurverkrygingsmeganismes; en (iv) die Breë Basis Swart Ekonomiese Bemagtiging Wet 53 van 2003 en die toepaslikheid daarvan op voorkeurverkryging in ondernemings besit deur die staat.

 [ISSN 0257 – 7747]