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RSCAS 2015/87
Robert Schuman Centre for Advanced Studies
Global Governance Programme-202

Government Procurement, Preferences and International Trading Rules: the South African Case

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EUI Working Paper **RSCAS** 2015/87

ISSN 1028-3625

Printed in Italy, November 2015
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu/RSCAS/Publications/
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Abstract

This paper reviews the South African government procurement regime and asks whether adherence to international trading instruments and rules, and in particular the World Trade Organisation's Government Procurement Agreement, would, and should, permit the maintenance of national policy criteria in the decision making matrix for procurement, whilst simultaneously enabling it to realise the efficiency gains of trade liberalisation. It also examines the likely impact, if any, that adherence to these rules would have in reducing the procurement system's vulnerability to corruption.

Keywords

Government procurement; South Africa, WTO, GPA, corruption.

Introduction

South African government procurement is, as with many countries, used to advance selected economic and social policy objectives. However, also in common, with many countries, the overarching framework also stresses the requirement for fairness, equity and price competitiveness. A third common feature of government procurement practices is the ubiquity of maladministration and corruption.

This paper asks whether adherence to international trading instruments and rules, and in particular to the World Trade Organisation's Government Procurement Agreement, would, and should, permit the maintenance of national policy criteria in the decision making matrix for procurement, whilst simultaneously enabling it to realise the efficiency gains of trade liberalisation. It also examines the likely impact, if any, that adherence to these rules would reduce the procurement system's vulnerability to corruption.

The Regulatory Framework

Prior to South Africa's transition to democracy in 1994, the procurement system in place was highly centralised. Partly in consequence of this centralisation, procuring goods and services favoured large corporate suppliers who dominated the market. Price was the overriding formal criterion for the procurement of goods and services by the government, although there is no doubt that public contracts were extensively deployed to support emerging Afrikaner-owned enterprises. However, on the face of it, price determined the outcome of public procurement bids, only overridden when there was clear evidence that the lowest bidder did not have the necessary experience or capacity to undertake the work or was financially unsustainable. That is, only if there was a high risk that the lowest bidder would not complete the contract – the 'functionality' criterion - was the tender awarded to another bidder.

As the system of Apartheid was dismantled in the 1990s and as new fiscal visions were adopted, so too were the forms of fiscal management and administration recast. This vision placed redistribution at the heart of procurement necessitating decentralisation as a framework to support small and medium enterprise. This required a radical shift in the form and content of procurement which translated into an overhaul of the legislative and regulatory framework governing government procurement and its practical application. Core to this reformulation is the explicit reconceptualization of procurement as a policy tool, allowing government to use its massive spend on goods and services to achieve socio-economic objectives.[1]

Procurement reforms that began in 1995 were directed at two broad focus areas, namely:

- the promotion of principles of good governance
- the introduction of a preference system to address certain socioeconomic objectives.

These principles and objective are enshrined in Section 217 of the Constitution of the Republic of South Africa which reads:

> 217 (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

[1] Uyarra and Flanagan, 2009:2.

> (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) may be implemented.

To give effect to the new policy role of its procurement spend, government embarked upon the process of reforming the procurement system. This was initiated by the formulation of a ten-point plan which provided for interim procurement strategies until the enactment of national legislation consistent with the objectives of the Reconstruction and Development Plan (RDP), government's overarching social and economic plan.

The RDP committed government to the following procurement-related measures:

- improved access to tendering information;
- the development of tender advice centres;
- the broadening of the supplier base for small contracts valued at less than R7500;
- the waiving of security/sureties on construction contracts with a value less than R100 000;
- the unbundling or unpacking of large projects into smaller projects;
- the promotion of early payment cycles by government;
- the development of a preference system for small, medium and micro-sized enterprises (SMMEs) which are owned by historically disadvantaged individuals (HDIs);
- the simplification of tender submission requirements;
- the appointment of a procurement ombudsman; and
- the classification of building and engineering contracts.[2]

The first thrust of reform was thus born out of a desire to "include emerging small and medium enterprises effectively in government contracts."[3] These reforms sought to utilise procurement as a device to incorporate previously disadvantaged business owners in the mainstream economy as enacted in the Procurement Act of 2000. That is to say, the initial reform measures appeared to conflate inclusion of previously disadvantaged South Africans with measures to support the inclusion of SMEs.

Ambe and Badenhorst-Weiss (2012, p. 245) note that these reforms were intended to modernise the management of the public sector, in essence to make it more "people-friendly" through the process of decentralisation and making the process more accessible to SMEs. This would not only allow government to diversify the supplier base, but it would also allow for more responsive procurement practices sensitive to the variable needs of local communities. However, the manner in which procurement was practically implemented and the ambitious policy imperatives that underpinned the initial formulation of post-apartheid procurement meant that procurement did not realise its objectives in relation to growing SMEs. Furthermore, lack of standardisation across different government structures led to a review of the system in the early 2000s. Two reviews, the Report on Opportunities for Reform of Government Procurement in South Africa[4] and the World Bank's Country Procurement Assessment Review of South Africa (World Bank, 2003), identified various deficiencies in the system and paved the way for the adoption of legislative and policy reforms that would enable more coherent decentralisation and thus allow public procurement to be used as a redistributive tool.

A plethora of legislation was enacted between 1999 and 2003. This legislative framework is largely created by Section 217 of the Constitution of the Republic of South Africa, Section 112 of the

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2 Bolton (2006), pp. 204-5.

3 Public Affairs Research Institute (2004), p. 16.

4 AusAID and South Africa Capacity Building Program, (2000).

Municipal Finance Management Act No. 56 of 2003 (MFMA), Section 76 (4) (C) of the Public Finance Management Act No. 1 of 1999 (PFMA), the Preferential Procurement Policy Framework Act No. 5 of 2000 (PPPFA) and the Broad-Based Black Economic Empowerment Act 53 of 2003.

In accordance with Section 217(3) of the Constitution, the Preferential Procurement Policy Framework Act (PPPFA) No 5 of 2000 was enacted to provide the requisite framework for procurement. Section 9(2) of the Constitution also provides for the advancement of black economic empowerment (BEE) policies by organs of state as defined in Section 1 of the PPPFA[5], which must be pursued within the confines of the framework provided for in the PPPFA. The PPPFA (and the attendant Public Procurement Regulations 2011) is to be read together with the Broad-Based Black Economic Empowerment Act No 56 of 2003. These are the primary pieces of legislation that set the parameters for the use of public procurement to achieve socio-economic objectives.

The Supply Chain Management (SCM) policy document, published in 2003, sought to address the lack of standardisation consequential upon a public procurement process which tasks organs of state in national, provincial or local government and other public institutions with drafting their own procurement policies, albeit guided by the national regulatory framework (Ambe and Badenhorst-Weiss, 2012). The National Treasury Policy Strategy notes that

> "Supply Chain Management is an integral part of financial management that seeks to introduce internationally accepted best practice principles, whilst at the same time addressing government's preferential procurement policy objectives" (National Treasury, 2003).

This document espoused the principle that managers should be given flexibility and discretion to give effect to the constitutional requirements of transparency and accountability. The policy involved the devolution of the SCM function to accounting officers at different tiers of government and aims to ensure "uniformity in bid and contract documentation, and options and bid and procedure standards" which would promote the standardisation of SCM practices (National Treasury, 2003, p. 6). These reforms entrenched the decentralisation of decision making in procurement, and gave supply chain managers the discretionary power to determine the form and practices of their SCM units and policies, within a basic requirement framework.

Standardisation of decentralised decision making, combined with an emphasis on economic empowerment of previously disadvantaged groups, as articulated in broad based black economic empowerment and associated preferential procurement frameworks and policies, are thus essential to understanding procurement in South Africa.

Preferential Procurement

Black economic empowerment has become the critical socio-economic objective that public procurement seeks to promote. Before 2011, the PPPFA, read with the Public Procurement Regulations 2001, provided for the award of preference points for being a 'historically disadvantaged individual'[6], for subcontracting with a historically disadvantaged individual or for attaining certain

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

6 A historically disadvantaged individual is a South African citizen who had no franchise in national elections before 1994, or is female or has a disability as per Section 3 (2) of Public Procurement Regulations 2001. See Bolton (2008).

specific goals. Contracting authorities or organs of state had the discretion to determine precisely how to award the preference points by selecting the specific social policy objectives to accompany the mandatory promotion of historically disadvantaged ownership.[7] These 'specific goals' included, inter alia, the promotion of South African enterprises, the promotion of enterprises in a specific region, municipality or rural area, the promotion of small, medium and micro enterprises, the creation of new jobs and the improvement of communities.[8] This created a lot of uncertainty in the award of preference points and had to be done away with in favour of the 2011 Regulations and BBBEE Codes of Good Practice.

Under the B-BBEE Act, there are various ways in which service providers can attain B-BBEE status level, and there is also an innovative option which allows multinational companies to attain B-BBEE status level, in addition to these companies generally being able to acquire B-BBEE points through the various elements created in the Codes of Good Practice. This is in the form of 'Equity Equivalent' contributions that are made in lieu of a direct sale of equity but which count towards the overall B-BBEE ownership element.[9] A multinational company may thus earn B-BBEE points without any black ownership of the company. Such equity equivalent programmes may take the form of enterprise creation programmes, programmes that promote social advancement, economic development programmes, projects aimed at technology diffusion/transfer within the small, medium and macro-enterprise sector of the local economy beyond the multinational's core business activities, programmes that promote economic growth and employment through the development of technological innovation beyond the multinational's core business activities, and initiatives that lead to sustainable job creation (Department of Trade and Industry, 2015).

New B-BBEE Codes of Good Practice were published in the Government Gazette on 11 October 2013 and came into effect on 11 October 2014. These codes reduce from 7 to 5 the number of the core elements to be considered for the scorecard from which an entity's B-BBEE status is determined. These are:

- Ownership
- Management control
- Skills development
- New enterprise and supplier development
- Socio-economic development.

These policies are practically applied using a scoring formula. The Codes set out how each of the elements listed above is to be measured and weighted and translated into the overall status score. Ownership, skills development and supplier development are identified as 'priority' elements and firms have to attain a prescribed minimum weighting of the total for each element.

However since price remains a critical criterion in the selection of contracts, the point system created by the Act is 'dual-scale' depending on the value of a specific contract. The total number of points that may be awarded to contractors is 100, and to ensure that organs of state still obtain competitively priced goods and services, more preference points are awarded for lower value contracts. This is evidence of the assumed interplay between the promotion of SMEs, on the one hand, and, on the other, the promotion of BEE as a means for diversifying the supplier base. For contracts with a Rand value between R30,000 and R1,000,000, the 80/20 preference system is used where a maximum of 80 points will be awarded for price and a maximum of 20 preference points will then be awarded for the B-BBEE status level of the bidder in accordance with the Preferential Procurement

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7 Ibid.

8 S 17 (3).

9 See BBBEE Codes of Good Practice, Code 100: Statement 103, issued under section 9 of the Broad-Based Black Economic Empowerment Amended Act of 2013.

Regulations 2011[10] as well as the B-BBEE Act and its associated Codes of Good Practice. For contracts with a Rand value of over R1,000,000, the 90/10 point system applies, where a maximum of 90 points will be awarded for price, while a maximum of 10 preference points must be awarded for the B-BBEE status level of bidders as set out in the 2011 Regulations.[11]

The Preferential Procurement Regulations also provide for exemptions from B-BBEE status level for bidders with an annual total revenue of less than R10 million,[12] who then qualify as Exempted Micro Enterprises (EMEs) in terms of the B-BBEE Act and must submit an affidavit stating their level of black ownership as well as their annual turnover.[13]

Local production and content requirements apply to designated sectors where local production and content is determined to be critical for the award of the tender. Local content is defined as that proportion of the tender price which is not included in the imported content, provided that local manufacturing does take place within the borders of South Africa.[14] Table 1 describes the designated sectors and the local production content requirements identified by the Department of Trade and Industry (DTI, 2015). In these cases an organ of state must advertise the tender with a specific condition which provides that only locally manufactured goods with a stipulated minimum threshold for local production and content will be considered.[15] If it is not a designated sector then the specific tendering condition on local production and content must be in accordance with the specific directives issued for this purpose by National Treasury, in consultation with the Department of Trade and Industry.

[10] Preferential Procurement Policy Framework Act, 2000 (Act No 5 of 2000) s 2 (1) (b) (i) read with Preferential Procurement Regulations 2011, regulation 5.

[11] Preferential Procurement Policy Framework Act, 2000 (Act No 5 of 2000) s 2 (1) (b) (ii) read with Preferential Procurement Regulations 2011, regulation 6.

[12] The Procurement Regulations of 2011 make provision for R5 million but this has been raised to Amended B-BBEE Act and the Revised scores in the Codes of Good Practice.

[13] This is a change from the previous Codes as well as the provisions of the Preferential Procurement Regulations 2011 whose regulation 10 required certification from a B-BBEE verification agent.

[14] SABS approved technical specification SATS 1286:2011

[15] Preferential Procurement Regulations 2011, Regulation 9.

Table 1: Minimum local content thresholds by sector or product

Industry/sector/sub-sector	Minimum threshold for local content
Buses (Bus Body)	80%
Textile, Clothing, Leather and Footwear	100%
Steel Power Pylons	100%
Canned / Processed Vegetables	80%
Pharmaceutical Products:	
• OSD Tender • Family Planning Tender	• 70% (volumes) • 50% value
Rail Rolling Stock	65%
Set Top Boxes (STB)	30%
Furniture Products:	
• Office Furniture • School Furniture • Base and Mattress	• 85% • 100% • 90%
Solar Water Heater Components	70%
Electrical and telecom cables	90%
Valves products and actuators	70%
Residential Electricity Meter :	
• Prepaid Electricity Meters • Post Paid Electricity Meters • SMART Meters	• 70% • 70% • 50%
Working Vessels/Boats (All types):	60%
• Components	• 10% - 100%

Where two bidders score an equal total amount of points, then the tender must be awarded to the bidder with the most preference points for B-BBEE. Where functionality is part of the evaluation process, and two bidders score the same total amount of points, then the award must go to the bidder who scored the most points for functionality. Where two or more bidders score the same amount of points in all respects, then the tender must be decided by the drawing of lots.[16] It further provides that a bidder must not be awarded BEE points if it is indicated in the tender documents that they intend to sub-contract more than 25% of the value of the contract to any other enterprise that does not qualify for at least the points that such a bidder qualifies for, unless such enterprise is an exempted micro enterprise.

Additional provision is also made in the PPPFA for the award of a tender to a bidder who does not score the highest points but which meets other objective criteria, in addition to the specific goals[17] set out in the Act, to justify such award. Section 2(1)(f) of the PPPFA provides that:

[16] Preferential Procurement Regulations 2011, Regulation 11 (5).

[17] The Preferential Procurement Regulations 2011 make no mention of the 'specific goals' listed in the PPPFA but rather makes specific reference to B-BBEE status for the award of preference points.

> "… the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer."

The 2011 Preferential Procurement Regulations similarly allow for the award of a contract to a supplier who does not score the highest total number of points, but "only in accordance with section 2(1)(f)" of the Act. A similar provision is contained in Regulation 9 of the 2001 Procurement Regulations which provide that

> "a contract may, on reasonable and justifiable grounds, be awarded to a tender[er] that did not score the highest number of points".

National legislation is mirrored in procurement legislation for the third (municipal) tier of government. The Municipal Finance Management Act of 2003 (MFMA) and its Regulations provide a framework for the procurement of goods and services by a municipality or a municipal entity. Section 111 of the MFMA requires each municipality to implement a Supply Chain Management (SCM) Policy that gives effect to section 217 of the Constitution. The SCM Policy of a municipality or municipal entity must:

- Describe in sufficient detail the supply chain management system that is to be implemented by the municipality or municipal entity; and
- Must describe in sufficient detail effective systems for demand, acquisition, logistics, disposal, risk and performance management.

Section 113 of the MFMA allows a municipality to consider an uninvited bid outside normal bidding processes; however, it may only do so within the prescribed rules. If a municipality approves a tender outside of regular processes, the accounting officer must notify the Auditor-General, the provincial treasury and the national treasury, outlining the reasons why it has deviated from the prescribed procedure. A municipal entity must also notify its parent municipality.

The MFMA Regulations also require any SCM policy to provide measures to combat abuse and corruption in the supply chain management system. Amongst other measures, the supply chain management policy must enable the accounting officer to consult the Treasury's database prior to awarding any contract to ensure that no bidder is prohibited from doing business with the public sector, as well as to enable the accounting officer to reject the bid of any bidders who have been listed on the Register for Tender Defaulters in terms of section 29 of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

The MFMA requires the accounting officer of a municipality to implement the SCM Policy and to take all reasonable steps to ensure that proper mechanisms are in place to minimise the likelihood of fraud, corruption, favouritism and unfair and irregular practices. The Regulations further provide that a supply chain management policy of a municipality or municipal entity must state that the municipality or municipal entity may not make an award to a person who is in the service of the state.

It is clear from the above that in terms of the preferential points awarded, B-BBEE remains the most critical factor. However, despite the social policy dimension afforded by the B-BBEE aspect, price still remains the most important consideration in awarding tenders and hence value for money and cost effectiveness is an important objective as well (Bolton and Quinot, 2011, p. 459).[18] Given the complex nature of preferential procurement within this framework, and critical to the effectiveness and efficiency of the public procurement system, are the mechanisms through which service providers can

[18] Courts have also set aside public tenders where the primary consideration for awarding the tender has been anything other than cost. See: Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others 199 (1) SA 324 (Ck), pp 351 – 2; Lohan Civil-Tebogo Joint Venture v. Mangaung Plaaslike Munisipaliteit (unreported, case no. 508/2009 (O), 9 April 2009), par 71 (8).

seek redress in cases where they believe the procurement regulations have been violated by procuring entities or bidding parties.

Enforcement and Dispute resolution mechanisms

Government procurement is subject to the general rules of constitutional and administrative law in South Africa. While there is no specialist adjudicative body in South Africa that deals with procurement matters and reviews alleged non-compliance with legislation, the very act of a government entity awarding a contract constitutes administrative action and is therefore subject to the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which provides recourse for aggrieved persons or parties prejudiced by maladministration. The Constitution provides for the challenge of tender awards or decisions on the grounds of lawfulness, reasonableness and procedural fairness. Since public procurement is regulated by both public law and private law, service providers therefore have recourse to both public law and private law remedies, including, in private law, delictual remedies in the event that there are damages.

Public law remedies find application mainly in the pre-contractual stage, although they may, in exceptional circumstances, also apply in the contractual and post-contractual stages (Bolton, 2008:781). It is important to note that the South African courts have been very active in clarifying legal issues on judicial remedies for persons or firms affected by procurement decisions. Some of these key findings include:[19]

- The finding that decisions to invite, evaluate and award tenders amount to 'administrative action' and are therefore subject to judicial review. This was an important decision which stipulates the application of the PAJA in procurement decisions and hence enables the judicial review of procurement decisions, especially as the PAJA provides that judicial review only applies to state actions if such actions are 'administrative actions'. It is also particularly noteworthy because not every act by an organ of state amounts to 'administrative action' under South African law.[20]

  The above is significant because the right to just administrative action is constitutionally protected. Section 33 of the South Africa Constitution provides for the right to just administrative action and provides:

  > (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
  > (2)Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
  > (3)National legislation must be enacted to give effect to these rights, and must —
  > (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
  > (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
  > (c) promote an efficient administration.

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19 Where specific case law is given in subsequent paragraphs, the paper draws from Volmink (no date).

20 Volmink (Ibid) notes that, the courts have held that a decision by an organ of state to dismiss an employee does not amount to administrative action (Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (2) BCLR 176 (SCA) at para 34). The courts have also held that a decision by a public body to cancel a contract that was concluded on equal terms with a major commercial undertaking does not constitute administrative action. (Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC 2001 (3) SA 1013 (SCA)) The determining factors in deciding whether state action amounts to "administrative action" includes the source of the power exercised, the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters which are not administrative, and on the other to the implementation of legislation, which is construed as administratrive. (President of the RSA and Others v SARFU and Others 1999 (10) BCLR 1059 (CC) at para 142)

This right to just administrative action is given effect by the PAJA and the right to access to reasons is given effect by the Promotion of Access to Information Act (PAIA). Section 33 of the Constitution should be read in tandem with Section 195 of the Constitution which deals with the values and principles that govern public administration.[21] These constitutional provisions, read together with PAJA, are clearly aimed at preventing abuse of power by organs of state in their dealings with the public. They provide that just administrative action is necessary to protect the rights of the individual against organs of state, and that the state has a constitutional duty to achieve and uphold a fair, accountable, honest and responsive administration which is in the interests of the general public (Beukes, 2004).

- South African courts have recognised that a losing bidder in a public procurement tender has had its rights affected by the decision and that such rights merit constitutional protection. While initially unwilling to recognise this right, the courts ultimately declared that the right of a bidder is not the right to be awarded the contract, but rather the right to access information that would enable the bidder to decide whether her right to fair administrative action has been infringed in the procurement process. The Supreme Court of Appeal has elaborated on this right as being the right to equal treatment before the law.[22]
- The courts have also held that the right to be furnished with information relating to a tender decision cannot be waived even if the bidder has signed an agreement to that effect with the procuring body.[23]
- The courts have also stated that the right to reasons requires that these be quality reasons and not simply standard form reasons where requirements are ticked off against a box. The reasons ought to be specific, detailed, in clear language that is neither ambiguous nor vague and is not framed in formal legal language[24].
- The courts have also been amenable to awarding punitive costs against the procuring state organ in instances where the state organ has unreasonably refused to furnish the requested information.[25]
- The courts have also held that organs of state should not use the excuse of 'state secrets' in order to circumvent the obligation to provide information to affected bidders.[26]

The PAJA provides that any person may institute proceedings in a court or tribunal for the judicial review of an administrative action and sets out the various instances where a court or tribunal may

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[21] These are:
a) The promotion and maintenance of a high standard of professional ethics;
b) The promotion of efficient, economic and effective use of resources;
c) A development oriented public administration;
d) The provision of services impartially, fairly, equitably and without bias;
e) A responsiveness to people's needs and the encouragement of the public to participate in policy making;
f) An accountable public administration;
g) The fostering of transparency by providing the public with timely, accessible and accurate information;
h) The cultivation of good human resource management and career development practices, to maximise human potential;
i) A public administration which is broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve such broad representation.

[22] SA Metal and Machinery Co (Pty) Ltd v Transnet Ltd [1998] JOL 3984 (W). There are four reported judgments involving these parties. To avoid confusion, reference will be made to SA Metal Machinery Co Ltd v Transnet (1) to (4) respectively.

[23] Goodman Brothers (Pty) Ltd v Transnet Ltd 1998 (8) BCLR 1024 (W)

[24] Nomala v Permanent Secretary, Department of Welfare 2001 (8) BCLR 844 (E)

[25] Claase v Information Officer of South African Airways (Pty) Ltd [2006] JOL 18804 (SCA

[26] ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd 1997 (10) BCLR 1429 (W) at paragraph 24.3

review an administrative action.[27] Procedures for judicial review must be instituted without unreasonable delay and no later than 180 days after all internal remedies have been concluded or after the administrative action is concluded if the courts have, in exceptional circumstances, exempted the person from exhausting all internal remedies first.[28] Otherwise no court shall review an administrative action until all the internal remedies have been exhausted.[29] In terms of remedies for persons whose rights have been infringed by the administrative action, the PAJA states that the court or tribunal may:

- direct the administrator to give reasons;
- direct the administrator to act in a manner required by the court or tribunal;
- prohibit the administrator from taking a particular action;
- set aside the administrative decision or action;
- direct the administrator to reconsider the action;
- substitute or vary the administrative action;
- direct the administrator to pay compensation;
- declare the rights of the parties;
- grant an interdict or other temporary relief;
- award costs.[30]

Bolton argues that the requirements for claiming compensation under the PAJA are controversial and unclear and essentially require an aggrieved bidder to prove the elements of delict in order to found a compensation claim (Bolton, 2008:781). In some instances, however, he notes that claiming costs under the PAJA may be the best route, as when contracts are terminated in the public interest or declared invalid because they were concluded without the necessary authority. The PAJA is thus a very useful tool to maintain the integrity of public procurement and ensure that the rights of the public and/or service providers are secure and protected.

Private law remedies for aggrieved bidders are founded in contract law and also in the law of delict. These may include remedies aimed at upholding the contract which could include specific performance and an interdict, cancellation and remedies aimed at compensating the innocent party which could include contractual or delictual damages or interest on amounts owing (Christie and MacFarlane, 2006). Delictual remedies, as distinct from contractual remedies, could arise for various situations such as:

> "fraud on the part of public officials; misleading statements made by an organ of state during the tender process resulting in the conclusion of a more onerous contract than anticipated; the wrongful interference by a third party (an unsuccessful bidder) in the contractual relationship between the successful bidder and the organ of state." (Bolton, 2008:781)

Bolton further states cost-effectiveness is the overriding principle and such legislation as the Public Finance Management Act, Municipal Finance Management Act, and the Municipal Systems Act give effect to this by encouraging feuding parties to resolve disputes through negotiation and mediation, with litigation being pursued only as a last resort.

However, as Magoro and Brynard (2010) note,

> "In practice these [procurement frameworks] are grossly oversimplified, and lead to difficulties and even corrupt practices during the implementation... These problems occur largely because the principles underlying the procurement system – fairness, equitableness, transparency,

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[27] Section 6 of the Promotion of Administrative Justice Act 3, 2000.

[28] Section 7 (1) and & (2) (c) of the Promotion of Administrative Justice Act 3, 2000.

[29] Section 2 (a) of the Promotion of Administrative Justice Act 3, 2000.

[30] Section 8 of the Promotion of Administrative Justice Act 3, 2000.

> competitiveness and cost-effectiveness – often are, or appear to be, in conflict with one another." (p. 8)

A high level assessment of South African Government Procurement Regime

The depth and breadth of the post-1994 transformation in the procurement regime should not be underestimated. As already elaborated, underpinning this radical transformation was the determination to use government procurement as a key mechanism for redressing the inequities of South Africa's past, in this particular instance racially defined access to business opportunities. Hence from a procurement system that, on the face of it, rested on price and, in practice, on exclusive, but otherwise undifferentiated, access by white-controlled businesses to government procurement, South Africa moved to a system based partly on price but also on a complex array of preferences largely directed at redressing unequal access, always undergirded by the constitutional requirements of fairness and administrative justice.

A related, and conceivably more disruptive transformation, was the comprehensive decentralisation, or, more accurately described as the fragmentation, of procurement. There are a number of reasons for this fragmentation, which is present at both the regulatory and operational levels of the procurement system. One important rationale is the introduction of a quasi-federal system of government with significant powers newly devolved to the second (provincial) and third (municipal) tiers of government. Hence in 2004, the National Treasury made significant changes to the system by introducing a public sector SCM (supply chain management) legislative framework that provides for decentralised policy and public sector resource management. In line with the Public Finance Management Act (PFMA) and the Municipal Finance Management Act (MFMA), the aim was to allow managers to manage (National Treasury, 2015:9).

However, decentralisation is also related to the introduction of non-price criteria into the procurement decision because a procurement regime explicitly charged with facilitating the access of small, new entrants provides a further rationale for bringing the procurement decision as close as possible to the only terrain on which producers of this scale could successfully compete, namely provincial and local government.

The disruption generated by decentralisation is experienced across a wide front. Legal or regulatory decentralisation introduces significant uncertainty and opacity into decision making. Operational decentralisation requires a massive replication of scarce procurement and supply chain management skills and renders the exercise of effective oversight significantly more onerous. Both regulatory and operational decentralisation provide enhanced opportunities and multiple sites for rent seeking. Each of these difficulties is compounded by the introduction of multiple and frequently conflicting decision-making criteria.

The data necessary to estimate the price premium, if any, arising from incorporating non-price considerations into the procurement decision and from sacrificing the scale economies of greater centralisation of procurement, are not available. However, the common sense conclusion that there is a premium to be paid arising both from fragmentation[31] and the imposition of non-price decision-making criteria, is widely supported.

Balancing the price and non-price considerations in procurement decision-making is inherently complex:

> Finally, there is the challenge of finding the best balance between the two major objectives of procurement. Section 217(2) of the Constitution and the Preferential Procurement Policy Framework (PPPFA) both provide for the use of public procurement as a means of development

[31] 'SCM across South Africa is highly fragmented. This makes it difficult for government to obtain maximum value when buying, and making use of, goods and services.' (National Treasury, 2015:3).

> and transformation. An effective SCM system must also have as an objective to ensure that goods and services are available at the best price, in the right qualities, at the right time and in the right place. Constantly having to make decisions about how to balance these objectives is demanding and difficult. It needs a cohort of SCM specialists with the right skills, experience, social awareness, ethical standards and dedication; and a regulatory and organisational environment that supports and monitors their work in the public interest." (National Treasury, 2015:5).

If hard evidence of the pricing consequences of a regime that is both highly fragmented and requires a balancing of non-price and price considerations is difficult to adduce, then there is little doubt about the extent of non-compliance with the complex array of regulatory requirements. The National Treasury Review confirmed findings of the Public Service Commission which puts overall compliance with SCM systems in certain departments at as low as 54% of all contracts issued (Public Service Commission, 2009:ix), with instances of non-compliance ranging over the entire SCM process, from the planning phase to the monitoring phase. The Treasury's procurement review notes that

Common findings in the Auditor General's annual reports on SCM non-compliance include:

- Appointment of suppliers who are not tax compliant
- Failure to use competitive processes for quotations and bids
- Incorrect use of the preference points system
- Lack of appropriately qualified and skilled bid committees
- Use of unqualified suppliers
- Passing over of bids for invalid reasons
- Use of incorrect procurement processes in relation to threshold values for quotations and competitive bidding
- Extension of validity periods
- Incorrect use of the limited bidding process
- Inadequate controls and procedures for handling bids
- Appointment of bid committee members not aligned with policy requirements
- Insufficient motivation for deviations from SCM procedures.

This is borne out by the experience of Corruption Watch, a non-governmental organisation that receives reports of corruption from the public, and which has, in the space of 3 years, received over 700 reports of alleged irregularities and corruption in public procurement processes (Corruption Watch, 2015:9). The irregularities reported range over contracts awarded when the relevant bid committees have indicated a preference for an alternative supplier, inadequate advertisement of tenders, the alteration of submission dates, contracts rolled over without cause, the appointment of suppliers with scores below those of other bidders, and conflicts of interest between the members of the various bid committees, on the one hand, and bidders, on the other.

Responsibility for rampant non-compliance is commonly ascribed to skills and capacity deficits in government, severely exacerbated by the high degree of operational fragmentation of the procurement system. However, with more than 80 different legal instruments that govern public sector SCM, it is probably the high degree of regulatory or legal fragmentation that bears primary responsibility for rendering an already skill-intensive function extremely difficult to operate. The *Review* lists the following as amongst the most serious problems arising from excessive regulatory fragmentation (National Treasury, 2015:11).

- The high degree of uncertainty resulting from significant overlap and duplication among different regulatory instruments relating to infrastructure, construction, public-private partnerships and SCM policy standards;

- The uncertain legal status of the different regulatory instruments for general and specific procurement regimes such as the standards for defence procurement and ICT procurement;
- The difficulty of deciding which legal regime applies, given the significant variation in the different legal instruments' scope of coverage; and
- The vast number of standard bidding documents.

These systemic and structural features of the procurement regimes, compounded by, and themselves exacerbating, severe SCM skill deficits, undoubtedly account for much of the non-compliance that is a feature of government procurement. However they, in turn, contribute to, and are exacerbated by, a further set of related problems, namely the absence of consequence for non-compliance with the regulatory regime. The *Review* notes

> There are few, if any consequences for those who, despite support and encouragement, fail to perform at the required level. Repeated negative reports by the Auditor General highlights this lack of accountability. An improved and more dynamic public SCM system should bring out the best in its officials, and there must be consequences for those who are not willing to play their part for the public good. (National Treasury, 2015:5)

The persistent failure to act upon negative findings of the Auditor General is itself partly a manifestation of the problems that resulted in much of the non-compliance in the first place, namely the absence of the skills required to manage the complex regulatory and operational environment. However non-compliance and the absence of consequences point to another ubiquitous and growing problem, namely corruption. In short, non-compliance with procurement regulation is not simply a consequence of complexity and human resource constraints; it is frequently the result of a wilful attempt to support outcomes that favour a pre-selected winner.

Corruption – and particularly the bribery that characterises the grand corruption of government procurement – is, per definition, a clandestine conspiracy between a bidder, on the one hand, and, on the other, a public sector official capable of influencing the outcome of the bid. Thus whistle-blowers, except in those cases where they are direct participants in the corrupt conduct, rarely witness the exchange of the proverbial brown envelope.

It is, however, significantly more difficult to hide the 'irregularities', the transgressions of the constitutional and other legislative and regulatory provisions that govern the procurement process, and that are generally a necessary feature of a corrupted public procurement process. As noted, these irregularities may take a multitude of forms spanning what may appear to be relatively minor bureaucratic transgressions (for example, permitting a slightly late submission), to more technically complex transgressions (for example, adjusting key bid specifications in the course of the decision-making process) to transgressions that generate immediate suspicion, and that, for that very reason, are more carefully concealed (for example, conflicts of interest between, on the one hand, public officials serving on key bid decision-making structures, and, on the other, bidders). As already indicated, the South African government procurement regime regularly experiences the full range of these irregularities.

A recent Constitutional Court judgement found an extremely large government tender awarded by the South African Social Security Agency to be illegal and invalid on the basis of a number of irregularities that were established in the course of hearings before a series of courts. In so doing, it overturned a judgement of a lower court – the Supreme Court of Appeal - that, although it broadly accepted that the tender had been irregularly awarded, nevertheless declined to invalidate the award reasoning that, in its view, even if the bid adjudicators had conscientiously adhered to the prescribed regulations, the result would not have changed. In short, the lower court held that the outcome was not materially affected by the irregularities in the process. In rejecting that argument, the Constitutional Court held

> 'deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed

> process. Hence insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.'[32]

In short, the Constitutional Court did not find corruption – it was not asked to do so. But it did find that there were clear irregularities in the awarding process. And it concluded that non-compliance was material, partly on the basis that

> '…compliance with process formalities…serves as a guardian against a process skewed by corrupt influences.'

This decision of the Constitutional Court should lead to closer scrutiny by the criminal justice authorities of irregularly awarded government procurement contracts. Indeed having initially declined to investigate the basis of the irregularities found by a number of lower courts, following the Constitutional Court's ruling the criminal justice authorities did announce that they were opening an investigation into the irregular, and hence inferentially corrupt, bid.

However, notwithstanding this decision of the Constitutional Court, under-enforcement of the robust anti-corruption laws - largely a consequence of poorly resourced and trained enforcement personnel and highly corrupted policing and prosecutorial services – will remain the order of the day for the foreseeable future.

Weak criminal enforcement serves to emphasise that critical to the effectiveness and efficiency of the public procurement system are the mechanisms through which service providers can themselves seek redress in cases where they believe the procurement regulations have been violated by procuring entities or bidding parties.

South African Government Procurement: a multilateral framework?

The Government Procurement Agreement (GPA) is a legally binding agreement under the auspices of the World Trade Organisation (WTO). It seeks to 'achieve an effective multilateral framework for government procurement, with a view to achieving greater liberalisation and expansion of, and improving the framework for, the conduct of international trade'.[33] This agreement, however, is a plurilateral agreement, that is, it only binds those WTO member countries that have signed up to it. The first four paragraphs of the preamble affirm the fundamental principles of non-discrimination, predictability and transparency.

The GPA is thus an agreement that is intended, consistent with the WTO's general purpose, to promote international trade, in this instance by liberalising the government procurement markets of member countries. This is bound to generate controversy, not least because government procurement is often thought to be the last redoubt of unfettered industrial policy, the one instrument left with which governments are able to pursue national social and economic objectives, relatively free from the policy constraints imposed by trade liberalisation.

On the other hand, most government procurement frameworks explicitly affirm the central importance of price competitiveness in the procurement decision-making matrix, a factor which should give even the most ardent adherents of industrial policy pause for thought before rejecting liberalisation of the national government procurement market. Moreover, as is well-known, a

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[32] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others.

[33] The Amended Government Procurement Agreement adopted on 30 March 2012 (GPA/113). For detail on the evolution of the GPA, see: WTO, 'Agreement on Government Procurement' 2012, Available at https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

necessary adjunct to opening a market to international trade is adherence to governance rules that give effect to the new trade regime, rules that potentially constrain the corruption and maladministration that bedevil so many national procurement markets.

The question posed in the title of this part will be examined from two angles. First, the trade and competitiveness implications of signing on to the GPA will be examined. It appears that it is these considerations that underpin the South African government's resistance to the GPA despite the fact that severe data constraints render it impossible to examine this issue with any degree of rigour.

Secondly, having already described and analysed the South African government procurement regime in some considerable detail, adherence to the GPA will be assessed by asking whether such adherence would indeed severely constrain the South African government's ability to utilise its procurement budget as an instrument of industrial policy and whether those rules will lend weight to efforts to combat maladministration and corruption in the country's procurement regime.

The GPA currently has 43 signatories and covers a market that is estimated at $1.6 trillion in 2008 and $1.7 trillion when the Amended GPA entered into force in April 2014. The eventual accession of the countries currently negotiating accession to the GPA (including China, New Zealand, Montenegro, Albania, Georgia, Jordan, Kyrgyz Republic, Moldova, Oman, Tajikistan and Ukraine), and those negotiating accession as part of their WTO accession protocols (Macedonia, Mongolia, the Russian Federation, Saudi Arabia and Seychelles) could potentially increase the size of the liberalised government procurement market by between an estimated $440bn to $1.127 trillion (Niggli and Osei-Lah, 2014).

In terms of scope and coverage, the GPA agreement applies to: the procurement by entities covered under a Party's Annex 1, 2 or 3 to Appendix I of the GPA agreement;[34] procurement whose value is above a specified threshold;[35] and, defines procurement in terms of the agreement as meaning purchase, lease, and rental or hire purchase of goods and services or any combination thereof.

South Africa and the GPA: the economic implications

The primary consideration when weighing up possible accession to the GPA is centred on the potential national economic consequences of the liberalisation of an important market. These are, in turn, measured, firstly, by the impact of the enhanced access granted to foreign competitors to the government procurement markets of the nation acceding to the GPA and, secondly, by the reciprocal access granted by incumbent GPA members to their procurement market. Both effects defy easy measurement, effectively relying, as they do, on an assessment of the responsiveness of national producers to enhanced international competition. Successful penetration on the part of national producers to hitherto closed national procurement markets elsewhere in the world is not guaranteed by greater formal access, just as easing formal access to one's own national government procurement market does not guarantee the ability of international producers to successfully penetrate that market. The price effects of enhanced competition in the domestic procurement are, trite to say, particularly difficult to estimate.

Niggli and Osei-Lah (2014) propose the following steps in determining a country's GPA market access potential, that is, its 'offensive' interests:

- Identify the GPA Parties which provide coverage in the sectors of interest to it and assess the scope and extent of the said commitments;
- Quantify the estimated size or value of market access that has been opened up by these parties;

[34] The Annexes to Appendix 1 identify the specific government and sub-government entities that each signatory has committed to GPA obligations, and thus opened to international competition, as specified by that signatory.

[35] This refers to the minimum threshold values above which the GPA agreement applies.

- Determine the competitive strength of its domestic firms to effectively compete in these markets; and,
- Assess the proximity advantage of regional markets, were several countries in the region to be Party to the GPA.

The sectors that provide the clearest basis for South Africa's offensive interests in the GPA are in construction and civil engineering, including the development of large scale mining projects, as well as in medium technology industrial machinery and transport equipment. Specifics include the repair, maintenance and upgrading of various kinds of oil and gas marine vessels; the design, fabrication and construction of specialised modules or facilities for the oil industry, including storage tanks, processing modules for offshore platform or onshore facilities, docking facilities, tugs/barges, civil structures, platforms. South Africa is a global leader in coal-based synthesis and gas-to-liquids technologies; globally competitive in the production of transport and haulage equipment as well as in the mining equipment sector, to mention but a few. That South Africa is competing in medium and high technology sectors also creates the potential for further upgrading in the value chain.

Significant lacunae in government procurement data render the determination of defensive interests extremely difficult. Indeed, given the poor state of procurement data, one can only conclude that South African government opposition to liberalising these markets is based on little more than guess work and a pre-determined opposition to trade liberalisation per se. Were serious consideration to be given to GPA accession, policy attention would, as a necessary prior step, have to be accorded to the generation of the data necessary to make an intelligent decision. For a government intent on utilising industrial policy in order to meet key economic and social objectives, it is clear that one of the most important instruments of this policy – namely, government procurement – is being deployed without the requisite empirical basis.

Nor, it appears, do South African trade officials; take much comfort from the fact that, by signing up to the GPA, they do not commit to liberalising access to the entire government procurement market. Their assessment of power imbalances in the WTO's negotiating framework underpin a fear that the inevitable outcome of negotiated accession will be to concede significantly greater access to the domestic procurement market than is in South Africa's mercantilist interest.

South Africa and the GPA: policy sovereignty

As already elaborated, government procurement as an instrument of industrial policy, is deployed not merely in order to prefer national over non-national producers, but principally to promote the interests of selected classes of national producers over all others.

However the GPA is founded on the principles of transparency and non-discrimination and its objective is to extend these principles to the signatories' public procurement markets (Alvarez-Fernáand and Brandstrup, no date). On the face of it then, preferences within the South African government procurement regime would appear to be fundamentally at odds with the principles underpinning the GPA. And yet, in practice, this does not appear to be the case.

Even though the revised GPA is not a drastic departure from the earlier texts, particularly with reference to the fundamental principles of non-discrimination and transparency, it has been significantly simplified and permits greater flexibility for developing country members, designed particularly to make accession to the Agreement easier. South Africa, however, is particularly wary of plurilateral agreements in general, and its default stance has been to exclude any discussion on new plurilateral agreements being introduced to the WTO and certainly to steer clear of existing plurilateral agreements to which the country is not party.

Generally, the governance principles underpinning the GPA are the same as those underpinning government procurement regulation in South Africa, especially regarding considerations of fairness, equity, transparency, competitiveness and cost effectiveness.

However, the non-discrimination principle underpinning the GPA may conflict with the social and economic objectives that underpin the South African procurement regime. As already elaborated, whilst espousing what are essentially principles of non-discrimination in relation to government procurement, the South African Constitution also explicitly provides for the introduction of preferences in the administration of government procurement, preferences which are elaborated in subordinate legislation and regulation. Thus, despite broadly identical high-level principles, the reality of the South African government procurement regime may conflict with unyielding enforcement of the GPA principles.

Of course, jealously guarding national control over government procurement decisions in the name of advancing key social and economic objectives, begs the question of whether the stated objectives are actually being advanced by the deployment of the procurement instrument. Once again hard evidence is strikingly difficult to adduce. However the National Treasury review of the supply chain mechanism is sceptical of the impact of procurement preferences on the building of sustainable SMEs (National Treasury, 2015:32).

Notwithstanding the lack of evidence supporting government procurement's stated goal of promoting sustainable SMEs and new entrants, South African accession to the GPA will undoubtedly remain conditional upon being able to retain these and other industrial and social policy objectives in its procurement regime. Given that the GPA provisions for special and differential treatment are temporary (through implementation periods) and transitional (through negotiation), South African policymakers will certainly view GPA accession as a potential barrier to SME growth and development, undoubtedly reinforced by the prevailing assessment of its trade officials that holds that power dynamics in the WTO will eventually eliminate its ability to hold its line on the preferential treatment in the procurement regime of selected classes of producers.

A brief survey of South Africa's key bilateral and regional trade agreements is testimony to South Africa's generalised opposition to any externally imposed disciplines on government procurement. The European Community-South Africa Agreement on Trade, Development and Cooperation (TDCA) of 1999 only provides, as far as government procurement is concerned, that the parties, 'agree to cooperate to ensure that access to the Parties' procurement contracts is governed by a system which is fair, equitable and transparent'.[36] The Southern African Development Community (SADC)-European Union (EU) Economic Partnership Agreement whose negotiation was concluded on 15 July 2014, and was, for South Africa, essentially a renegotiation of the TDCA, also does not include a chapter on government procurement. It appears that negotiations leading to the South Africa – European Free Trade Association (EFTA) Free Trade Agreement of 2006 traversed the implications of the black economic empowerment policy for public procurement. However the text that was ultimately agreed simply emphasises that the countries recognise the importance of cooperation to enhance the mutual understanding of their respective government procurement systems.[37]

Continental trade agreements also confirm this pattern. The Southern African Customs Union (SACU) Agreement does not contain any provisions relating to government procurement and neither does the Southern African Development Community (SADC) Trade Protocol. South Africa is also currently involved with the negotiations towards the Tri-partite Free Trade Area (TFTA), a preferential trade area that combines SADC, the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA). Again, government procurement is a non-issue

[36] What follows draws on McCrudden (2003).

[37] Article 29 (1) of the South Africa – European Free Trade Association (EFTA) Free Trade Agreement of 2006, as cited in McCrudden (2003).

in these negotiations, a reflection of South Africa and other African countries' desire to maintain national policy sovereignty in that area or possibly a reflection of the level of importance accorded such issues by the relevant countries.

In short, there does not appear to be much support for a multi-country initiative to address issues of government procurement in Africa. Within the TFTA, it is only COMESA that has adopted a regional framework on government procurement. COMESA's Regional Procurement Regulations were adopted in 2012, designed to address the weak, inefficient and uncompetitive government procurement systems in member states.

Other regional configurations would probably benefit from a regional approach to public procurement. This would likely boost intra-regional trade and enable African producers to take advantage of investment and infrastructure development opportunities in Africa. This is particularly so within the context of the TFTA to which South Africa is party and where infrastructure development is one of the priority areas. Procurement regimes will play a central role in whether or not South African producers get a share of the market to provide the various goods and service needed to realise the infrastructure development ambitions of the TFTA.

Non-discrimination and Transparency

Article IV:1 of the GPA deals with the general principles on non-discrimination and provides for both the most favoured nation as well as the national treatment principle. The South African government procurement regime provides for award criteria that are more concerned with supplier characteristics than with the national origin of the procured goods and services procured being of South African origin. The conditions of competition for both local and foreign firms are, with limited exception, identical in relation to government procurement criteria. The competing firms are simply required to satisfy the legislated award criteria (Bolton and Quinot, 2011:459). Domestic firms that do not meet the procurement award criteria will be just as disadvantaged as the foreign firms that also fail to meet the criteria. The same conditions and criteria that apply to domestic suppliers with regard to black economic empowerment also apply to foreign suppliers.

Nevertheless, the South African government procurement regime's emphasis on broad-based black economic empowerment effectively puts the South African subsidiaries of foreign owned firms at a decided disadvantage. In recognition of this, the new preferential procurement regulations allow for differentiated contributions to BBBEE for local and foreign owned firms through the use of offsets. In this regard, the Equity Equivalent Programme for multinational companies, referred to above, becomes significant as it does away with the black ownership requirement for BBBEE status. This approach therefore creates scope for foreign suppliers to compete with local suppliers in the government procurement market.

The use of offsets is expressly prohibited in the Article IV: 6 of the GPA which precludes parties from seeking, taking account of, imposing or enforcing any offsets. At the same time, Article V on special and differential treatment provides for the use of offsets by developing countries on condition that such requirement is expressly stated in the notice of intended procurement. But, this provision is limited in that it is temporary and the transition period would still need to be negotiated with other parties.

Under the non-discrimination principle in the GPA, parties must also not discriminate against the producers of other GPA members for protectionist reasons. However, South Africa does utilise public procurement for the purposes of promoting industrialisation and the Department of Trade and Industry, through its Industrial Policy Action Plan, seeks to support selected sectors in manufacturing. As such, local production and content requirements apply to designated sectors. Again, while this approach is, in principle, prohibited under the GPA, Article V recognises that developing countries have different developmental, financial and trade needs and allows for special and differential treatment of developing countries.

The non-discrimination provisions of the GPA are supported by the transparency provisions of Article IV: 4. This article provides that procuring entities must avoid conflicts of interest and prevent corrupt conduct in their procurement practices. This would speak directly to some of the governance challenges, elaborated above, that South Africa faces in its procurement system.

The GPA would, therefore, provide a potential external constraint on corruption and also facilitate efficiency and cost-effectiveness in government procurement in South Africa. This can be achieved through the transparency and disclosure requirements in Articles XVI through to XVII. Article XVI, in particular, would oblige the government to establish a one-stop portal on procurement information. This would partly address the decentralization problem in procurement. At the same time, it would also limit the discretion of supply chain managers by holding them accountable to publicly available requirements regarding procurement specifications, processes and award criteria.

Because the GPA requires adherence to principles and practices of transparency, efficiency, procedural fairness and good governance, accession on the part of South Africa may act to constrain contrary conduct which, as outlined above, increasingly characterises the government procurement regime. On the other hand, it may be credibly argued that these principles are already enshrined in South African law and that taking on what are effectively identical obligations in the GPA would add little to the domestic provisions already in place. Moreover, the National Treasury review has indicated that it intends making public information pertaining to the demand, acquisition and contract management phases of the procurement process.

Review and Enforcement

The GPA mandates each Party to establish or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to adjudicate the review of procurement cases.

South Africa does not have a review and enforcement mechanism that is dedicated to government procurement issues. As such, determining the effectiveness of the domestic review process, requires a judgement of the South African judicial system. While the independence of the South African high courts is generally accepted, the same cannot be said of the National Prosecuting Authority. The upshot is that while judicial reviews – usually initiated by losing bidders – of administrative processes governing the award of public procurement contracts can be relied upon to uphold the principles enshrined in both domestic law, the likelihood of criminal investigation and prosecution of allegedly corrupted public procurement awards is relatively remote.

Successful judicial review may result in the setting aside of government procurement contracts. However, the inordinate length of judicial proceedings, frequently means that by the time that the final appeal court has made its decision, the disputed contract has run its course, or it is at such an advanced stage that termination would result in significant prejudice to the beneficiaries. This conundrum is clearly illustrated in the *All Pay* matter referred to above. At issue was the award of the tender to manage South Africa's massive social security programme. In this instance the Constitutional Court, in setting aside the severely flawed tender award, was compelled to craft a remedy that nevertheless enabled the winner of the award to continue servicing the contract so as to ensure that the continued functioning of a complex system was not jeopardised. Given that the decision of the final court was only handed down in the third year of a five year grant, the outcome effectively permitted the incumbent to complete the contract. One can readily assume that the courts may be similarly constrained when confronted by a half-built dam or football stadium.

The only advantage of the GPA in terms of the domestic review procedures is that it provides the option for Parties to utilise the WTO dispute settlement mechanism where South Africa's laws, regulations and practices contravene GPA principles. This avenue is not directly open to private foreign bidders but they can lobby their governments to intervene.

Special and Differential Treatment for Developing Countries

For developing countries, implementation constraints as well as perceived and actual limitations imposed on policy sovereignty, dominate discussion and decision-making surrounding adherence to WTO instruments.

Article V of the GPA, which deals with both the implementation and market access derogations for developing countries, would be considered especially critical by South Africa were it to consider accession to the GPA. Article V provides that in the accession negotiations, the GPA members shall give special consideration to the developmental, financial and trade needs and circumstances of developing countries and least developed countries (LDCs). This is the special and differential treatment (S&DT) element of the GPA. S&DT is one of the basic tenets of the WTO that seeks to level the playing field for both developed and developing countries by relaxing the rules and commitments applied to the latter category of countries.

Through S&DT, developing countries are provided with longer implementation periods for their commitments under the GPA, with the exception of the obligations contained in Article IV:1(b) on non-discrimination of goods, services or suppliers of any other party. LDCs are given 5 years in which to achieve implementation, while other developing countries are given 3 years.[38] These implementation periods may be extended upon request to the GPA Committee or the Committee may approve new transitional measures if there are special circumstances that were unforeseen during the accession process.[39] Upon a developing country's accession to the GPA, each party is obliged to accord it the most favourable coverage afforded to any other party in the Agreement.[40]

Article V also makes provision for transitional measures for developing countries which cater to both the defensive and offensive interests of developing countries (Niggli and Osei-Lah, 2014). The defensive tools, which give developing countries flexibility as they transition into the open market, include price preference programmes, the phased-in addition of specific entities or sectors, and the ability to impose thresholds that are higher than the permanent levels.[41]

With regard to offensive interests, Article V:3 (b) provides for the use of offsets[42] which, in the case of South Africa, would help promote local industry as per the objectives of the Industrial Policy Action Plan. Both the defensive and offensive measures provided for by Article V are designed to give developing countries a temporary reprieve from foreign competition as they transition into the agreement. It must be noted, however, that unlike the longer implementation periods specified for any obligations assumed under the agreement, the market related transitionary measures have to be established through negotiation.

There has been increasing discontent among developing countries with the traditional S&DT provisions in WTO agreements. Most of these provisions are deemed ineffective, especially with regard to the capacity building and technical assistance provisions. The provision in the GPA on the review of Article V provides a unique opportunity for developing countries to strengthen the S&DT provisions. This is especially as there is also a provision for the Committee to review Article V in terms of its operation and effectiveness every five years. In the Trade Facilitation Agreement, agreed to at the December 2013 Bali Ministerial Conference, the implementation of some commitments is contingent on countries receiving capacity building and technical assistance. Where developing

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38 Article V: 4 of the GPA.

39 Article V: 6 of the GPA.

40 Article V: 2 of the GPA.

41 Article V: 3 (a), (c) and (d), read with Niggli and Osei-Lah (2014).

42 'Offset means any condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement.'(Article 1 (l) GPA).

countries have not received the requisite assistance, they shall not be expected to implement the commitments.

Rather than a blanket transition period for developing and least developed countries, the TFA provides for a staggered implementation process that is based on each individual developing country's national trade facilitation needs assessment. This needs assessment is then used to determine the country's capacity and, concomitant to that, the level of assistance needed to implement its commitments under the TFA. Of course, trade facilitation cannot be equated with government procurement in terms of implementation assistance but the same principle with regard to transition periods and a staggered implementation process could be adopted.

Some programmes, such as the black economic empowerment programme, if South Africa were to sign up to the GPA, could be left open-ended. This is especially considering the unique circumstances that have created a dual economy in South Africa where the majority of the population was excluded from active participation in the formal economy. Such empowerment policies are needed to effect redress. The major problems with black economic empowerment policies in South Africa are less to do with the policy itself but rather the implementation of the policy.

The use of procurement policies for socio-economic objectives itself remains contested but South Africa seems to have made significant strides in opening up competition in the procurement sector. There appears to be room for South Africa's procurement regime to escape discrimination censure under the GPA as well as for negotiation of the BBBEE programme as a derogation and exemption.

As elaborated above, there are general challenges to obtaining data on government procurement in South Africa. There is no mechanism in place for data collation, both aggregated and disaggregated, beyond information on how much National Treasury allocates to government procurement in each year. This creates a wastage of resources and inefficiencies in the system as well as massive loopholes for corrupt practices in government procurement. There is also lack of data on the total general government procurement; on the number of tender awards and the disaggregation between BEE beneficiaries and non-BEE beneficiaries; or, even, on the efficacy of the BEE policy itself in government procurement to achieve its objectives.

The National Treasury's Supply Chain Management Review seeks to remedy this and a host of other issues through such measures as a centralised automated government procurement database. A framework is also being put in place to standardise reporting on government contracts and information required will include: procurement plans; tenders to be advertised; tenders awarded; supplier company information; the value of each award; and, progress in implementing tenders. The information will be made public at varying intervals depending on its nature.

In order to combat the ubiquitous interest conflicts that beset the award of governments contracts, the recently passed (but not yet promulgated) Public Administration Management Act prohibits public servants from doing business with the state. Such reform is in line with the provisions of Article VI and VII which detail the procedural requirements GPA members have to implement to ensure transparency in the sector. The NGO, Corruption Watch, the local chapter of Transparency International, is participating actively in the latter's global campaign for national public registers of beneficial owners. The campaign is, in the first instance, proposing that eligibility for a government procurement contract be conditional upon a prospective bidder being willing to declare, for the public record, the identity of the beneficial owners of its shareholding companies and trusts. This proposal would not only make a significant contribution to detecting money laundering – the principal target of the campaign – but it would also expose, or, better, deter, the interest conflicts present in so many government procurement deals.

From a governance perspective, although the South African procurement regime appears consistent with the requirement of GPA membership, there is little doubt that an additional layer of

accountability would assist in promoting procurement that is 'fair, equitable, transparent, competitive and cost effective'.

However, this consideration will not feature significantly in a decision to accede to the GPA. Of much greater importance will be an assessment, firstly, of the impact on South Africa's ability to retain national sovereignty over the procurement decision making framework and so retain the presence of socio-economic criteria in the purchasing decision. And, secondly, an assessment of the extent to which South Africa is able to win a bargain in which it would aspire to access to the procurement markets of other countries while defending those parts of the domestic procurement markets in which South African producers will be particularly exposed to foreign competition. Notionally at least, South Africa should be able to hold the line on these objectives. However, it appears that fear of the power dynamics in the WTO negotiating processes – whether well advised or not – seems destined to keep South Africa out of the GPA for the foreseeable future.

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